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Chapter 3

Availability of Appropriations: Purpose

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This chapter introduces the concept of the "availability" of appropriations. The decisions are often stated in terms of whether appropriated funds are or are not "legally available" for a given obligation or expenditure. This is simply another way of saying that a given item is or is not a legal expenditure. Whether appropriated funds are legally available for something depends on three things:

- The purpose of the obligation or expenditure must be authorized;
- The obligation must occur within the time limits applicable to the appropriation; and
- The obligation and expenditure must be within the amounts Congress has established.

Thus, there are three elements to the concept of availability: purpose, time, and amount. All three must be observed for the obligation or expenditure to be legal. Availability as to time and amount are covered in subsequent chapters. This chapter discusses availability as to purpose.

A. The purpose statute: 31 U.S.C. § 1301(a)

One of the fundamental statutes dealing with the use of appropriated funds is 31 U.S.C. § 1301(a), also known as the purpose statute:

> "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

Simple, concise, and direct, Congress originally enacted this statute in 1809[1] and it is one of the cornerstones of congressional control over the federal purse. Simply stated, the purpose statute says that public funds may be used only for the purpose or purposes for which they were appropriated.[2] Because the Constitution forbids payment of money from the Treasury except as provided by an appropriation,[3] and because an appropriation must be derived from an act of Congress, it is for Congress to determine the purposes for which an appropriation may be used. The purpose statute prohibits charging authorized items to the wrong appropriation, and unauthorized items to any appropriation. Anything less would render congressional control largely meaningless. An earlier Treasury Comptroller was of the opinion that the statute did not make any new law, but merely codified what was already required under the Appropriations Clause of the Constitution. 4 Lawrence, First Comp. Dec. 137, 142 (1883).

Administrative applications of the purpose statute can be traced back almost to the time the statute was enacted. In an 1898 decision captioned "Misapplication of Appropriations," the Comptroller of the Treasury talked about the purpose statute in these terms:

> "It is difficult to see how a legislative prohibition could be expressed in stronger terms. The law is plain, and any disbursing officer disregards it at his peril."

[1] Ch. 28, § 1, 2 Stat. 535 (Mar. 3, 1809).

[2] Because revolving funds constitute an appropriation, albeit a permanent appropriation that is indefinite as to amount, a necessary conclusion is that the purpose statute also applies to revolving funds. *See* B-247348, June 22, 1992; B-240914, Aug. 14, 1991. *See also* 63 Comp. Gen. 110, 112 (1983), and decisions cited therein. For further discussion of the principle that revolving funds are appropriations, see Chapter 2, "The Legal Framework".

[3] U.S. Const. art. I, § 9, cl. 7

4 Comp. Dec. 569, 570 (1898). *See also* 36 Comp. Gen. 621, 622 (1957) (quoting an 1821 decision).

The starting point in applying the purpose statute is that, absent a clear indication to the contrary, the common meaning of the words in the appropriation act and the program legislation it funds governs the purposes to which the appropriation may be applied. To illustrate, an appropriation available for the "replacement" of state roads damaged by nearby federal dam construction could be used only to restore those roads to their former condition, not for improvements such as widening. 41 Comp. Gen. 255 (1961). Similarly, funds provided for the modification of existing dams for safety purposes could not be used to construct a new dam, even as part of an overall safety strategy. B-215782, Apr. 7, 1986.

If a proposed use of funds is inconsistent with the statutory language, the expenditure is improper, even if it would result in substantial savings or other benefits to the government. Thus, while the Federal Aviation Administration (FAA) could construct its own roads needed for access to FAA facilities, it could not contribute a share for the improvement of county-owned roads, even though the latter undertaking would have been much less expensive. B-143536, Aug. 15, 1960. Similarly, the Merit Systems Protection Board (MSPB) was required by law to adjudicate federal employees' appeals from agency personnel actions. MSPB would conduct the hearings at one of its field offices, which required many individuals from the agency that employed the appellant to travel to the hearing. It would have cost considerably less for the employing agency to reimburse MSPB so its hearing officer could travel to the employing agency's location rather than for the employing agency to pay the costs for several of its staff to travel to a hearing at MSPB's field office. However, because there was no statutory authority for the employing agency to provide such a reimbursement or for MSPB to accept it, we concluded that such a reimbursement would be impermissible despite the considerable cost savings. 61 Comp. Gen. 419 (1982). *See also* 39 Comp. Gen. 388 (1959).

As we discussed in Chapter 2, "The Legal Framework," transfer between appropriations is prohibited without specific statutory authority, even where reimbursement is contemplated. It follows that deliberately charging the wrong appropriation for purposes of expediency or administrative convenience, with the expectation of rectifying the situation by a subsequent transfer from the right appropriation, violates the purpose statute. 36 Comp. Gen. 386 (1956); 26 Comp. Gen. 902, 906 (1947); 19 Comp. Gen. 395 (1939); 14 Comp. Gen. 103 (1934); B-248284.2, Sept. 1, 1992. The fact that the expenditure would be authorized under some other appropriation is irrelevant. Charging the "wrong" appropriation, unless authorized by some statute such as 31 U.S.C. § 1534 (which authorizes adjustments between appropriations), violates the purpose statute. For several examples, see GAO, *Improper Accounting for Costs of Architect of the Capitol Projects,* PLRD-81-4 (Washington, D.C.: Apr. 13, 1981).

The transfer rule illustrates the close relationship between 31 U.S.C. § 1301(a) and statutes relating to amount such as the Antideficiency Act, 31 U.S.C. § 1341. An unauthorized transfer violates 31 U.S.C. § 1301(a) because the transferred funds would be used for a purpose other than that for which they were appropriated. B-279886, Apr. 28, 1998; B-278121, Nov. 7, 1997; B-248284.2, Sept. 1, 1992. If the balance of the receiving appropriation, after deducting the unauthorized transfer, is exceeded, the Antideficiency Act is also violated. Further, informal congressional approval of an unauthorized transfer of funds between appropriation accounts does not have the force and effect of law. B-278121; B-248284.2.

Although every violation of 31 U.S.C. § 1301(a) is not automatically a violation of the Antideficiency Act, and every violation of the Antideficiency Act is not automatically a violation of 31 U.S.C. § 1301(a), cases frequently involve elements of both. Thus, an expenditure in excess of an available appropriation violates both statutes. The reason the purpose statute is violated is that, unless the disbursing officer used personal funds, he or she must necessarily have used money appropriated for other purposes. 4 Comp. Dec. 314, 317 (1897). The relationship between purpose

violations and the Antideficiency Act is explored further in Chapter 6.

Brief mention should also be made of the axiom that an agency cannot do indirectly what it is not permitted to do directly. Thus, an agency cannot use the device of a contract, grant, or agreement to accomplish a purpose it could not do by direct expenditure. *See* 18 Comp. Gen. 285 (1938) (contract stipulation to pay wages in excess of Davis-Bacon Act rates held unauthorized). *See also* B-259499, Aug. 22, 1995 (an agency cannot use an Economy Act agreement to provide personal services where the ordering agency is not authorized to contract for personal services).

Similarly, a grant of funds for unspecified purposes would be improper. 55 Comp. Gen. 1059, 1062 (1976). Settlements cannot include benefits that the agency does not have authority to provide. *See* B-247348, June 22, 1992 (broad authority to provide remedies for claims arising under Title VII of the Civil Rights Act does not permit an agency to provide unauthorized benefits). *See also* B-239592, Aug. 23, 1991.

Under the principles of statutory construction (discussed in Chapter 2, *The Legal Framework*), the purpose statute applies to all uses of appropriations across the federal government, unless Congress enacts a more specific statute. This gives the purpose statute broad applicability across federal agencies and programs. For example, some federal employees are represented by unions and those unions negotiate collective bargaining agreements that include various benefits. Any benefits provided under such an agreement must be permitted by applicable law, such as the Federal Service Labor-Management Relations Statute, which sets forth the framework for collective bargaining of many federal employees. Applicable legal requirements also include the purpose statute and any restrictions Congress may enact that pertain to a particular appropriation.

Accordingly, GAO concluded that the Department of Commerce could not use its appropriations to purchase disposable cups, plates, and cutlery for employee use because these items

constituted personal expenses of employees. B-326021, Dec. 23, 2014. A union representing Department of Commerce employees asked GAO to reconsider its decision. B-327146, Aug. 6, 2015. The union asserted that the Federal Service Labor Management Statute prohibited GAO from rendering a decision on the availability of appropriations for the personal expenses of federal employees if an arbitrator has opined on the matter. *Id*.

The union failed to take into account that GAO's authority to render advance decisions derives not from the Federal Service Labor Management Relations Statute but, rather, from 31 U.S.C. § 3529. The conclusion that appropriations were unavailable for the personal expense at issue was well rooted in statute and precedent. As the Court of Appeals for the District of Columbia Circuit had previously held:

> "Federal collective bargaining is not exempt from the rule that funds from the Treasury may not be expended except pursuant to congressional appropriations. Indeed, the statute governing federal labor relations explicitly relieves agencies of the duty to bargain over any matter that would be inconsistent with Federal law or any Government-wide rule or regulation. 5 U.S.C. § 7117(a)(1). Therefore, under Section 7117, a collective bargaining proposal is contrary to law, and hence not subject to bargaining, if it requires expenditure of appropriated funds for a purpose not authorized by law."

Navy v. Federal Labor Relations Authority, 665 F.3d at 1347.

B. The necessary expense rule and the three-step analysis

In applying 31 U.S.C. § 1301(a) in a purpose analysis, it is not expected, nor would it be reasonably possible, that every item of

expenditure be specified in the appropriation act. Thus, while the statute sets out a strict principle of appropriations law, defining the objects for which any particular appropriation was made recognizes an element of discretion seasoned by a statutory construction analysis and reference to the common meaning of the words in the appropriations act and agency program legislation. This concept, known as the "necessary expense doctrine," has been around almost as long as the statute itself. Following is an early yet vital statement of the rule:

> "It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the Government creating the implication that such expenditures should not be incurred except by its express authority."

6 Comp. Gen. 619, 621 (1927). The Comptroller General has never established a precise formula for determining the application of the necessary expense rule. In view of the vast differences among agencies, any such formula would almost certainly be unworkable. Rather, the determination must be made essentially on a case-by-case basis.

In addition to recognizing the differences among agencies when applying the necessary expense rule, we act to maintain a vigorous body of case law responsive to the changing needs of government.

In this regard, our decisions indicate a willingness to consider changes in societal expectations regarding what constitutes a necessary expense. This flexibility is evident, for example, in our analysis of whether an expenditure constitutes a personal or an official expense. As will be discussed more fully later in the chapter, use of appropriations for such an expenditure is determined by continually weighing the benefit to the agency, such as the recruitment and retention of a dynamic workforce and other considerations enabling efficient, effective, and responsible government. We recognize, however, that these factors can change over time, and are willing to consider empirical evidence on a case-by-case basis establishing society's changed expectations of the American workplace. *See, e.g.,* B-302993, June 25, 2004 (modifying earlier decisions to reflect determination that purchase of kitchen appliances for use by agency employees in an agency facility is reasonably related to the efficient performance of agency activities, provides other benefits such as assurance of a safe workplace, and primarily benefits the agency, even though employees enjoy a collateral benefit); B-286026, June 12, 2001 (overruling GAO's earlier decisions based on reassessment of the training opportunities afforded by examination review courses); B-280759, Nov. 5, 1998 (overruling GAO's earlier decisions on the purchase of business cards). *See also* 71 Comp. Gen 527 (1992) (eldercare is not a typical employee benefit provided to the nonfederal workforce and not one that the federal workforce should expect).

The necessary expense rule embodies a three-step analysis:

- The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.

- The expenditure must not be prohibited by law.

- The expenditure must not be otherwise provided for, that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

E.g., B-303170, Apr. 22, 2005; 63 Comp. Gen 422, 427–28 (1984); B-240365.2, Mar. 14, 1996; B-230304, Mar. 18, 1988.

C. Step 1: logical relationship between the expenditure and the appropriation

1. Overview of Step 1

a. Expenditure must contribute to accomplishing the purposes of the corresponding appropriation

The most important element of this first step is the extent to which the expenditure will contribute to accomplishing the purposes of the appropriation the agency wishes to charge. For example:

- Operating appropriations of the Equal Employment Opportunity Commission (EEOC) are not available to pay the IRS the taxes due on judgment proceeds recovered by the EEOC in an enforcement action. While the payment would further a purpose of the IRS, it would not contribute to fulfilling the purposes of the EEOC appropriation. 65 Comp. Gen. 800 (1986).

- The procurement of evidence is a necessary expense for an agency with law enforcement responsibilities. For example, Forest Service appropriations could be used to pay towing and storage charges for a truck seized as evidence of criminal activities in a national forest. B-186365, Mar. 8, 1977. *See also* 27 Comp. Gen. 516 (1948); 26 Comp. Dec. 780, 783 (1920); B-56866, Apr. 22, 1946.

The necessary expense rule does not require that the expenditure be "necessary" in the sense that the agency cannot achieve the object of the appropriation without it. However, the expenditure must be more than merely desirable or even important. *E.g.,* 34 Comp. Gen. 599 (1955); B-42439, July 8, 1944. Indeed, an expenditure cannot be justified merely because some agency official thinks it is a good idea, nor because it would provide general value to the government or to some social purpose in the abstract sense, nor simply because it is a practice engaged in by private business. *See United States Dep't of the Navy v. Fed. Labor Rels. Auth*., 665 F.3d 1339, 1349 (D.C. Cir. 2012); B-288266, Jan. 27, 2003.

If the basic test is the relationship of the expenditure to the appropriation sought to be charged, it should be apparent that the "necessary expense" concept is a relative one. As stated in 65 Comp. Gen. 738, 740 (1986):

> "We have dealt with the concept of 'necessary expenses' in a vast number of decisions over the decades. If one lesson emerges, it is that the concept is a relative one: it is measured not by reference to an expenditure in a vacuum, but by assessing the relationship of the expenditure to the specific appropriation to be charged or, in the case of several programs funded by a lump-sum appropriation, to the specific program to be served. It should thus be apparent that an item that can be justified under one program or appropriation might be entirely inappropriate under another, depending on the circumstances and statutory authorities involved."

Application of the necessary expense rule frequently requires an agency to determine whether a particular

expenditure constitutes an official expense of the government or a personal expense of its employees. When it comes to personal expenses, the public's money is not available for that purpose unless Congress, as a matter of public policy, has enacted specific, statutory authority or on balance, the expenditure primarily benefits the agency, notwithstanding any collateral or incidental benefit to the employee.

(1) Determining authorized purposes: examine the language of the appropriation

To find the authorized purposes of an appropriation, first examine the appropriation act itself. The actual language of the appropriation act is always of paramount importance in determining the purpose of an appropriation. For example, an appropriation for topographical surveys in the United States was not available for topographical surveys in Puerto Rico. 5 Comp. Dec. 493 (1899). Similarly, an appropriation to install an electrical generating plant in the customhouse building in Baltimore could not be used to install the plant in a nearby post office building, even though the plant would serve both buildings and thereby reduce operating expenses. 11 Comp. Dec. 724 (1905). An appropriation for the extension and remodeling of the State Department building was not available to construct a pneumatic tube delivery system between the State Department and the White House. 42 Comp. Gen. 226 (1962). An appropriation to the Department of Labor for payment to the New York Workers' Compensation Board for the processing of claims related to the September 11, 2001, terrorist attack on the World Trade Center was not available to make payments to other New York State entities. B-303927, June 7, 2005. And, as noted previously, an appropriation for the "replacement" of state roads could not be used to make improvements to them. 41 Comp. Gen. 255 (1961).

As the cases in the previous paragraph illustrate, the necessary expense rule does not permit an agency to obligate funds in a manner that contravenes the plain language of the appropriation.

The rule does, however, permit an agency to obligate an appropriation made for a specific object for expenses necessarily incident to accomplishing that object, unless the expense is prohibited by law or provided for by another appropriation. For example, an appropriation to erect a monument at the birthplace of George Washington could be used to construct an iron fence around the monument where administratively deemed necessary to protect the monument. 2 Comp. Dec. 492 (1896). Likewise, an appropriation to purchase bison for consumption covers the slaughtering and processing of the bison as well as the actual purchase. B-288658, Nov. 30, 2001.

Every appropriation has one or more purposes in the sense that Congress does not provide money for an agency to do with as it pleases, although purposes are stated with varying degrees of specificity. Some appropriations, for example, are quite specific:

> "[T]he Secretary of the Treasury . . . is hereby, authorized and directed to pay to George H. Lott, a citizen of Mississippi, the sum of one hundred forty-eight dollars . . . ."

Act of March 23, 1896, ch. 71, 29 Stat. 711.

There is no need to look beyond the language of the appropriation; it was available to pay $148 to George H. Lott, and for absolutely nothing else. Language this specific leaves no room for administrative discretion. For example, language of this type authorizes only payments to the named individual; it does not authorize reimbursement to an agency that used its own appropriation to make the appropriate payment to the same individual. B-151114, Aug. 26, 1964.

(2) Determining authorized purposes: examining other statutes

Other appropriations are more general. In an example typical of smaller agencies, the Consumer Product Safety Commission

receives but a single appropriation "for necessary expenses of the Consumer Product Safety Commission."[4] As used in this context, the term "necessary expenses" refers to "current or running expenses of a miscellaneous character arising out of and directly related to the agency's work." 38 Comp. Gen. 758, 762 (1959); 4 Comp. Gen. 1063, 1065 (1925). One must use the necessary expense rule to determine whether funds appropriated for a broad purpose, such as an agency's "necessary expenses," "salaries and expenses," or "operations and maintenance," are indeed available for an given expenditure. The legislation authorizing the appropriation (if any) as well as the underlying program or organic legislation will both inform the analysis. For example, the Denali Commission received an annual appropriation that was broadly available for "expenses of the Denali Commission." In light of Denali's statutory mission as stated in its authorizing legislation, its lump sum appropriation was available for grants for bulk fuel storage tanks for rural Alaskan communities. B-323365, Aug. 6, 2014.

Yet another common form of appropriation funds a single program. For example, the Interior Department receives a separate appropriation to carry out the Payments in Lieu of Taxes Act (PILT), 31 U.S.C. §§ 6901–6904.[5] While the appropriation is specific in the sense that it is limited to PILT payments and associated administrative expenses, the appropriation does not define the scope of the PILT program. Therefore, it is necessary to look beyond the appropriation language and examine the PILT statute to determine authorized expenditures.

[4] *E.g.*, Financial Services and General Government Appropriations Act, 2016, Pub. L. No. 114-113, div. E, 129 Stat. 2242, 2448 (Dec. 18, 2015).

[5] *E.g.*, Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016, Pub. L. No. 114-113, div. G, title I, 129 Stat. 2242, 2541 (Dec. 18, 2015) ("$452,000,000 shall be available . . . for payments in lieu of taxes under chapter 69 of title 31, United States Code.").

In addition to the appropriations and authorizing legislation that may apply to a specific agency, other statutes of general applicability may authorize expenditures of a particular nature. For example, legislation enacted in 1982 amended 12 U.S.C. § 1770 to authorize federal agencies to provide various services, including telephone service, to employee credit unions. Pub. L. No. 97-320, § 515, 96 Stat. 1469, 1530 (Oct. 15, 1982). Prior to this legislation, an agency would have violated 31 U.S.C. § 1301(a) by providing telephone service to a credit union, even on a reimbursable basis, because this was not an authorized purpose under any agency appropriation. 60 Comp. Gen. 653 (1981). The 1982 amendment made the provision of special services to credit unions an authorized agency function, and hence an authorized purpose, which it could fund from unrestricted general operating appropriations. 66 Comp. Gen. 356 (1987). Similarly, by statute agencies have discretion to use appropriated funds to pay the expenses their employees incur for obtaining professional credentials. 5 U.S.C. § 5757(a); B-289219, Oct. 29, 2002; discussed at section C.4.g below. Prior to this legislation, agencies could not use appropriated funds to pay fees incurred by their employees in obtaining professional credentials. *See, e.g.,* 47 Comp. Gen 116 (1967). Other examples are interest payments under the Prompt Payment Act (31 U.S.C. §§ 3901–3907) and administrative settlements less than $2,500 under the Federal Tort Claims Act (28 U.S.C. §§ 2671–2680).

Thus, the analysis under Step 1 of the necessary expense rule depends heavily upon the relevant statutory authorities, as reflected both in the pertinent appropriation and in the agency's authorizing legislation. "It should thus be apparent that an item that can be justified under one program or appropriation might be entirely inappropriate under another, depending on the circumstances and statutory authorities involved." 65 Comp. Gen. 738, 740 (1986). For example, as we will discuss later in this chapter, agencies generally may not purchase insurance. However, the Federal Bureau of Investigation could buy insurance on an undercover business, not so much to insure the property, but to enhance the credibility of the operation. B-204486, Jan. 19, 1982. *Compare* B-285066, May 19, 2000 (finding that the Department of Housing and Urban

Development (HUD) lacked the requisite authorization to use its appropriations for a gun buyback initiative) *with* B-285066.2, Aug. 9, 2000 (concluding that HUD's Office of the Inspector General had authority to carry out a program to combat violent crime in public and assisted housing and thus could use an appropriation set aside for the Inspector General for a gun buyback program).[6]

b. Agency determinations play a role

Analysis of a proposed expenditure under Step 1 of the necessary expense rule does not require that the object of the appropriation could not possibly be fulfilled without making a particular expenditure. Put differently, the expenditure does not have to be the *only* way to accomplish a given object, nor does it have to reflect GAO's perception of the best way to do it. When considering an agency's proposed use of its appropriation, or the propriety of an obligation or expenditure already incurred, the evaluative standard GAO uses is summarized in the following passage:

> "When we review an expenditure with reference to its availability for the purpose at issue, the question is not whether we would have exercised that discretion in the same manner. Rather, the question is whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range."

B-223608, Dec. 19, 1988.

[6] In this opinion, we also voiced a concern about the involvement of the Inspector General in a program that could impair the Inspector General's audit and investigative independence.

For example, in August 2004, in response to an elevated national security threat level in Washington, D.C., the Capitol Police established the Security Traffic Checkpoint Program (STCP), which consisted of 14 security traffic checkpoints intended to secure all streets to the two main avenues leading to the Capitol building. Under this program, Capitol Police officers were required to staff the 14 checkpoints on a 24-hour, 7-days-a-week basis, with each officer working 12-hour shifts. During the STCP's operation, the Capitol Police incurred approximately $1.5 million in overtime expenses every pay period. The Capitol Police financed the overtime expenses related to the program with money transferred to it from the Emergency Response Fund (ERF), established by Congress to, among other things, fund counterterrorism measures and support national security. GAO was asked whether the use of the ERF for the STCP overtime payments was a proper use of the ERF appropriation. In concluding that the Capitol Police had articulated a reasonable nexus between the overtime expenditure and ERF appropriation charged, GAO stated:

> "Law enforcement agencies are entitled to discretion in deciding how best to protect our national institutions, such as the United States Congress, its Members, staff, and facilities. Here, the Capitol Police implemented the STCP in reaction to the heightened terror alert in August 2004 due to intelligence information suggesting the strong possibility of a terrorist attack at the Capitol Complex . . . The STCP checkpoints, clearly, were a counterterrorism measure, and certainly fall within the very broad scope of 'supporting national security.' . . . So long as the agency's use of the appropriation serves one of the . . . purposes for which the appropriation was enacted, the agency cannot be said

> to have used the appropriation improperly."

B-303964, Feb. 3, 2005, at 5.

A decision on a question of necessary expense therefore involves (1) analyzing the agency's appropriations and other statutory authority to determine whether the purpose is authorized, and (2) evaluating the adequacy of the administrative justification. B-205342, Dec. 8, 1981. The agency's interpretation must be reasonable and must be based on a permissible construction of the statute.[7] *See* 18 Comp. Gen. 285 (1938) (highlighting that an agency's justification "may not transcend the statutes, nor be exercised in conflict with law, nor for the accomplishment of purposes unauthorized by the appropriation").

Cases involving fairs and expositions are illustrative. Occasionally, Congress enacts specific statutory authority permitting federal participation in a fair or exposition. For example, Congress authorized federal participation in HemisFair 1968 in San Antonio. B-160493, Jan. 16, 1967. As another example, Congress authorized federal participation in the 1927 International Exposition in Seville, Spain. 10 Comp. Gen. 563, 564 (1931).

However, an agency need not have specific statutory authority to participate in a fair or exposition. If participation is in furtherance of the purposes for which a particular appropriation has been made, and an appropriate administrative determination is made to that effect, the appropriation is available for the expenditure. For example, because the Federal Power Commission had authority to collect data on the electric industry and to disseminate information, it could show exhibits at a conference showing information about

[7] A government corporation with the authority to determine the character and necessity of its expenditures has, by virtue of its legal status, a broader measure of discretion than a "regular" agency. But even this discretion is not unlimited and is bound at least by considerations of sound public policy. *See* 14 Comp. Gen. 755 (1935), *aff'd upon reconsideration,* A-60467, June 24, 1936.

the industry. 16 Comp. Gen. 53 (1936). In another case, the Bureau of Public Roads could participate in fairs and exhibitions because its parent agency, the Department of Agriculture, had statutory authority to "diffuse among the people of the United States useful information on" the subjects of its lawful work. 7 Comp. Gen. 357 (1927). *See also* 10 Comp. Gen. 282 (1930); 4 Comp. Gen. 457 (1924).[8] Authority to disseminate information will generally provide adequate justification for an agency to participate in a fair or exposition related to its authorities. *E.g.,* 7 Comp. Gen. 357; 4 Comp. Gen. 457.

In the absence of either statutory authority to participate in a fair or exposition or an adequate justification under the necessary expense doctrine, the expenditure, like any other expenditure, is illegal. Thus, the Department of Housing and Urban Development (HUD) had no authority to finance participation at a trade exhibition in the Soviet Union where HUD's primary purpose was to enhance business opportunities for American companies. 68 Comp. Gen. 226 (1989); B-229732, Dec. 22, 1988. Regardless of whether it may or may not have been a good idea, commercial trade promotion of American companies is not one of the purposes for which Congress appropriated money to HUD.

Other examples:

- In 1951, the Interior Department asked whether funds appropriated to the Bonneville Power Administration (BPA) could be used to enter into a contract to determine the feasibility of "artificial nucleation and cloud modification" (also known as artificial rainmaking) for a portion of the Columbia River drainage basin. If the amount of rainfall during the dry season could be significantly increased by this method, the amount of marketable power for the region would be enhanced. Naturally, BPA did not have an appropriation specifically

[8] A few early cases purporting to require specific authority, such as 2 Comp. Gen. 581 (1923), must be regarded as implicitly modified by the later cases.

available for rainmaking. However, in view of BPA's statutory role in the sale and disposition of electric power in the region, GAO concluded that the expenditure was authorized. B-104463, July 23, 1951.

- "Marauding woodpeckers" were causing considerable damage to government-owned transmission lines managed by the Southwestern Power Administration (Southwestern). Southwestern could use its construction appropriation to buy guns and ammunition with which to shoot the woodpeckers, provided that Southwestern made an appropriate administrative determination that such an expense was necessary to protect the transmission lines. (The views of the woodpeckers were not solicited.) B-105977, Dec. 3, 1951. Several years earlier, the Department of the Interior used its "maintenance of range improvements" appropriation for the control of coyotes, rodents, and other "predatory animals." A-82570, Dec. 30, 1936. *See also* A-82570, B-120739, Aug. 21, 1957.[9]

- Demolition of old air traffic control tower which would obstruct the view from the new one is directly connected with and in furtherance of the construction of a new tower such that the

[9] Everyone loves a good animal case. Unfortunately, the animals in most GAO decisions are dead or, as in the cases cited in the text, soon to become dead. Readers interested more in amusement than precedent might also check out 7 Comp. Gen. 304 (1927) (removal of a horse "found dead lying on its back in a hole"); 18 Comp. Gen. 109 (1938) (another dead horse); B-86211, July 26, 1949 (death of hogs allegedly caused by being fed garbage purchased from Navy installation; it was pointed out that other hogs had eaten the same government-furnished garbage and managed to survive); B-47255, Feb. 6, 1945 (burial of three dead bulls); B-37205, Oct. 19, 1943 (mule fell off cable swing bridge); A-92649, Apr. 22, 1938 (still another dead horse); B-115434-O.M., June 19, 1953 (agency borrowed a bull from another agency for breeding purposes, then had it slaughtered when it became vicious); 70 Comp. Gen. 720 (1991) (rate of fish migration measured by fisherman returning government fish tags—from fish presumed dead or to have at least had a very bad day); *but see* B-318386, Aug. 12, 2009 (agency devised plans to help save endangered ducks being targeted by hunters due to a deadly case of mistaken identity). Insects do not escape either. *See* 34 Comp. Gen. 236 (1954) (grasshopper control in national forests).

demolition expenses are covered by Federal Aviation Administration's appropriation act for tower construction. B-286457, Jan. 29, 2001.

The availability of appropriations to settle claims and to pay money judgments is discussed in Chapter 14, "Claims against and by the Government."

2. New or additional duties

Occasionally, Congress may enact a statute that imposes new duties on an agency but that does not provide any additional appropriations. In such instances, existing agency appropriations that generally cover the type of expenditures involved are available to defray the expenses of the new or additional duties. The test for availability is whether the duties imposed by the new law bear a sufficient relationship to the purposes for which the previously enacted appropriation was made, so as to justify the use of that appropriation for the new duties. This test simply applies Step 1 of the necessary expense rule to this specific category of cases.

For example, in the earliest published decision cited for the rule, the Securities and Exchange Commission could use its general operating appropriation for fiscal year 1936 to perform additional duties imposed upon it by a statute enacted subsequent to the enactment of the appropriation. 15 Comp. Gen. 167 (1935). Similarly, the Interior Department could use its 1979 "Departmental Management" appropriation to begin performing duties imposed by two subsequently enacted statutes. B-195007, July 15, 1980. In another case, a statute directing the Department of Health and Human Services (HHS) to make payments to qualified health plans did not, by its terms, enact an appropriation to make those payments. However, because HHS was responsible for making the payments, amounts appropriated to an HHS component agency for authorized programs were available to make the payments. B-325630, Sept. 30, 2014. *See also* B-290011, Mar. 25, 2002; 30 Comp. Gen. 205 (1950); B-211306, June 6, 1983; 54 Comp. Gen. 1093 (1975); B-153694, Oct. 23, 1964. The rule also applies

to additional duties imposed by executive order. 32 Comp. Gen. 347 (1953); 30 Comp. Gen. 258 (1951).

A related question is the extent to which an agency may use current appropriations for preliminary administrative expenses in preparation for implementing a new law, prior to the receipt of substantive appropriations for the new program. Again, the appropriation is available provided it is sufficiently broad to embrace expenditures of the type contemplated. Thus, the National Science Foundation could use its fiscal year 1967 appropriations for preliminary expenses of implementing the National Sea Grant College and Program Act of 1966,[10] enacted after the appropriation, since the purposes of the new act were similar to the purposes of the appropriation. 46 Comp. Gen. 604 (1967). The preliminary tasks in that case included such things as development of policies and plans, issuance of internal instructions, and the establishment of organizational units to administer the new program. Similarly, the Bureau of Land Management could use current appropriations to determine fair market value and to initiate negotiations with owners in connection with the acquisition of mineral interests under the Cranberry Wilderness Act,[11] even though actual acquisitions could not be made until funding was provided in appropriation acts. B-211306, June 6, 1983. *See also* B-153694, Oct. 23, 1964; B-153694, Sept. 2, 1964.

Of course, an appropriation is not available for the preparatory costs of new programs if Congress has prohibited the agency from using it. For example, a statute specifically barred the Department of Energy from using funds made available under an Energy and Water Development Appropriations Act to implement or finance any authorized loan guarantee program unless specific provision had been made for that program in an appropriations act. Since no provision was made, Energy could not use the Energy and Water

[10] Pub. L. No. 89-688, 80 Stat. 998 (Oct. 15, 1966).

[11] Pub. L. No. 97-466, 96 Stat. 2538 (Jan. 13, 1983).

appropriation to begin implementing the loan guarantee program. B-308715, Apr. 20, 2007.

As discussed in Chapter 2, *The Legal Framework,* agencies may transfer funds from one appropriation to another only if authorized by specific statutory authority. 31 U.S.C. § 1532. The prohibition on transfers bars an agency from using one appropriation to reimburse another unless there is specific statutory authority to do so. In accordance with the principles described above, an agency might use an existing appropriation to carry out new or additional duties. Should Congress later make a new appropriation specifically available to carry out the new or additional duties, the prohibition against transfers bars the agency from using the new appropriation to reimburse the one initially used to carry out the duties. 30 Comp. Gen. 258 (1951); B-290011, *supra.*

3. Termination of program

Step 1 of the necessary expense rule has a critical role when determining whether an appropriation is available to terminate a program.

a. Termination desired by the agency

When Congress appropriates money to implement a program, and implementation of the program is mandatory, the agency may not use the appropriated amounts to terminate the program.[12] For example, in 1973 the administration attempted to terminate certain programs funded by the Office of Economic Opportunity (OEO), relying in part on the fact that it had not requested any funds for OEO for the following fiscal year. The programs in question were funded under a multiple-year authorization that directed that the programs be carried out during the fiscal years covered by the authorization. The U.S. District Court for the District of Columbia

[12] Program termination expenses may include such expenses as contract termination costs and personnel reduction-in-force expenses.

held that funds appropriated to carry out the programs could not be used to terminate them. *Local 2677, American Federation of Government Employees v. Phillips,* 358 F. Supp. 60 (D.D.C. 1973). The court cited 31 U.S.C. § 1301(a) as one basis for its holding. *Id.* at 76 n.17. *See also* 63 Comp. Gen. 75, 78 (1983).

Where the program is non-mandatory, the agency must apply Step 1 of the necessary expense rule: termination is permissible if the termination is reasonably necessary to accomplish an authorized purpose. For example, the Air Force could terminate B-1 bomber production, as it had been funded under a lump-sum appropriation and was not mandated by any statute. B-115398, Aug. 1, 1977. Later cases have stated the rule that an agency may use funds appropriated for a program to terminate that program where (1) the program is non-mandatory, and (2) the termination would not result in curtailment of the overall program to such an extent that it would no longer be consistent with the scheme of applicable program legislation. 61 Comp. Gen. 482 (1982) (Department of Energy could use funds appropriated for fossil energy research and development to terminate certain fossil energy programs); B-203074, Aug. 6, 1981. Several years earlier, GAO had held that the closing of all Public Health Service hospitals would exceed the Surgeon General's discretionary authority because a major portion of the Public Health Service Act would effectively be inoperable without the Public Health Service hospital system. B-156510, Feb. 23, 1971; B-156510, June 7, 1965.

b. Reauthorization pending

Another variation on the use of appropriated funds for program termination occurs when an entity's enabling legislation is set to expire and Congress shows the intention of extending or reauthorizing the entity, but has not yet provided funds or authority to continue. For example, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) was statutorily authorized to give continuing attention to intergovernmental problems. In 1995, ACIR was statutorily terminated effective September 30, 1996. About 2 months before ACIR was to terminate, Congress enacted legislation giving ACIR a new responsibility, to provide research

and a report under a contract with the National Gambling Impact Study Commission. Although Congress continued ACIR's existence beyond fiscal year 1996 for the limited purpose of providing research for the Gambling Commission, Congress appropriated no funds for fiscal year 1997. ACIR had separate statutory authority, 42 U.S.C. § 4279, to receive and expend unrestricted contributions made to ACIR from state governments. GAO concluded that this statute constituted an appropriation (a permanent, indefinite appropriation[13]) separate from ACIR's annually enacted fiscal year appropriation, and that from October 1, 1996, until such time as ACIR was awarded the research contract, ACIR could use its unconditional state government contributions. B-274855, Jan. 23, 1997.

Occasionally, an entity's authorizing legislation is set to terminate and Congress provides an appropriation, but does not reauthorize the entity until months later. For example, the U.S. Commission on Civil Rights was set to terminate by operation of law on September 30, 1991. 71 Comp. Gen. 378 (1992). The Commission was not reauthorized until November 26, 1991. However, during the interim and prior to the expiration date, Congress provided the Commission with appropriations for fiscal year 1992. In general, once a termination or sunset provision for an entity becomes effective, the agency ceases to exist and no new obligations may be incurred after the termination date.[14] In this case, however, the enactment of an appropriation subsequent to the statutory termination date made clear that Congress intended for the Commission to continue to operate after September 30, 1991. The specific appropriation provided to the Commission served to suspend its termination until the Commission was reauthorized.

[13] *See* Chapter 2 for a discussion of permanent, indefinite appropriations.

[14] 71 Comp. Gen. at 380 n.7, citing *inter alia* B-182081, Jan. 26, 1977, *aff'd upon reconsideration*, B-182081, Feb. 14, 1979.

4. Personal expenses must primarily benefit the government

a. Introduction

The general rule is that appropriated funds are not available for personal expenses. In exchange for their labors, the federal government pays its employees a salary. In the absence of contrary statutory authority, employees are expected to use this salary, rather than appropriations, to satisfy their personal needs. For example, employees are expected to feed themselves using their own funds, not the public's money. Employees must bear the costs of commuting to and from their official duty stations each day, and must also bear the costs necessary to present themselves to the government with the professional licenses that are necessary to perform their work. These expenses that government employees are expected to bear from their own salaries are known as "personal expenses."

As we will discuss in this section, occasionally appropriations are available for personal expenses because Congress has enacted specific statutory authority. Examples include some child care costs, some commuting expenses, and some apparel; we will discuss these statutes in this section. In the absence of such authority, the expense may be permissible under the necessary expense rule. Application of the necessary expense rule in these cases involves a refinement particular to personal expenses: in the absence of express statutory authority, an agency's appropriation is available for personal expenses only upon a documented legal determination that the expense is an essential, constituent part of the effective accomplishment of a statutory responsibility, notwithstanding the collateral benefit to the individual. B-325023, July 11, 2014. As one would expect of any agency legal determination, a finding that appropriations are available for a personal expense must be rooted in a sound interpretation of applicable statutes as well as in the sound application of relevant legal precedents. For personal expenses, these legal precedents include the decisions of the Comptroller General, as they are

issued pursuant to and are informed by his statutory authority to settle the accounts of the United States government. 31 U.S.C. § 3526. As the decisions have consistently shown, this test imposes a high bar and renders appropriations unavailable for most personal expenses. In the absence of specific statutory authorization, appropriations are available for personal expenses only rarely.

Whether appropriations are available to purchase food is such a common question that is the focus of so much case law that it has earned its own section; see section C.5 below.

b. Apparel

The starting point is the principle that "every employee of the Government is required to present himself for duty properly attired according to the requirements of his position." 63 Comp. Gen. 245, 246 (1984), quoting from B-123223, June 22, 1955. In other words, the government will not clothe the naked, at least where the naked are receiving government salaries.

Nevertheless, there are certain out-of-the-ordinary items, required by the nature of the job, which the government should furnish. The test was described in 3 Comp. Gen. 433 (1924), and that discussion is still relevant today:

> "In the absence of specific statutory authority for the purchase of personal equipment, particularly wearing apparel or parts thereof, the first question for consideration in connection with a proposed purchase of such equipment is whether the object for which the appropriation involved was made can be accomplished as expeditiously and satisfactorily from the Government's standpoint, without such equipment. If it be determined that use of the equipment is necessary in the accomplishment of

> the purposes of the appropriation, the next question to be considered is whether the equipment is such as the employee reasonably could be required to furnish as part of the personal equipment necessary to enable him to perform the regular duties of the position to which he was appointed or for which his services were engaged. Unless the answer to both of these questions is in the negative, public funds can not be used for the purchase. In determining the first of these questions there is for consideration whether the Government or the employee receives the principal benefit resulting from use of the equipment and whether an employee reasonably could be required to perform the service without the equipment. In connection with the second question the points ordinarily involved are whether the equipment is to be used by the employee in connection with his regular duties or only in emergencies or at infrequent intervals and whether such equipment is assigned to an employee for individual use or is intended for and actually to be used by different employees."

Id. at 433–34. Under the rule set forth in 3 Comp. Gen. 433, most items of apparel were held to be the personal responsibility of the employee. *E.g.,* 5 Comp. Gen. 318 (1925) (rubber boots and coats for custodial employees in a flood-prone area); 2 Comp. Gen. 258 (1922) (coats and gloves for government drivers). But there were limited exceptions. Thus, caps and gowns for staff workers at Saint Elizabeth's Hospital in Washington were viewed as for the protection of the patients rather than the employees and could therefore be provided from appropriated funds as part of the

hospital equipment. 2 Comp. Gen. 652 (1923). *See also* 5 Comp. Gen. 517 (1926) (shoes and suits for hospital interns). Similarly, aprons for general laboratory use were held permissible in 2 Comp. Gen. 382 (1922). Another exception was wading trousers for Geological Survey engineers as long as the trousers remained the property of the government and were not for the regular use of any particular employee. 4 Comp. Gen. 103 (1924). One category of apparel not permissible under the early decision was uniforms. Uniforms were viewed as personal furnishings to be procured at the expense of the wearer. 24 Comp. Dec. 44 (1917).

Business attire is a personal expense of government employees. For example, appropriations were not available to buy business suits worn by Agency for International Development chauffeurs. Such suits are not uniforms under section 636(a)(12) of the Foreign Service Act of 1961 (22 U.S.C. § 2396(a)(12)) since they are worn as a part of customary business attire and provide no distinctive identification of the employees as a group. As such, the suits are a personal expense of the employees. B-251189, Apr. 8, 1993.

Similarly, formal wear for official events is also a personal expense of employees. In one case, an employee on travel status in England rented a dinner jacket to attend a dinner related to the purposes of the trip. Based on the rule of 3 Comp. Gen. 433, the Comptroller General denied reimbursement for the cost of renting the jacket. 35 Comp. Gen. 361 (1955). “The claimant’s failure to take with him necessary clothing to meet reasonably anticipated personal necessities is not considered sufficient to shift the burden of the cost of procuring such clothing from personal to official business.” *Id.* at 362. This decision was followed in a similar situation involving the rental of a tuxedo in 45 Comp. Gen. 272 (1965), and again in 64 Comp. Gen. 6 (1984). *See also* 67 Comp. Gen. 592 (1988) (advising agency to resolve certain conflicting information and pay or deny a claim for a rental tuxedo accordingly).

Our office has recognized two exceptions to the formal attire rule. First, we have allowed payment “when the use of formal attire was necessary for the proper performance of the employee’s duties

beyond merely being attired in a socially acceptable manner." Thus, appropriated funds could be used to pay for rental of formal wear for Secret Service agents when needed for security purposes, *i.e.,* to be less readily identified as a security agent. 48 Comp. Gen. 48 (1968). Second, if formal wear is not a usual part of an employee's wardrobe and is only rarely required to perform official duties, then appropriated funds may be used. 67 Comp. Gen. at 593. For example, the Justice Department could rent morning coats for attorneys assigned to argue before the Supreme Court. The wearing of formal attire was necessary for the proper performance of an attorney's assigned duties. Since individual attorneys were required only occasionally to appear before the Court it would be unreasonable to expect them to purchase such formal attire. B-164811, July 28, 1969.

For those reasons, we concluded that the White House Communications Agency may use appropriated funds to purchase or rent formal attire for WHCA military personnel attending formal events. The personnel are required to blend in with other attendees for security and communication purposes. Also, WHCA personnel only attend one or two formal events in a calendar year. B-247683, July 6, 1992. Similarly, the Department of State could use its representation appropriation funds to reimburse rental costs for formal morning attire required by Ambassador and Deputy Chief of Mission in representing the United States on occasions of State in Great Britain. B-256936, June 22, 1995.

Finally, the rules we have been discussing for wearing apparel apply to government employees. Questions may arise with respect to nongovernment employees, in which event the answer is a pure application of the necessary expense doctrine, in light of whatever statutory authority may exist. For example, the State Department was administering a training program for citizens of the Philippines to assist in post-war rehabilitation. The government could provide "special purpose" clothing required for the training, such as uniforms, overalls, or work aprons. However, this could not include the furnishing of complete wardrobes adaptable to the cooler climate of the United States; this was a personal expense. B-62281, Dec. 27, 1946. *See also* 29 Comp. Gen. 507 (1950)

(clothing for indigent narcotic patients upon release from Public Health Service Hospitals, as therapeutic measure to aid rehabilitation).

Though the general rule is that government employees must clothe themselves in appropriate attire, Congress has enacted three general[15] statutory exceptions to this rule: (1) 5 U.S.C. § 7903, which allows agencies to purchase "special clothing and equipment for the protection of personnel"; (2) the Federal Employees Uniform Act; and (3) the Occupational Safety and Health Act of 1970. We discuss these three statutes below. Two decisions summarizing all three statutes are 63 Comp. Gen. 245 (1984) and B-289683, Oct. 7, 2002.

(1) 5 U.S.C. § 7903

Congress enacted 5 U.S.C. § 7903 as part of the Administrative Expenses Act of 1946. It provides:

> "Appropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks. For the purpose of this section, 'appropriations' includes funds made available by statute [to wholly owned government corporations]."

Id. (explanatory information provided). In order for an item to be authorized by 5 U.S.C. § 7903, three tests must be met: (1) the item must be "special" and not part of the ordinary and usual

[15] Some agencies also have specific authority to provide uniforms or clothing allowances to their employees. *See, e.g.,* 10 U.S.C. §§ 775, 1593; 22 U.S.C. §§ 1474(14), 2396(a)(12), 2669(e); 37 U.S.C. §§ 415–419.

furnishings an employee may reasonably be expected to provide for himself; (2) the item must be for the benefit of the government; that is, essential to the safe and successful accomplishment of the work, and not solely for the protection of the employee, and (3) the employee must be engaged in hazardous duty. *See* 32 Comp. Gen. 229 (1952); B-193104, Jan. 9, 1979. Thus, this provision is but a slight liberalization of the rule in 3 Comp. Gen. 433.

Applying 5 U.S.C. § 7903, the Comptroller General has held that raincoats and umbrellas for employees who must frequently go out in the rain are not special equipment but are personal items that the employee must furnish. B-193104, Jan. 9, 1979; B-122484, Feb. 15, 1955. Similarly unauthorized are coveralls for mechanics (B-123223, June 22, 1955) and running shoes for Department of Energy nuclear materials couriers (B-234091, July 7, 1989). Nor does 5 U.S.C. § 7903 authorize reimbursement for ordinary clothing and toiletry items purchased by narcotics agents on a "moving" surveillance. B-179057, May 14, 1974.

An illustration of the type of apparel authorized by 5 U.S.C. § 7903 is found in 51 Comp. Gen. 446 (1972). There, the Comptroller General advised the Department of Agriculture that snowmobile suits, mittens, boots, and crash helmets for personnel required to operate snowmobiles over rough and remote forest terrain were clearly authorized by the statute. Similarly authorized are down-filled parkas for Office of Surface Mining employees temporarily assigned to Alaska or the high country of the western states.[16] 63 Comp. Gen. 245 (1984). Conversely, the purchase of insulated coveralls by the U.S. Army Corps of Engineers for the use of employees working outdoors in near-freezing temperatures would be an improper use of appropriated funds, absent the agency's determination that such cold weather clothing is necessary to satisfy Occupational Safety and Health Act standards, discussed in

[16] The distinction between this case and the "foul weather" cases cited in the preceding paragraph is that an employee is expected to provide his or her own clothing suitable for the climate in which the employee normally works or resides. *See* B-230820, Apr. 25, 1988 (nondecision letter).

more detail below. B-289683, Oct. 7, 2002; B-288828, Oct. 3, 2002. The decision notes that "the weather encountered on the job is no different from that encountered by millions in the midwest during their day-to-day activities" and that the Corps was providing sheltered or heated enclosures for employees. *Id.* Thus, cold weather clothing is generally a personal expense of the employee.

Items other than wearing apparel may be furnished under 5 U.S.C. § 7903 if the tests set forth above have been met. For example, an agency may purchase prescription ground safety glasses for employees engaged in hazardous duties. The glasses become and remain property of the government. The government can also pay the cost of related eye refraction examinations in limited circumstances. 51 Comp. Gen. 775 (1972). *See also, e.g.,* 28 Comp. Gen. 236 (1948) (mosquito repellent for certain Forest Service employees).

(2) Federal Employees Uniform Act

The second statutory provision that authorizes the purchase of apparel is 5 U.S.C. § 5901, the so-called Federal Employees Uniform Act.[17] This provision authorizes annual appropriations to each agency, on a showing of necessity or desirability, to provide a uniform allowance of up to $400 a year (or more if authorized under Office of Personnel Management regulations) to each employee who wears a uniform in the performance of official duties. The agency may pay a cash allowance or may furnish the uniform.[18]

[17] The Federal Employees Uniform Act was enacted in 1954 and has been amended many times. Pub. L. No. 764, title IV, §§ 401-404, 68 Stat. 1105, 1114–15 (Sept. 1, 1954), *codified at* 5 U.S.C. § 5901. The Comptroller General previously held that 5 U.S.C. § 7903 does not constitute general authority for the purchase of uniforms. 32 Comp. Gen. 229 (1952).

[18] While the uniform allowance under 5 U.S.C. § 5901 may be in cash or in kind, there is no similar option for "special clothing or equipment" under 5 U.S.C. § 7903. The latter statute authorizes the furnishing of covered items in kind only. 46 Comp. Gen. 170 (1966).

Note that 5 U.S.C. § 5901 is merely an authorization of appropriations. An appropriation is still required in order for payments to be made or obligations incurred. 35 Comp. Gen. 306 (1955). While the decision stated that specific appropriation language is preferable, it recognized that the inclusion of an item for uniforms in an agency's budget request that is then incorporated into a lump-sum appropriation is legally sufficient.

An example of an item that could properly be required under 5 U.S.C. § 5901 is frocks for Department of Agriculture meat grader employees. 57 Comp. Gen. 379, 383 (1978). Another example is robes for administrative law judges of the Occupational Safety and Health Review Commission. B-199492, Sept. 18, 1980. (The decision concluded merely that the expenditure would be legal, not that it was an especially good idea, pointing out that federal judges pay for their own robes.)

The annual cash limitation in 5 U.S.C. § 5901 applies to the particular position. For example, a National Park Service employee was given a uniform allowance but, in less than a year, was promoted to a higher position that required substantially different uniforms. The Comptroller General held that the employee could receive the uniform allowance of his new position even though the sum of the two allowances would exceed the statutory annual ceiling. The employee should be regarded as having commenced a new one-year period on the date he was promoted. To hold otherwise would have been inconsistent with the statutory purpose. 48 Comp. Gen. 678 (1969).

(3) The Occupational Safety and Health Act of 1970

The third piece of legislation which may permit the purchase of items of apparel from appropriated funds is the Occupational Safety and Health Act of 1970 (OSHA). Section 19 of OSHA, 29 U.S.C. § 668, requires each federal agency to establish an occupational safety and health program and to acquire necessary safety and protective equipment. Thus, protective clothing may be furnished by

the government if the agency head determines that it is necessary under OSHA and its implementing regulations.

Under the OSHA authority, the following items have been held permissible:

- Snowmobile suits, mittens, boots, and crash helmets for Department of Agriculture employees required to operate snowmobiles over rough and remote terrain. 51 Comp. Gen. 446 (1972). (This decision has already been noted in the discussion of 5 U.S.C. § 7903 at section C.4.b(1) above. The decision held that the items were justifiable on either basis.)

- Down-filled parkas for Interior Department employees temporarily assigned to Alaska or the high country of the Western states during the winter months. 63 Comp. Gen. 245 (1984). (This decision is also noted under the discussion of 5 U.S.C. § 7903 at section C.4.b(1) above. As with 51 Comp. Gen. 446, the items could be justified under either statute.)

- Protective footwear for Drug Enforcement Administration agents assigned to temporary duty in jungle environments. The footwear remains the property of the United States and must be disposed of in accordance with the Federal Property Management Regulations. B-187507, Dec. 23, 1976.

- Cooler coats and gloves for Department of Agriculture meat grader employees. 57 Comp. Gen. 379 (1978).

- Ski boots for Forest Service snow rangers, where determined to be necessary protective equipment in a job-hazard analysis. B-191594, Dec. 20, 1978.

- Steel-toe safety shoes for an Internal Revenue Service supply clerk whose work includes moving heavy objects. 67 Comp. Gen. 104 (1987). This item also could have been justified under 5 U.S.C. § 7903. *Id.*

If an item is authorized under OSHA, it is unnecessary to determine whether it meets the tests under 5 U.S.C. § 7903. *E.g.,* B-187507,

Dec. 23, 1976. As noted in the above listing, however, several of the decisions have discussed both statutes. If an item does not qualify under OSHA, it is still necessary to examine the other possibilities. *E.g.,* B-234091, July 7, 1989 (running shoes unauthorized under either statute).

c. Child care; elder care

Child care expenses incurred by federal employees in the course of official travel or relocation are not reimbursable since neither the governing statutes nor the Federal Travel Regulations authorize such an entitlement. B-246829, May 18, 1992.

In contrast, Congress has enacted statutes pertaining to the provision of child care in federal workplaces. Prior to the enactment of more general legislation in 1985, some agencies had authority to provide day care facilities under agency-specific legislation. For example, legislation authorized the then Department of Health, Education, and Welfare to donate space for day care centers.[19] The statute's use of the term "donate" gave the Department discretion to provide the space without charge, or to lease space in other buildings for that purpose if suitable space was not available in buildings the agency already occupied. 57 Comp. Gen. 357 (1978).

In 1985, Congress enacted former 40 U.S.C. § 490b,[20] now codified at 40 U.S.C. § 590, which authorizes, but does not require, federal agencies to provide space and services for child care centers. The term "services" is defined as including "lighting, heating, cooling, electricity, office furniture, office machines and equipment, classroom furnishings and equipment, kitchen appliances, playground equipment, telephone service (including installation of

[19] Education Amendments of 1976, Pub. L. No. 94-482, § 524, 90 Stat. 2081, 2240 (Oct. 12, 1976), *codified at* 20 U.S.C. § 2564.

[20] Pub. L. No. 99-190, § 139, 99 Stat. 1185, 1323 (1985).

lines and equipment . . .), and security systems . . . ." [21] *Id.* § 590(c)(1). The space and services may be provided with or without charge. *See* 67 Comp. Gen. 443 (applying provisions of former 40 U.S.C. § 490b).

Former 40 U.S.C. § 490b did not preclude the General Services Administration from leasing space or constructing buildings for child care facilities if there is insufficient space available in existing federal buildings. 70 Comp. Gen. 210 (1991). The authority in section 490b to use existing space was not exclusive. (The 1988 decision to the Air Force, 67 Comp. Gen. 443, had expressed a contrary view and was overruled to that extent.) In another case, the Forest Service could use its appropriations to pay a consultant for services rendered to a Forest Service-supported child care center on Forest Service premises. 73 Comp. Gen. 336 (1994). Under former section 490b and a recurring appropriation act provision that permitted payment of expenses (predecessor to 40 U.S.C. § 590(d)(2), discussed below), Forest Service funds were available to pay "start-up/support costs" for the day care facility, including consultant services.

In 1998, Congress made permanent a recurring appropriation act provision authorizing reimbursement of "travel, transportation, and subsistence expenses incurred for training classes, conferences, or other meetings" in connection with the provision of child care services. Pub. L. No. 105-277, div. A, § 101(h), title VI, § 603, 112 Stat. 2681-480, 2681-513 (Oct. 21, 1998). This statute is now codified at 40 U.S.C. § 590(d)(2).

Similarly, in 2001, Congress made permanent another recurring provision that made appropriated funds available "to improve the affordability of child care for lower income Federal employees." Pub. L. No. 107-67, § 630, 115 Stat. 514, 552–53 (Nov. 12, 2001). This statute is now codified at 40 U.S.C. § 590(g). Pursuant to

[21] The definition was patterned generally after the statute authorizing agencies to provide space to federal credit unions, classified at 12 U.S.C. § 1770, discussed in 66 Comp. Gen. 356 (1987).

statutory authority granted in 40 U.S.C. § 590(g)(2), the Office of Personnel Management promulgated implementing regulations. 5 C.F.R. pt. 792, subpt. B.

Congress enacted new child care legislation for the armed forces, including the authority to use fees collected from parents, in late 1989. Military Child Care Act of 1989, Pub. L. No. 101-189, div. A, title XV, 103 Stat. 1352, 1589 (Nov. 29, 1989). This provision was revised and recodified by Pub. L. No. 104-106, § 568, 110 Stat. 186, 329–336 (Feb. 10, 1996), which added new legislation governing Department of Defense child care programs. [22] 10 U.S.C. § 1791-1800.

In the absence of specific statutory authority, appropriated funds are not available to provide "eldercare" facilities for adult relatives of federal employees. 71 Comp. Gen. 527 (1992). The costs of caring for one's elder relatives normally are considered a personal expense. An agency may not use appropriated funds to pay for items of personal expense unless there is specific statutory authority to do so, and Congress had provided no such authority for elder care. Because Congress had provided specific authority for the provision of similar benefits to federal employees (such as child care) and because elder care was not a "typical benefit offered the American work force," it was apparent that it was "for the Congress to decide whether agency appropriations can be used to support eldercare centers." *Id*. Accordingly, without statutory authorization, IRS could not use its appropriation to pay start-up and operating costs for an eldercare center. IRS's appropriated funds were available, however, "to implement a resource and referral service on eldercare issues" under the authority of 5 U.S.C. § 7901, which authorizes "preventive programs related to health." *Id.* at 530.

[22] Implementation of the DOD program is discussed in GAO, *Military Child Care: DOD is Taking Actions to Address Awareness and Availability Barriers,* GAO-12-21 (Washington, D.C.: Feb. 3, 2012).

As of 2016, more than 100 independently-operated child care centers are located in GSA-managed facilities.[23] For instance, in the National Capital Region, there are "Children's House" (HUD), "Diplotots" (State Department), and "Just Us Kids" (Department of Justice).[24] GAO manages a child care center in its headquarters building as well; it's called "Tiny Findings." (Get it?)

d. Commuting and parking

One personal expense everyone is familiar with is commuting to and from work (more precisely, between permanent residence and permanent duty location). The employee is expected to be at work; how the employee chooses to get there is entirely his or her own business. 27 Comp. Gen. 1 (1947); 16 Comp. Gen. 64 (1936).

As a general rule, then, employees must bear the costs of transportation between their residences and official duty locations.[25] Congress has authorized agencies to use appropriations for "the maintenance, operation, or repair of any passenger carrier," but "only to the extent that such carrier is used to provide transportation for official purposes." 31 U.S.C. § 1344(a)(1). It has specified that "transporting any individual . . . between such individual's residence and such individual's place of employment is not transportation for an official purpose." *Id.*

For example, the United States Capitol Police (USCP) could not use appropriated funds for a shuttle bus service from its parking lot to a new USCP facility or any other USCP building, where the only purpose of the shuttle service is to facilitate the commutes of USCP employees. The employee's arrival at the parking lot is an

[23] GSA, *Child Care Services*, *available at* www.gsa.gov/portal/category/108059 (last visited Feb. 17, 2017).

[24] GSA, *National Capital Region (11) Child Care Centers, available at* www.gsa.gov/portal/content/101942 (last visited Feb. 17, 2017).

[25] This is the case even when unusual conditions, such as a transit strike, may increase commuting costs. 60 Comp. Gen 633, 635 (1981).

intermediate stop—like a subway or bus stop—within the totality of the commute from home to office. Therefore, the trip from the parking lot to the new USCP facility is part of the employee's commute and a personal expense. GAO noted that there would be no objection to the use of appropriated funds for a shuttle bus from USCP headquarters to the new facility and other USCP buildings, so long as USCP established a legitimate operational need to shuttle persons among those buildings and its purpose is not to aid employees' commutes. If USCP established a legitimate operational need for shuttle service among USCP buildings, there would also be no objection to any incidental use of the service by USCP employees to complete their home-to-work commutes, provided, of course, that there is no additional expenditure of time or money by the government in order to accommodate these riders. B-305864, Jan. 5, 2006. *See also* B-320116, Sept. 15, 2010 (appropriations are not available to pay for vehicle battery recharging stations for the privately owned hybrid or electric vehicles of employees or Members of Congress without legislative authority; recharging stations would facilitate commuting between home and work, which is a personal expense); B-318229, Dec. 22, 2009 (agency appropriations were not available to pay for local lodging as a reasonable accommodation under the Rehabilitation Act since the local travel was more akin to a commute, which is not covered by the act).

Although generally agencies may not pay commuting costs, agencies may exercise administrative discretion and provide transportation on a temporary basis when there is a clear and present danger to government employees or an emergency threatens the performance of vital government functions. 62 Comp. Gen 438, 445 (1983). Under 31 U.S.C. § 1344(b)(9), an agency may provide for home-to-work transportation for an employee if the agency head determines that "highly unusual circumstances present a clear and present danger, that an emergency exists, or that other compelling operational considerations make such transportation essential to the conduct of official business." Section 1344(b)(9) also stipulates, however, that exceptions granted under it must be "in accordance with" 31 U.S.C. § 1344(d), which limits emergency exceptions to periods of up to 15 calendar

days, subject to periodic renewal for up to a total of 180 additional calendar days, under specified detailed procedures.[26]

GAO considered the provisions in 31 U.S.C. § 1344 in B-307918, Dec. 20, 2006. The National Logistic Support Center (NLSC) was created by the National Oceanic and Atmospheric Administration to maintain a stockpile warehouse and ship replacement parts and equipment crucial to ensuring the proper functioning of equipment in the weather forecasting stations across the country. Since NLSC receives between 200 and 400 requests each year for emergency service outside of normal office hours, NLSC schedules employees to attend to these emergency, after-hours service requests on an "on-call" basis. When NLSC receives a request for after-hours emergency service, it notifies the on-call employees who return from their homes to their NLSC offices to respond to the requests, prepare the required parts for shipment to the affected weather station, deliver them to the shipping vendor, and return home. GAO determined that the prohibition in 31 U.S.C. § 1344(a)(1) precluded NLSC from using appropriated funds to reimburse its employees for the mileage between their residences and their NLSC offices since the statute precludes the payment of commuting expenses regardless of whether it is incident to a regular work schedule or the on-call work schedule described here. The emergency exception recognized in 31 U.S.C. §§ 1344(b)(9) and (d) did not apply because it is limited to brief, specific periods and NLSC's proposal contemplated reimbursing the on-call employees for commuting costs on a continual basis—without limit or end date.

[26] The detailed procedures require agencies to make written determinations that name the specific employees, explain the reasons for their exemption, and specify the duration of their exemptions; they preclude agency heads from delegating this authority to another; and they require congressional notification of the above information for each exemption granted. 31 U.S.C. § 1344(d). Other subsections require the General Services Administration to promulgate government-wide regulations and require agencies to maintain logs detailing all home-to-work transportation provided by the agency. 31 U.S.C. §§ 1344(e), 1344(f).

(1) Transit benefits

A government-wide provision in the fiscal year 1991 Treasury, Postal Service, and General Government Appropriation Act authorized federal agencies to participate in state or local government programs designed to encourage employees to use public transportation. Pub. L. No. 101-509, § 629, 104 Stat. 1389, 1478 (Nov. 5, 1990). Thus, an agency could use its general operating appropriations to subsidize the use of discounted transit passes by its employees.[27] The legislation had a sunset date of December 31, 1993. Shortly before that provision was set to expire, Congress enacted the Federal Employees Clean Air Incentives Act. Pub. L. No. 103-172, § 2(a), 107 Stat. 1995, 1995-96 (Dec. 2, 1993), *codified at* 5 U.S.C. § 7905. This authorized each agency head to establish a program to encourage employees to use means other than single occupancy motor vehicles to commute to and from work. The purposes of this authority are to improve air quality and reduce traffic congestion. 5 U.S.C. § 7905 note.

On April 21, 2000, the President ordered federal agencies to implement a transportation fringe benefit program under section 7905 no later than October 1, 2000. Exec. Order No. 13150, *Federal Workforce Transportation*, 65 Fed. Reg. 24613 (Apr. 21, 2000). The executive order states that agencies shall provide transit passes "in amounts approximately equal to employee commuting costs, not to exceed the maximum level allowed by law (26 U.S.C. [§] 132(f)(2))."[28] *Id.,* § 2. Five years later, Congress required federal agencies in the National Capital Region to implement a transit benefit program as described in Executive Order No. 13150. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU),

[27] The "subsidy" is not additional pay for purposes of the prohibition in 5 U.S.C. § 5536. *Id. See also* B-243677, B-243674, May 13, 1991.

[28] The maximum amount of transit benefits is set out in 26 U.S.C. § 132(f)(2)(A). IRS increases the amount every year for inflation per 26 U.S.C. § 132(f)(6). For example, for calendar year 2016, IRS adjusted the amount from $175/month to $255/month. IRS, *Publication 15-B*, *Employer's Tax Guide to Fringe Benefits* (Dec. 23, 2015), at 19.

Pub. L. No. 109-59, title III, § 3049, 119 Stat. 1144, 1711–12 (Aug. 10, 2005).

Programs established under section 7905 may include such options as: transit passes or cash reimbursements for transit passes; furnishing space, facilities, or services to bicyclists; and nonmonetary incentives. 5 U.S.C. § 7905(b)(2). Agencies may reimburse for the costs of taking a commuter train (B-316381, July 18, 2008) or provide a cash reimbursement to employees who commute by bicycle (B-318325, Aug. 12, 2009), for example.[29] A transit benefit program could not include parking benefits for disabled employees, however, since payment would encourage employees to commute in privately owned vehicles. [30] B-291208, Apr. 9, 2003.

(2) Parking

Along with commuting goes parking. It is equally clear that parking incident to ordinary commuting is also a personal expense. 63 Comp. Gen. 270 (1984); 43 Comp. Gen. 131 (1963); B-162021, July 6, 1977. These cases stand for the proposition that the government may not be required to provide parking facilities for its employees. However, GAO has concluded, in some instances, that an agency may provide employee parking facilities if the agency establishes that the lack of parking facilities will significantly impair

[29] *But see* B-320116, Sept. 15, 2010 (5 U.S.C. § 7905 does not permit the Architect of the Capitol to install and operate recharging stations for employees' privately owned hybrid vehicles). Congress later passed several laws authorizing the installation and operation of battery recharging stations in parking areas under the jurisdiction of the Senate, the House of Representatives, and the Library of Congress. Pub. L. No. 112-167, § 1,126 Stat. 1296, 1296–98 (Aug. 10, 2012) (Senate), *classified at* 2 U.S.C. § 2170; Pub. L. No. 112-170, § 1, 126 Stat. 1303, 1303–05 (House), *classified at* 2 U.S.C. § 2171; Pub. L. No. 114-113, div. I, title II, § 209, 129 Stat. 2242, 2673 (Dec. 18, 2015), *classified at* 2 U.S.C. § 2171a.

[30] Appropriated funds were also not available to pay for parking as a reasonable accommodation under the Rehabilitation Act. B-291208, Apr. 9, 2003. However, GAO noted that, if the Commission employees with disabilities pay substantially more to park closer to the building than employees without disabilities, the differential portion may be paid under our holding in 63 Comp. Gen. 270 (1984).

the operating efficiency of the agency and will be detrimental to the hiring and retention of personnel. 72 Comp. Gen. 139 (1993); 49 Comp. Gen. 476 (1970); B-168946, Feb. 26, 1970; B-155372-O.M., Nov. 6, 1964.

When making a "significant impairment" determination, an agency should consider important factors relevant to current workplace and government policies. B-322337, Aug. 3, 2012 (U.S. International Trade Commission (ITC) may not use appropriations to acquire parking permits from commercial parking garage for resale at discounted rates to ITC employees). For instance, an agency should consider the effect of single-occupancy vehicles on air quality and traffic congestion, its authority to establish a telework program and to offer flexible work schedules, the impact on recruitment and retention, and the extent to which parking is subsidized in similar circumstances in the nonfederal workplace. *Id.* An agency in a major metropolitan area should affirmatively explain the impact on agency operations were it not to subsidize parking permits for employees. *Id.*

Agencies must generally obtain parking accommodations through the General Services Administration under the Federal Property and Administrative Services Act of 1949, as amended, unless they have independent statutory authority or a delegation from GSA. *See* B-327242, Feb. 4, 2016. GSA regards a delegation of authority to lease parking facilities as a delegation of authority to enter into a service contract, which can be approved at the regional level, rather than a delegation of leasing authority. 41 C.F.R. § 102-73.240. If an agency has independent statutory or delegated authority to procure space and facilities and has made the requisite determinations, it may provide for employee parking in a collective bargaining agreement. *See* 55 Comp. Gen. 1197 (1976).

e. Entertainment of government personnel

There have been relatively few cases in this area, probably because there are few situations in which entertainment could conceivably be authorized. In the absence of specific statutory authority otherwise, agencies must go through the typical "personal

expense" analysis to determine whether appropriations are available for entertainment costs.

An early decision held that 10 U.S.C. § 4302, which authorizes training for Army enlisted personnel "to increase their military efficiency and to enable them to return to civilian life better equipped for industrial, commercial, and business occupations," did not include sending faculty members and students of the Army Music School to grand opera and symphony concerts. 4 Comp. Gen. 169 (1924). Another decision found it improper to hire a boat and crew to send federal employees stationed in the Middle East on a recreational trip to the Red Sea. B-126374, Feb. 14, 1956.

A 1970 decision deserves brief mention although its application will be extremely limited. Legislation in 1966 established the Wolf Trap Farm Park in Fairfax County, Virginia, as a park for the performing arts and directed the Interior Department to operate and maintain it. A certifying officer of the National Park Service asked whether he could certify a voucher for symphony, ballet, and theater tickets for Wolf Trap's Artistic Director. The Comptroller General held that such payments could be made if an appropriate Park Service official determined that attendance was necessary for the performance of the Artistic Director's official duties. The Artistic Director attended these functions not as personal entertainment, but so that he could review the performances to determine which cultural and theatrical events were appropriate for booking at Wolf Trap. B-168149, Feb. 3, 1970. As noted, this case would seem to have little precedential value, except for perhaps the Artistic Director at Wolf Trap.

Food and entertainment frequently go hand-in-hand; we discuss food further in section C.5 below. We discuss entertainment of persons who are not federal employees in section C.6.h below.

f. Greeting cards and seasonal decorations

(1) Greeting cards

The cost of seasonal greeting cards is a personal expense to be borne by the officer who ordered and sent them, and may not be charged to public funds.

For example, an agency with overseas posts wanted to send Christmas cards to "important individuals" in the countries where the posts were located. The agency tried to justify the expense as a means of disseminating information and thereby to promote mutual understanding. However, GAO concluded that the expense was a personal one and could not be paid from the agency's appropriations. 37 Comp. Gen. 360 (1957). As to the purported justification, the Comptroller General said "it seems to us that very little, if any, information in that regard is contained on the ordinary Christmas greeting card." *Id.* at 361. *See also* 7 Comp. Gen. 481 (1928); B-247563.4, Dec. 11, 1996; B-115132, June 17, 1953.

It is immaterial that the card is "nonpersonal," that is, sent by the agency and not containing the names of any individuals. The expenditure is still improper. 47 Comp. Gen. 314 (1967); B-156724, July 7, 1965. It was also immaterial that the expenditure had been charged to a trust fund in which donations, which the agency was statutorily authorized to accept, had been deposited. 47 Comp. Gen. 314.

Transmitting the greetings in the form of a letter rather than a card does not legitimize the expenditure. For example, an agency head sent out a letter stating that the entire staff of the agency "joins me in wishing you a joyous holiday. We look forward to working with you and your staff throughout the coming year." A Member of Congress questioned the propriety of sending these letters in

penalty mail envelopes.[31] GAO noted that the letter "transacts no official business" and "is the essence of a Christmas card." 64 Comp. Gen. 382, 384 (1985). Therefore, the costs should not have been charged to appropriated funds.

While all of the above cases deal with Christmas greetings, the rule would presumably apply equally to other holiday or seasonal cards. It would also apply to "greetings" not tied in to any particular holiday. B-149151, July 20, 1962 ("thank you for hospitality" cards). The point is that while sending greetings may be a nice gesture, it is not the sort of thing that should be charged to the taxpayers.

(2) Seasonal decorations

Prior to 1987, based in part on the reasoning that seasonal decorations are significantly different from ordinary office furnishings designed for permanent use, it had been GAO's position that Christmas decorations (trees, lights, ornaments, etc.) were not a proper charge to appropriated funds. 52 Comp. Gen. 504 (1973); B-163764, Feb. 25, 1977 (nondecision letter).

In 1987, GAO overruled 52 Comp. Gen. 504, concluding that the rules for office decorations should be the same whether the decorations are seasonal or permanent. 67 Comp. Gen. 87 (1987). Thus, seasonal decorations are now permissible "where the purchase is consistent with work-related objectives [such as enhancement of morale], agency or other applicable regulations, and the agency mission, and is not primarily for the personal convenience or satisfaction of a government employee." *Id.* at 88. In implementing this decision, agencies should be appropriately sensitive (whatever that means) with respect to the display of

[31] Penalty mail is "official mail, sent by U.S. government agencies, relating solely to the business of the U.S. government, that is authorized by law to be carried in the mail without prepayment of postage. For this standard, agencies are departments, agencies, corporations, establishments, commissions, committees, and all officers and authorities of the U.S. government authorized to use penalty mail." U.S. Postal Service, *Domestic Mail Manual,* § 703, ¶ 7.0, *available at* pe.usps.com/text/dmm300/703.htm (last visited Oct. 24, 2016).

religious symbols. *Id.* at 89. *Cf.* B-226781, Jan. 11, 1988 (the National Park Service could purchase items to decorate a historic ranch house to show how the ranch celebrated Christmas during the frontier era).

The rationale of 67 Comp. Gen. 87 does not apply to Christmas cards, which remain "basically individual good will gestures and are not part of a general effort to improve the work environment." *Id. See also* B-247563.4 , Dec. 11, 1996.

g. Personal qualification expenses

Generally, expenses necessary to qualify a government employee to do his or her job are personal expenses and not chargeable to appropriated funds in the absence of specific statutory authority. However, Congress has enacted a statute that permits agencies to pay such expenses at their discretion, even though the expenses remain personal in nature.

(1) Personal qualification is a personal expense

As stated in an early decision:

> "That which is required of a person to become invested with an office must be done at his own expense unless specific provision is made by law for payment by the Government."

2 Comp. Dec. 262, 263 (1895). Somewhat coldly, the Comptroller added, "if he does not desire the office, he need not accept it." *Id.* Numerous decisions have applied this rule. For example, expenses of admission to the bar for federal attorneys are generally personal qualification expenses that the attorney must pay. *See, e.g.*, 22 Comp. Gen. 460 (1942) (expense of bar admission to a federal appellate court was personal to employee, even though the employee paid for the admission to make an appearance to represent the agency); 47 Comp. Gen. 116 (1967) (noting that "the privilege to practice before a particular court is personal to the

individual and is his for life unless disbarred regardless of whether he remains in the Government service"); B-161952, June 12, 1978 (the fact that an attorney might require admission to several courts rather than just one in the performance of official duties is immaterial); B-171667, Mar. 2, 1971 (fee for membership in bar association is personal to attorney, even where such membership is required to practice law; *see also* 51 Comp. Gen. 701 (1972); B-204213, Sept. 9, 1981; B-204215, Dec. 28, 1981); B-187525, Oct. 15, 1976 (cost of bar examination is part of qualification process and is also personal to attorney); 61 Comp. Gen. 357 (1982) (bar admission fees personal to attorneys even where the requirement to be admitted to a bar was a new one the agency had imposed upon incumbent employees). *See also United States v. Van Duzee*, 140 U.S. 169, 171 (1891) ("it is the duty of persons receiving appointments from the government . . . to qualify themselves for the office").

As with any other personal expense, GAO has concluded that appropriations are available for some personal qualification expenses where GAO determines that the benefit of the expenditure accrues primarily to the government, with only incidental benefit to the individual. For example, where federal employees are required by federal law to comply with state and local licensing regulations, the employee's agency can use appropriations to cover the cost of obtaining the license necessary to perform the regulated activity. 73 Comp. Gen. 171 (1994) (asbestos abatement license required by South Carolina; water treatment foreman's license required by Texas; pesticide and herbicide application license required by North Carolina). Such licenses are distinguished from the licensing requirements of professional personnel such as teachers, accountants, engineers, lawyers, doctors, and nurses.

> "These individuals are fully aware of the licensing requirements of their professions from the time they begin their professional education, and of the fact that society expects them to fully qualify themselves for the performance

> of their chosen professions. In that sense, the licensing requirements are considered to be more for the personal benefit of the individuals than for their employers."

Id.

Generally, driver's licenses are for the personal benefit of the employee. 73 Comp. Gen. 171; 21 Comp. Gen. 769, 772 (1942); 6 Comp. Gen. 432 (1926); 23 Comp. Dec. 386 (1917). An exception was recognized in B-115463, Sept. 18, 1953, for Army civilian employees on temporary duty (TDY) of at least 6 months' duration in foreign countries, where the employees did not already possess driver's licenses, operating a motor vehicle was not part of the job for which the employees were hired but the Army wanted to include driving as part of their TDY duties as a less expensive alternative to hiring additional personnel, and the license was required by the host country.

In another case, the National Security Agency (NSA) needed to perform communications security testing at remote sites using state-of-the-art communications equipment. A team of employees highly trained in engineering, computer sciences, physics, and other technical areas would perform the testing. The team's equipment was required to be transported in a large government-owned commercial vehicle that would require a commercial driver's license. Though NSA considered having a professional government driver accompany the team, it was far more cost-effective to have a member of the team perform the driving. NSA argued "that it would be unfair for team volunteers to bear the training and licensing expenses since their duties as scientists do not include, and will not be changed to include, driving commercial vehicles." GAO agreed that, under these circumstances, the benefit of paying for the driver's licenses would accrue primarily to the government, with only marginal benefit to the employees. Therefore, it was permissible for NSA to pay for the driver's licenses. B-257895, Oct. 28, 1994.

Other personal qualification decisions and opinions include:

- actuarial accreditation (B-286026, June 12, 2001);
- licenses to practice medicine (B-277033, June 27, 1997);
- a Certified Government Financial Manager designation (B-260771, Oct. 11, 1995); and
- professional engineering certificates (B-248955, July 24, 1992).

(2) Statutory authority: 5 U.S.C. § 5757[32]

As the cases in the previous section discuss, qualification expenses are personal to the employee and generally may not be paid with appropriated funds. However, Congress in 2001 enacted legislation permitting agencies to use appropriations for "expenses for employees to obtain professional credentials, including expenses for professional accreditation, State-imposed and professional licenses, and professional certification; and examinations to obtain such credentials." Pub. L. No. 107-107, § 1112(a), 115 Stat. 1238 (Apr. 12, 2001), *codified at* 5 U.S.C. § 5757. This authority is not available to pay such fees for employees in or seeking to be hired into positions excepted from the competitive service because of the confidential, policy-determining, policy-making, or policy-advocating character of the position. 5 U.S.C. § 5757(b). The statutory language does not create an entitlement; instead, it authorizes agencies to consider such expenses as payable from agency appropriations if the agency chooses to cover them. Agencies have the discretion to determine whether resources permit payment of credentials, and what types of professional expenses will be paid under the statute.

[32] In addition to the provision we discuss in this section, Congress has also enacted another provision of law that it also designated as 5 U.S.C. § 5757. It is unrelated to the section we discuss here. Pub. L. No. 107-273, § 207(a), 116 Stat. 1757, 1779–1780 (Nov. 2, 2002).

An agency may pay expenses of an employee to obtain professional credentials, but an agency may only pay employee expenses necessary to qualify for a particular profession. B-302548, Aug. 20, 2004. Agency payment of fees for voluntary memberships in organizations of already-credentialed professionals is prohibited under 5 U.S.C. § 5946, which bars use of appropriations for membership in a society or association. *Id*. (We discuss 5 U.S.C. § 5946 further in section D.6 below) Therefore, an agency could pay for an employee's cost of obtaining a Certified Public Accountant (CPA) license. However, it could not pay for the employee's membership in the California Society of Certified Public Accountants, as such membership was voluntary and not a prerequisite to obtaining a CPA license. B-302548. Similarly, if an agency determines that the fees its attorneys must pay for admission to practice before federal courts are in the nature of professional credentials or certifications, the agency may exercise its discretion under 5 U.S.C. § 5757 and pay those fees out of appropriated funds. B-289219, Oct. 29, 2002.

Obtaining a professional credential often requires the applicant to sit for an examination, which may require study. Section C.6.r below discusses whether appropriations are available to pay for courses of preparation for professional examinations.

Another statute, 5 U.S.C. § 5945, specifically covers notary publics. It permits agencies to reimburse an employee whose job includes serving as a notary public the expense required to obtain the commission. 5 U.S.C. § 5945. The expense is reimbursable even though the employee uses the notarial power for private as well as government business. 36 Comp. Gen. 465 (1956).

h. Recreation and welfare

The basic rule for recreational facilities is that appropriations are not available unless the expenditure is authorized by express statutory provision or by necessary implication. Thus, appropriations for a river and harbor project on Midway Island were held not available to provide recreational facilities such as athletic facilities and motion pictures for the working force. 18 Comp.

Gen. 147 (1938). Similarly, the Comptroller General advised that Navy appropriations were not available to hire full-time or part-time employees to develop and supervise recreational programs for civilian employees of the Navy. The reason in both cases was that the expenditure would have at best only an indirect bearing on the purposes for which the appropriations were made. 27 Comp. Gen. 679 (1948). Other early decisions applying the general rule are B-49169, May 5, 1945 (rental of motion picture by Bonneville Power Administration); B-37344, Oct. 14, 1943 (footballs and basketballs for employees in Forest Service camps); and A-55035, May 19, 1934 (billiard tables for Tennessee Valley Authority employees).

It follows that, as a general proposition, appropriated funds may not be used to underwrite travel to or participation in sports or recreational events since this is not the performance of public business. 42 Comp. Gen. 233 (1962). For example, appropriated funds were not available to the Department of Energy to pay the registration fees of employees participating in competitive fitness promotion, team activities, and sporting events. 73 Comp. Gen. 169 (1994). GAO concluded that these activities were not an essential part of a statutorily authorized physical fitness program and therefore were "generally personal, rather than official," with costs to be "borne by the participating employees, not by the taxpayers." *Id.* at 170. *See also* B-247563.3, Apr. 5, 1996 (Department of Veterans Affairs appropriations not available for registration fees for athletic contest "virtually indistinguishable" from contest in 73 Comp. Gen. 169).

Similarly, GAO found that the Army Corps of Engineers could not use appropriated funds to pay an entrance fee for Corps employees in a "Corporate Cup Run" sponsored by the American Lung Association. B-262008, Oct. 23, 1996. The fact that the employees were to participate as an agency-sponsored team, rather than as individuals, did not change the result. GAO reasoned that there was an "absence of any justification to show that participation of employees in the run—a competitive athletic event—in any way supports the mission of the Corps."

One area in which recreational and welfare expenditures have been permitted with some regularity is where employees are located at a remote site, where such facilities would not otherwise be available. Expenditures were permitted in the following cases:

- Purchase of ping pong paddles and balls by the Corps of Engineers to equip a recreation room on a seagoing dredge. B-61076, Feb. 25, 1947.

- Transportation of musical instruments, billiard and ping pong tables, and baseball equipment, obtained from surplus military stock, to isolated Weather Bureau installations in the Arctic. B-144237, Nov. 7, 1960.

- Purchase of playground equipment for children of employees living in a government-owned housing facility in connection with the operation of a dam on the Rio Grande River in an isolated area. 41 Comp. Gen. 264 (1961). The agency in that case had statutory authority to provide recreational facilities for employees and GAO held that authority extended to employees' families as well.

- Use of an appropriation of the Federal Aviation Administration (FAA) for construction of "quarters and related accommodations" to provide tennis courts and playground facilities in an isolated sector of the Panama Canal Zone. B-173009, July 20, 1971.

- Purchase of a television set and antenna for use by the crew on a ship owned by the Environmental Protection Agency. The ship was used to gather and evaluate water samples from the Great Lakes, and cruises lasted for up to 15 days. 54 Comp. Gen. 1075 (1975).

- Provision of television services for National Weather Service employees on a remote island in the Bering Sea. The agency was authorized to furnish recreational facilities by the Fur Seal Act of 1966, but the statute also required that the employees be charged a reasonable fee. B-186798, Sept. 16, 1976.

- Provision of limited off-site busing to shopping centers, recreational facilities, and places of worship in the nearest town several miles away for students at the Federal Law Enforcement Training Center. The students—government employees in travel status—must live at the Center for several weeks, most do not have cars, and there is no public transportation to the nearest town. B-214638, Aug. 13, 1984.

- Use of government vehicles to transport FAA employees on temporary duty at a remote duty location permissible under applicable Federal Travel Regulations, subject to "reasonable limitations and safeguards." B-254296, Nov. 23, 1993.

i. Telework

Telework is a work flexibility arrangement under which an employee performs her duties and responsibilities from an approved alternate worksite. 5 U.S.C. § 6501; U.S. Office of Personnel Management, *What is Telework?*, *available at* www.telework.gov/about/ (last visited June 29, 2017). Both the President and Congress have increasingly sought to encourage more widespread use of telework:

- In 1994, President Clinton directed the head of each executive department or agency to establish a program to encourage and support the expansion of flexible family-friendly work arrangements, including telecommuting and satellite locations. Memorandum, *Expanding Family-Friendly Work Arrangements in the Executive Branch,* 30 Weekly Comp. Pres. Doc. 1468, 59 Fed. Reg. 36017 (July 11, 1994).

- In 1995, Congress enacted permanent authority for federal agencies to spend money for the installation of telephone lines and necessary equipment in an employee's residence and pay monthly fees for an employee authorized to work at home. The head of the agency concerned must certify that adequate safeguards against private misuse exist, and that the service is necessary for direct support of the agency's mission. Pub. L. No. 104-52, § 620, 106 Stat. 468, 501 (Nov. 19, 1995), 31 U.S.C. § 1348 note.

- In 1996, Congress authorized federal telework centers. Pub. L. No. 104-208, div. A, title I, § 101(f),110 Stat. 3009-337 (Sept. 30, 1996), *codified at* 40 U.S.C. § 587.

- Since 1998, certain executive agencies must make at least $50,000 available annually for expenses necessary to carry out a telework work program. Pub. L. No. 105-377, div. A, title VI, § 630, 112 Stat. 2681, 2681-522 (Oct. 21, 1998), *codified at* 40 U.S.C. § 587(d).

- In 2000, Congress required certain executive branch agencies to establish a policy under which eligible employees may participate in telecommuting, so long as the employee's performance is not diminished. Pub. L. No. 106-346, title III, § 359, 114 Stat. 1356, 1356A-36 (Oct. 23, 2000). The law also required the Office of Personnel Management to ensure that this requirement was applied to 25 percent of the federal workforce by April 2001 and to an additional 25 percent each year thereafter. *Id.* Congress gradually expanded federal telework over the next decade.

- In 2010, Congress enacted the Telework Enhancement Act. Pub. L. No. 111-292, 124 Stat. 3165 (Dec. 9, 2010), *codified at* 5 U.S.C. §§ 6501–6506, 5711. The act requires each executive branch agency to establish and implement a telework policy, designate a telework managing officer, train employees and managers on telework issues, sign written telework agreements, and incorporate telework into continuity of operations plans. The act also establishes guidelines by which agencies will work with OPM to satisfy annual reporting requirements.

In B-308044, Jan. 10, 2007, GAO considered whether an agency may use its appropriated funds to reimburse employees for home high-speed internet access under its telecommuting program. The law requires that the agency ensure that adequate safeguards against private misuse exist and that the service is necessary for direct support of the agency's mission. Pub. L. No. 104-52, § 620. As part of its program, the Patent and Trademark Office (PTO)

would require telecommuting employees to maintain high speed internet access that meets certain minimum technical requirements at their residence or other designated alternative work site, and it proposed to reimburse participating employees for the costs incurred in their use of the internet access related to PTO work. Employees would be eligible for 50 or 100 percent reimbursement (up to a maximum of $100 per month) depending on the amount of monthly business use of the internet service. However, reimbursements "also would be limited to the amount PTO would have had to pay to procure these services directly." B-308044, at 2.

To obtain reimbursement, employees each month would be required to submit copies of invoices from the internet service provider and to attest to the appropriate percentage of internet service used for work-related purposes. GAO determined that PTO could use its appropriated funds to reimburse telecommuting employees for the costs of the high-speed internet access service since such service, "an essential tool in today's workplace," is related or "necessary equipment" as authorized by the law. B-308044, Jan. 10, 2007. In doing so, GAO recommended that PTO periodically review the reimbursements to ensure that it has adequate safeguards against private misuse and it is reimbursing employees for home internet service used for official purposes. *Id.*

While telephone lines and related equipment may be provided by the agency, increased utility expenses (heating, air conditioning, lighting, etc.) incurred by the employee by virtue of working at home are personal expenses and may not be reimbursed in the absence of statutory authority. 68 Comp. Gen. 502 (1989). As the 1989 decision points out, along with the increased utility costs, the employee also incurs savings from reduced commuting, child care, meal, and/or clothing expenses. "How the balance should be struck, if at all, . . . is a legislative judgment." *Id.* at 506. The fact that the employee is participating in a mandatory work-at-home program, as opposed to voluntary, does not matter. The incremental costs of utilities associated with the residential workplace may not be reimbursed. *See also* 70 Comp. Gen. 631 (1991) (residential utility costs are personal expenses of federal employees).

j. Miscellaneous employee expenses

Personal expense questions may occur in contexts that arise infrequently and for which there is little precedent. The rationale of the decisions cited and discussed throughout this section should provide the approach necessary to analyze the problem.

For example, the Forest Service requested a lodge owner to furnish lodging and meals to a group of summer employees on temporary duty on a forest project in Maine. While the Forest Service made the request on behalf of the employees, it did not contract directly with the lodge owner. The individual employees received a *per diem* allowance and were expected to settle their own accounts with the lodge. One of the employees left at the end of the summer without paying his bill and the lodge owner filed a claim against the government. Under these circumstances, the unpaid bill was nothing more than a personal debt of the individual and there was therefore no basis for government liability. B-191110, Sept. 25, 1978.

In another case, the Navy asked whether it could use appropriated funds to buy luggage for use by members of the Navy's Recruit Mobile Training Team. Normally, luggage is a personal expense. The employee who travels on government business is generally expected to provide his or her own luggage. In this case, however, the members of the team traveled an average of 26 weeks a year. The Comptroller General applied the test set forth in 3 Comp. Gen. 433 (1924), discussed at various points throughout this section, and accepted the Navy's judgment that it would be unreasonable to require the team members to furnish their own luggage in view of this excessive amount of travel. Therefore, Navy could buy the luggage, but only on the conditions that it would become Navy property and be stored in Navy facilities. In other words, the members could not use the luggage for any personal business. B-200154, Feb. 12, 1981. The Comptroller General declined to state a precise rule as to how much travel is enough to justify government purchase of luggage, and emphasized that the purchase would be permitted only in highly unusual circumstances.

The payment of a federal employee's union dues is the employee's personal obligation even though payment by payroll withholding is authorized. If an agency wrongfully fails to withhold the dues from a paycheck, it may use appropriated funds to reimburse the labor union, but must then recover the payment from the employee unless the debt can be waived. 60 Comp. Gen. 93 (1980); B-235386, Nov. 16, 1989.

Customs and Border Protection (CBP) asked whether it could use its Salaries and Expenses appropriations to pay for relocation expenses for its border station employees who resided in Canada or Mexico. In response to heightened security concerns, CBP issued a directive requiring employees assigned to duty stations in the United States to maintain their primary residence in the United States. The Federal Travel Regulation, 41 C.F.R. chapters 300-304, does not address the question of benefits for employees' relocations that do not involve a change in duty station. Recognizing CBP's determination that U.S. residency enabled its border workforce to better carry out its mission, GAO determined that CBP's Salaries and Expenses appropriations were available to pay the relocation expenses if the agency chose to do so. B-306748, July 6, 2006.

Another personal expense issue concerns payments for professional liability insurance. Certain federal employees, such as those engaged in law enforcement activities, may be vulnerable to civil tort suits by plaintiffs alleging that they have been injured by the actions of the employees. Where liability is established, plaintiffs may be awarded compensatory or even punitive damages, which the federal employee-defendants would be required to pay. Consequently, government employees whose jobs place them in positions where they risk being sued may purchase liability insurance as a protection against such suits. B-211883-O.M., Dec. 14, 1983.

In 1996, Congress enacted legislation authorizing the reimbursement of "qualified employees" of the executive and legislative branches for up to one-half the costs incurred by such employees for professional liability insurance. Pub. L. No. 104-208,

title VI, § 636, 110 Stat. 3009-363 to 3009-364 (Sept. 30, 1996). A qualified employee is an agency employee whose position is that of a law enforcement officer or a supervisor or management official. These reimbursements were to be paid from amounts appropriated for Salaries and Expenses.

In 1998, Congress amended the law to include justices, judges, judicial officers, supervisors, and managers within the judicial branch. Pub. L. No. 105-277, title VI, § 644, 112 Stat. 2681, 2681-526 (Oct. 21, 1998). Then, in 1999, Congress once again amended the law to make the reimbursement mandatory as of October 1, 1999. Pub. L. No. 106-58, title VI, § 642(a), 113 Stat. 430, 477 (Sept. 29, 1999). These provisions were not enacted in the form of an amendment or addition to title 5 of the United States Code, although their text is set out as an uncodified note under subchapter IV, "Miscellaneous Expenses," preceding 5 U.S.C. § 5941. *See generally* B-300866, May 30, 2003 (addressing whether a federal court could retroactively reimburse an eligible employees for professional liability insurance).

5. Food

Food is an example of the quintessential personal expense: "Feeding oneself is a personal expense which a Government employee is expected to bear from his or her salary."[33] Therefore, as a general rule, appropriated funds are not available to pay subsistence or to provide free food to government employees at their official duty stations unless specifically authorized by statute. The "no free food" rule applies to snacks and refreshments as well as meals. It also applies to the use of appropriations to provide food to persons other than federal employees.

Under the limited circumstances that we discuss in this section, agencies may use appropriations to pay for food. It is critical to approach the cases in this section with the appropriate civic

[33] 65 Comp. Gen. 738, 739 (1986); B-288536, Nov. 19, 2001.

mindset. Congress makes appropriations to agencies so they may carry out official government business. Such business includes the payment of salaries that employees may use to feed themselves as they see fit. However, Congress does not make appropriations so that official salaries may be supplemented with food purchased with appropriated dollars. Such unauthorized food purchases might violate 5 U.S.C. § 5536, which prohibits an employee from receiving compensation in addition to the pay and allowances fixed by law.[34] Undoubtedly, using appropriations to buy unauthorized food also breaches the trust that Congress and the American people vest in government officials to use public money only for official purposes.

Since appropriations are available for official purposes only and not for food, the wise and dutiful public servant plans and executes agency activity with a simple rule in mind: appropriations generally are not available for food. Rarely, however, this wise and dutiful public servant may encounter a situation where the incidental purchase of food may contribute materially to the conduct of official business. In such situations, consider whether one of the exceptions described in this section allows the purchase of food. If none of these exceptions apply, then the purchase of food likely is not allowed.

The wise and dutiful public servant considers the purchase of food when it is incidental to the conduct of official business. She does not carry out official business that is incidental to the purchase of food. It is unwise and irresponsible to purchase food and then search for a justification. Such an exercise contorts the principles we discuss in this section to arrive at an answer that permits a food purchase. Even if this unwise and irresponsible employee manages to place check marks in a sufficient number of boxes to justify the purchase of food, the exercise ultimately falls short of the careful

[34] *See*, *e.g.,* 68 Comp. Gen. 46, 48 (1988); 42 Comp. Gen. 149, 151 (1962); B-272985, Dec. 30, 1996.

stewardship of appropriated funds that the Congress and the American people rightly expect.

a. Employees in travel status

The government may pay for the meals of civilian and military personnel in travel status because there is specific statutory authority to do so.[35] The National Oceanic and Atmospheric Administration asked if it could provide in-flight meals, at government expense, to persons on extended flights on government aircraft engaged in weather research. 65 Comp. Gen. 16 (1985). The answer was yes for government personnel in travel status, but no for anyone else, including government employees not in official travel status. *See also* B-256938, Sept. 21, 1995 (because the aircraft and its airbase were determined to be a U.S. Customs aircraft pilot's permanent duty station, the pilot could be reimbursed only for meals purchased incident to duties performed away from the aircraft outside the limits of his official duty station).

b. Employees working at official duty station under unusual conditions

Except in extreme emergencies, the government may not furnish free food (also referred to as "per diem" or "subsistence") to employees at their official duty station, even when they are working under unusual circumstances. This is because even under unusual circumstances, employees would still have to eat and incur the expense of meals.

For example, appropriations were not available for meals of an Internal Revenue investigator who was required to maintain 24-hour surveillance. 16 Comp. Gen. 158 (1936). The investigator would presumably have eaten (and incurred the expense of) three

[35] 5 U.S.C. § 5702 (civilian employees); 37 U.S.C. § 474 (military personnel).

meals a day even if he had not been required to work the 24-hour shift. Similarly, appropriations were not available for meals for a Central Intelligence Agency (CIA) security detail while providing 24-hour security to the Director or Deputy Director of the CIA. B-272985, Dec. 30, 1996. The general rule was also applied to deny payment for food in the following situations:

- Postal employees remaining on duty beyond working hours to carry out an internal election. 42 Comp. Gen. 149 (1962).
- Federal mediators required to conduct mediation sessions after regular hours. B-169235, Apr. 6, 1970; B-141142, Dec. 15, 1959.
- District of Columbia police officers involved in clean-up work after a fire in a municipal building. B-118638.104, Feb. 5, 1979.
- Geological Survey inspectors at offshore oil rigs who had little alternative than to buy lunch from private caterers at prices that the Geological Survey characterized as “excessive”. B-194798, Jan. 23, 1980. *See also* B-202104, July 2, 1981 (Secret Service agents on 24-hour-a-day assignment required to buy meals at high cost hotels).
- Law enforcement personnel retained at staging area for security purposes prior to being dispatched to execute search warrants. B-234813, Nov. 9, 1989.
- Air Force enlisted personnel assigned to a security detail at an off-base social event. B-232112, Mar. 8, 1990.

GAO has found exceptions where the expenditure occurs during an ongoing extreme emergency involving danger to human life and the destruction of federal property. In one case, GSA assembled a cadre of special police in connection with the unauthorized occupation of a building in which the Bureau of Indian Affairs was located. 53 Comp. Gen. 71 (1973). The cadre unexpectedly spent the whole night there in alert status until relieved the following morning. Agency officials purchased and brought in sandwiches and coffee for the cadre. GAO concluded that it would not question

the agency's determination that the food was a necessary expense. *See also* B-232487, Jan. 26, 1989 (government employees required to work during a 24-hour period to evacuate and secure an area threatened by the derailment of a train carrying toxic liquids); B-189003, July, 5, 1977 (FBI agents forced to remain at their duty station during a severe blizzard during a state of emergency to maintain essential functions).

The exception, however, is limited. Dangerous conditions or 24-hour duty alone are not enough. Appropriations were not available for meals for Treasury Department agents required to work over 24 hours while investigating a bombing of federal offices. B-185159, Dec. 10, 1975. There, the agents were investigating a dangerous situation that had already occurred and there was no suggestion that any further bombings were imminent. *See also* B-217261, Apr. 1, 1985 (Customs Service official required to remain in a motel room for several days on a surveillance assignment); B-202104, July 2, 1981.

Similarly, inclement weather is not enough to support an exception. There are numerous cases in which employees have spent the night in motels rather than returning home in a snowstorm in order to be able to get to work the following day. Reimbursement for meals has consistently been denied. 68 Comp. Gen. 46 (1988); 64 Comp. Gen. 70 (1984); B-226403, May 19, 1987; B-200779, Aug. 12, 1981; B-188985, Aug. 23, 1977. It makes no difference that the employee was directed by his or her supervisor to rent the room (B-226403 and B-188985),[36] or that the federal government in Washington was shut down (68 Comp. Gen. 46).[37]

Naturally, statutory authority will overcome the prohibition. For example, where the Veterans Administration (VA) had statutory

[36] A supervisor has no authority to do so. As noted in B-226403, such an erroneous exercise of authority does not bind the government.

[37] While the storm in 68 Comp. Gen. 46 was certainly more than flurries, it nevertheless remains the case that the government in Washington will be disrupted by storms that do not approach the severity of the Buffalo blizzard in B-189003.

authority to accept uncompensated services and to contract for related "necessary services," VA could contract with local restaurants for meals to be furnished without charge to uncompensated volunteer workers at VA outpatient clinics when their scheduled assignment extended over a meal period. B-145430, May 9, 1961. Similarly, because the Bureau of Indian Affairs (BIA) hired emergency firefighters under special statutory authority, 43 U.S.C. § 1469, BIA's practice of furnishing hot meals and snack lunches for emergency firefighters was legally permissible. B-241708, Sept. 27, 1991. There is also authority to make subsistence payments to law enforcement officials and members of their immediate families when threats to their lives force them to occupy temporary accommodations.[38] 5 U.S.C. § 5706a.

c. Training

The Government Employees Training Act (Training Act) authorizes agencies to pay for "all or a part of the necessary expenses of training." 5 U.S.C. § 4109. This section addresses when the government may pay to feed its employees at training when attendance is authorized under the principles set forth in section C.6.r below, which discusses the availability of appropriations for training generally.[39] If appropriations are not available for training under the principles discussed in section C.6.r, then appropriations are not available for any expense associated with the training, including food. In particular, note that routine meetings, however formally structured, are not "training," so the Training Act provides

[38] Federal employees may not accept donations of food, except where the recipient agency has statutory authority to accept and retain the donation. One example of such authority is found in the Legislative Branch Appropriations Act for fiscal year 2002. The Act permits the U.S. Capitol Police to "accept contributions of meals and refreshments" during a period of emergency, as determined by the Capitol Police Board. Pub. L. No. 107-68, § 121, 115 Stat. 560, 576 (Nov. 12, 2001), *codified at* 2 U.S.C. § 1971.

[39] Under limited circumstances, appropriations may be available to feed persons who are not government employees who take part in agency training. We discuss a case in which this was permissible in section C. 5. l.

no authority to furnish food at such meetings. 68 Comp. Gen. 606 (1989).

For the most part, appropriations are not available to pay for food at a training. As we explain below, in limited circumstances, appropriations may be available to pay for food at training that is otherwise authorized by law if the food is necessary to achieve the objectives of the training program. Generally, this requires that an agency justify that attendance at the meals or refreshment periods is necessary in order for the employees to obtain the full benefit of the training.

For example, GAO determined that food could be a proper training expense for federal civilian employees and military members where the food was necessary for the employees and members to obtain the full benefit of an antiterrorism training exercise conducted by the U.S. Army Garrison Ansbach. B-317423, Mar. 9, 2009. The purpose of the training was to simulate realistic antiterrorism scenarios, which could very well require nonstop participation through mealtimes in order to protect life and property. *Id. See also* B-244473, Jan. 13, 1992; 50 Comp. Gen. 610 (1971); 39 Comp. Gen. 119 (1959); B-247966, June 16, 1993; B-193955, Sept. 14, 1979. The government may also furnish meals to nongovernment speakers as an expense of conducting the training. 48 Comp. Gen. 185 (1968).

The fact that an agency characterizes its meeting as “training” is not controlling for purposes of authorizing the government to feed participants. For example, headquarters employees of the then Department of Health, Education, and Welfare met with consultants in a nearby hotel at what the agency termed a “research training conference.” However, the conference consisted of little more than “working sessions” and included no employee training as defined in the Training Act. Therefore, the cost of meals could not be paid. B-168774, Sept. 2, 1970.

Similarly, grant funds provided to the government of the District of Columbia under the Social Security Act for personnel training and administrative expenses could not be used to pay for a luncheon at

a 4-hour conference of officials of the D.C. Department of Human Resources. B-187150, Oct. 14, 1976. The conference could not be reasonably characterized as training and did not qualify as an allowable administrative cost under the program regulations. *See also* 72 Comp. Gen. 178 (1993); 68 Comp. Gen. 606 (1989); B-247563, Dec. 11, 1996; B-208527, Sept. 20, 1983; B-140912, Nov. 24, 1959.

Finally, a Social Security Administration employee who had been invited as a guest speaker at the opening day luncheon of a legitimate agency training conference in the vicinity of her duty station could be reimbursed for the cost of the meal.[40] 65 Comp. Gen. 143 (1985).

d. Employees' food while attending non-federal meetings

This subsection addresses whether agencies may use appropriations to pay for federal employees' food at meetings organized by a non-federal entity. Use of appropriations for food at formal conferences organized by the agency is discussed in section C.5.f below, while use of appropriations for federal employees' food at meetings organized by a federal entity is discussed in section C.5.e below.

The Government Employees Training Act (Training Act) authorizes agencies to pay "for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made," 5 U.S.C. § 4110, regardless of whether the event is held within the employee's official duty station. This section addresses when the government may pay to feed its employees at a meeting when attendance at the meeting is authorized under the principles set forth in section D.5.d below, which discuss the use of

[40] The decision unfortunately confuses 5 U.S.C. §§ 4109 and 4110 by analyzing the case under section 4110 yet concluding that reimbursement is authorized "as a necessary training expense," which is the standard under section 4109.

appropriated funds for the attendance of government employees at meetings more generally.

Although section D.5.d below discusses in great detail whether attendance at a particular meeting may be authorized, here it suffices to say that the meeting must bear a relationship to official agency business. For example, there was no relationship between the meeting of a local business association and the official business of the Department of Housing and Urban Development. Thus, no expenses of the event (whether for attendance or for food) could be paid using appropriated funds. B-166560, May 27, 1969.

(1) Food must be incidental to the meeting

Non-federal entities frequently organize meetings, and official agency business often requires federal employees to attend these meetings. Appropriations are available to pay for food at a meeting only if the food is incidental to the meeting. Generally, the meal must be "part of a formal meeting or conference that includes not only functions such as speeches or business carried out during a seating at a meal but also includes substantial functions that take place separate from the meal." 64 Comp. Gen. 406 (1985). For example, in one case an employee sought reimbursement for the cost of a breakfast meeting in which an employee

> "attended a joint breakfast meeting of the New England Co-Generation Association and Energy Engineers for which each employee paid $35, which [the employee] indicates was charged whether or not the breakfast was eaten. We were not provided with any information regarding the nature of the New England Co-Generation Association or the Energy Engineers. We assume that they are trade and professional associations, non-governmental in nature. [The employee] states that the breakfast took place

> between 9 a.m. and 9:30 a.m. which was followed by a speaker who spoke from 10 a.m. to 11 a.m."

B-249351, May 11, 1993. GAO noted that apparently the meeting was sponsored by non-federal organizations, that the fee to attend the meeting included breakfast at no extra charge, and that "the breakfast appears to have been an incidental part of the business of the meeting." GAO concluded that using appropriations to pay the fee would be permissible if "the agency affirms these facts and confirms that the substance of the meeting was concerned with the functions or activities for which the agency's funds are appropriated or contributes to the improved conduct, supervision, or management of those functions or activities." *See also* 38 Comp. Gen. 134 (1958); B-66978, Aug. 25, 1947.

In contrast, appropriations are not available to pay for food where it appears the meeting is incidental to the food. For instance, the agency could not pay for food where although "the participants conducted business during a seating as a meal and for a brief time thereafter, there is no evidence that any substantial functions occurred separate from the meal." 65 Comp. Gen. 508 (1986); *see also* 64 Comp. Gen. 406 (1985) ("we are unwilling to conclude that a meeting which lasts no longer than the meal during which it is conducted qualifies for reimbursement"); B-233807, Aug. 27, 1990.

In a case that may rest near the outer bound of instances in which the Training Act permits agencies to buy food, the Federal Bureau of Investigation (FBI) could reimburse the Special Agent in Charge of the FBI's San Francisco office for his cost of attending a retirement banquet for a local California police chief. B-249249, Dec. 17, 1992. The Special Agent in Charge represented the FBI at the banquet and presented the chief with a plaque and commendation letter from the FBI Director. The FBI had a "long-standing tradition of recognizing the contributions of local police officials to the FBI's mission" and the agency approved of the agent's attendance "to represent the agency and present the plaque and letter." Therefore, "it is clear that his attendance was in furtherance of the functions or activities for which the agency's

appropriations are made" and that the meal was incident to this official function. Accordingly, GAO concluded it was permissible to reimburse the Special Agent in Charge for his cost in attending the banquet.

The Department of Justice, Office of Legal Counsel, applying this decision, stated that "[w]e believe that the Comptroller General's holding was correct and would be applicable to an employee of a United States Attorney's Office attending the same kind of event under like circumstances." 17 Op. Off. Legal Counsel 70 (1993). The Office of Legal Counsel cautioned, however, that the application of the ruling should be carefully limited to where the nature of the ceremonial event "provides good reason to believe that the official or employee's attendance advances the office's authorized functions." *Id.* A reader presented with a similar situation may wish to consider whether official reception and representation funds would be available for such an occasion; we discuss such funds in section C.5.n below.

In many of the cases described above, the charge for the meeting or conference was a single non-separable fee that included the cost of the food. Thus, applying the principles discussed above, an agency may pay the single fee if the subject of the meeting is related to official agency business, the meeting is not a routine business meeting, and if the food is incidental to the meeting. Similarly, an agency may pay a single meeting registration fee that includes the non-separable cost of an evening social event, if the event is incidental to the meeting as a whole. 66 Comp. Gen. 350 (1987). As we will discuss later in this section, additional rules arise when the cost of food is charged separately from the meeting fee.

In summary, as many decisions have pithily observed, appropriations are available only to pay for a meeting that is incident to a meal, and not for a meal that is incident to a meeting. *E.g.* 64 Comp. Gen. 406 (1985); 65 Comp. Gen. 508 (1986).

(2) Additional rules where the cost of meals is charged separately

If a separate charge is made for meals, the government may pay for the meals if the above criteria are met and if (1) attendance of the employee at the meals is necessary to full participation in the business of the meeting; and (2) the employee is not free to take the meals elsewhere without being absent from essential formal discussions, lectures, or speeches concerning the purpose of the meeting. B-233807, Aug. 27, 1990; B-198471, May 1, 1980; B-160579, Apr. 26, 1978; B-166560, Feb. 3, 1970. Absent such a showing, the government may not pay for the meals. B-154912, Aug. 26, 1964; B-152924, Dec. 18, 1963; B-95413, June 7, 1950; B-88258, Sept. 19, 1949. These rules apply regardless of whether the conference takes place within the employee's duty station area or someplace else.

For example, a Forest Service employee attended a meeting of an external group. The meeting concerned a subject involving the Forest Service and the agency's presence at the meeting contributed to improved agency participation in a project. The Forest Service employee attended the meeting as the agency's representative. The employee sought reimbursement for the amount he paid for his lunch, which was not included as part of a registration fee. The employee needed to attend the luncheon to participate fully in the meeting and "to have eaten elsewhere would have been unusual and somewhat limiting on his effectiveness as a Forest Service representative." GAO concluded that if the agency could show that "the particular meal was incidental to the meeting; that the attendance of the employee was necessary to full participation in the scheduled meeting; and that he was not free to partake of his meals elsewhere without having been absent from essential formal discussions, lectures, or speeches concerning the purpose of the conference," then payment for the meal would be permissible. B-166560, Feb. 3, 1970.

(3) Reimbursement for alternate meals not permitted

Where the government is authorized to pay for meals under the above principles, the employee normally cannot be reimbursed for purchasing alternate meals. *See* B-193504, Aug. 9, 1979; B-186820, Feb. 23, 1978. Personal taste is irrelevant. Thus, an employee who, for example, loathes broccoli will either have to eat it anyway, pay for a substitute meal from his or her own pocket, or go without. For an employee on travel or temporary duty status, which is where this rule usually manifests itself, per diem is reduced by the value of the meals provided. *E.g.,* 60 Comp. Gen. 181, 183-84 (1981). The rule will not apply, however, where the employee is unable to eat the meal provided (and cannot arrange for an acceptable substitute) because of *bona fide* medical or religious reasons. B-231703, Oct. 31, 1989 (*per diem* not required to be reduced where employee, an Orthodox Jew who could not obtain kosher meals at conference, purchased substitute meals elsewhere).

e. Employees' food at meetings organized by a federal entity

(1) General rule: no use of appropriations for food at meetings organized by a federal entity

As discussed in the previous subsection, 5 U.S.C. § 4110 generally applies to formal meetings, typically organized by entities *outside* of the federal government. 68 Comp. Gen. 604 (1989); B-247563.4, Dec. 11, 1996. It does not make appropriations available to supply food at internal agency-sponsored meetings. "The [Training Act] has little or no bearing upon a purely internal conference or meeting sponsored by the government . . . ." 46 Comp. Gen. 135 (1966); *see also* B-140912, Nov. 24, 1959.

"Internal" generally means internal to the government, rather than internal to a particular agency. That is, both intra- and inter-agency

meetings generally fall outside the scope of the Training Act. B-249351, May 11, 1993 (Training Act did not permit agency to pay for food at a meeting of a Federal Executive Board, which is an interagency coordinating group to improve federal management practices in a particular metropolitan area); 68 Comp. Gen. 604 (1989) (denying payment for meal expenses by employees attending a Customs Service sponsored meeting of an interagency task force). Attendance at agency-sponsored meetings, whether intra- or inter-agency, will generally be subject to the prohibition on furnishing free food to employees at their official duty stations. Thus, agencies generally may not use their appropriations to pay for their employees to eat at meetings that are hosted by other federal agencies.

Food does not become a permissible expense merely because non-federal individuals attend a meeting. For example, in one case a Forest Service official asked whether appropriations were available to pay for a meal at a meeting attended by Forest Service employees and by representatives from various private timber associations. The meeting participants conducted business only during the meal itself and for a brief time afterward; no substantial activities occurred outside of the meal period. GAO concluded that the food was not an allowable purchase because the food was not incidental to the meeting. The presence of non-federal individuals did not affect the conclusion. 65 Comp. Gen. 508 (1986). In addition, a subsequent opinion commented that the use of appropriations for food in 65 Comp. Gen. 508 also was impermissible because, despite the inclusion of non-federal attendees, the occasion ultimately was a routine business meeting primarily involving day-to-day agency operations and concerns. 68 Comp. Gen. 606 (1989).

As we discuss in section C.6.r below, appropriations are available to pay for food at training under limited circumstances; however, a routine meeting does not qualify as “training.” B-230939, Aug. 14, 1989.

Thus appropriated funds could not be used in the following cases:

- For meals and refreshments served to government employees attending Federal Communication Commission radio spectrum auctions. B-260692, Jan. 2, 1996. *See also* 47 Comp. Gen. 657 (1968); B-45702, Nov. 22, 1944.

- For refreshments at new employee orientations or for refreshments for employees randomly selected for breakfasts with senior agency managers. B-247563.4, Dec. 11, 1996.

- For food at an internal training session. B-270199, Aug. 6, 1996. (The food also was not a proper training expense under 5 U.S.C. § 4109 because provision of the food was not necessary for employees to obtain the full benefit of the training.)

- For meals at quarterly managers meetings of the U.S. Army Corps of Engineers. 72 Comp. Gen. 178 (1993).

- For meals at monthly luncheon meetings for officials of law enforcement agencies. B-198882, Mar. 25, 1981.

- For the cost of meals at an agency-sponsored meeting for employees who were not in travel status, even though they ate alongside other employees who dined at government expense because they were in travel status. B-180806, Aug. 21, 1974.

- For coffee breaks at a management seminar. B-159633, May 20, 1974.

- For meals served during “working sessions” at Department of Labor business meetings. B-168774, Jan. 23, 1970.

(2) Exceptions: where food at federally organized meetings may be permissible

In one case, the Nuclear Regulatory Commission (NRC) could pay an all-inclusive facility rental fee for a meeting to discuss internal matters, even though the fee resulted in food being served to NRC employees at their official duty stations. B-281063, Dec. 1, 1999. The facility that NRC selected best met the agency’s needs, notwithstanding the included food. There was no indication that that

the included food influenced NRC's determination to select the facility. Because the fee would have remained the same to NRC whether or not it accepted the food and its employees ate the food, the harm that the general rule aims to prevent (i.e., expenditure of federal funds on personal items) was not present.

Under some circumstances, appropriations are available for food incident to an agency-hosted *formal conference.* We discuss this in the next subsection.

Finally, though 5 U.S.C. § 4110 generally applies only to meetings sponsored by nongovernmental organizations, "we have extended section 4110 to government-sponsored meetings as long as the meeting satisfies the same conditions as required for nongovernment-sponsored meetings and the government sponsored meeting is not an internal day-to-day business meeting." B-288266, Jan. 27, 2003. However, we are aware of only a single decision that used 5 U.S.C. § 4110 as a basis to permit the use of appropriations for food at a government-sponsored meeting. B-198471, May 1, 1980. In that case, GAO acknowledged that it would be permissible to pay for meals for two GAO employees who were attending an annual meeting of the President's Committee on Employment of the Handicapped, provided that GAO determined that 1) meals were incidental to the meeting; 2) attendance at the meals was necessary for full participation; and 3) that employees were not free to take meals elsewhere without missing essential formal discussions, lectures, or speeches concerning the purpose of the meeting.

Years of experience have demonstrated that agencies sometimes view B-198471 as the loophole through which the lunch wagon may be driven. We caution, however, that the holding of this decision is not nearly as broad as it might at first appear. Though the three-factor test set forth in the decision is critically important, the decision made no reference to the rule that food is available only at meetings that are not internal government business meetings. Long before B-198471 was issued in 1980, the decisions recognized that food is not a permissible expense for internal business meetings. *See, e.g.*, B-140912, Nov. 24, 1959. Decisions subsequent to

B-198471 make it clear that application of the three-part test is in order only where the agency first determines that the occasion in question is not an internal government business meeting. *E.g.* 68 Comp. Gen. 604 (1989); 68 Comp. Gen. 606 (1989).

Furthermore, preceding application of the three-part test of B-198471 is a determination that the food is incident to the meeting. "In order to meet the three part test, a meal must be part of a formal meeting or conference that includes not only functions such as speeches or business carried out during a seating at a meal but also includes substantial functions that take place separate from the meal." 64 Comp. Gen. 406, 408 (1985). In other words, the three-part test, and hence the authority to reimburse, relates only to a meal that is incident to a meeting, not to a meeting that is incident to a meal. *See also* 65 Comp. Gen. 508, 510 (1986); 64 Comp. Gen. 406, 408 (1985); B-249249, Dec. 17, 1992. For example, appropriations were not available to reimburse employees for the cost of a meal at a meeting where the meeting "lasts no longer than the meal during which it is conducted." 64 Comp. Gen. at 408.

Thus, before an agency may use appropriations to pay for food at a federally-sponsored meeting under 5 U.S.C. § 4110, the agency must, at a minimum, ensure the meeting is not an internal government business meeting and that the meal is merely an incidental part of the meeting. The agency must not structure the meeting around the purpose of including food. Only after a meeting satisfies these conditions may the agency apply the three-part test given in B-198471. The decision in B-198471 offers little reasoning to the reader attempting to ascertain whether 5 U.S.C. § 4110 permits payment for food at a particular federally-sponsored event. Given the lack of other decisions pertaining to this specific application of 5 U.S.C. § 4110, the reader is urged to proceed with caution and is reminded that GAO will issue decisions upon request.

f. Agency hosting a formal conference

When an agency is hosting a *formal conference* that meets particular criteria, it may provide food to its own personnel, to

employees of other agencies, and to nonfederal personnel. An agency was found to have the requisite statutory authority to provide meals and refreshments to nonfederal personnel in B-300826, Mar. 3, 2005. In that case, GAO considered whether the National Institutes of Health (NIH) could use appropriated funds to provide meals and light refreshments to both federal and nonfederal attendees and presenters at a formal conference NIH was hosting on the latest scientific advances in treating Parkinson's disease. After reviewing NIH's statutory authority to conduct and support research to further the treatment of diseases, GAO concluded that NIH had the requisite authority to host the formal conference to which NIH had invited experts from the private sector as well as from other federal agencies, in addition to researchers from its own research institutes.[41]

To determine whether the costs of meals and refreshments at such an agency-hosted formal conference are necessary to achieve the conference objectives, GAO established the following criteria: (1) the meals and refreshments are incidental to the formal conference, (2) attendance at the meals and when refreshments are served is important for the host agency to ensure attendees' full participation in essential discussion, lectures, or speeches concerning the purpose of the formal conference, and (3) the meals and refreshments are part of a formal conference that includes substantial functions occurring separately from when the food is served. Since the NIH proposal met these criteria, NIH could provide meals and refreshments at the Parkinson's disease conference. In so finding, GAO noted that the listed criteria must be applied on a case-by-case basis and advised federal agencies to develop procedures to ensure that the provision of meals and refreshments meet the criteria.

Another aspect of hosting a formal conference addressed in B-300826 concerned whether NIH could charge an attendance fee

[41] The decision also concluded that 31 U.S.C. § 1345 did not bar the provision of food at this formal conference. We discuss this further in section D. 5.

at the formal conference and retain the proceeds, or permit its contractor to do so. GAO held that without specific statutory authority an agency hosting a formal conference may not charge and retain an attendance fee, and the agency may not cure that lack of authority by engaging a contractor to do what it may not do. A contractor in this situation is "receiving money for the Government," and the miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires that such funds must be deposited in the Treasury.[42] This decision in B-300826 was affirmed in B-306663, Jan. 4, 2006. For more on the miscellaneous receipts statute, see Chapter 6, section E.2.

Earlier we noted that agencies sometimes view GAO's decision in B-198471, May 1, 1980, as the loophole through which the lunch wagon may be driven. The lunch wagon is still rolling, and with the decision in the NIH conference case, it is now loaded with food not only for federal employees but also for nonfederal attendees. Years of informal contact with agencies have shown that officials often place undue weight on the three-factor test specified in B-300826, just as they did with the three-factor test specified in B-198471. However, just like the three-part test in B-198471, the three-part test of B-300826 applies only after a particular occasion satisfies particular prerequisites. Specifically, an agency may use appropriations for food under B-300826 only for a *formal conference*.

The decision in B-300826 does not offer a strict rule for what constitutes a "formal conference"; instead, the "level of formality required is the same as what one would expect of a conference sponsored by a nongovernmental entity." B-300826, at 6. Certainly the formal conference "must involve topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants." *Id.* However the formal conference must also include,

[42] In 2006, Congress provided the Department of Defense (DOD) with specific authority to accept and retain fees from any individual or commercial participant in conferences, seminars, exhibitions, symposiums, or similar meetings conducted by DOD. Pub. L. No. 109-364, 120 Stat. 2083, 2395–96 (Oct. 17, 2006), *codified a*t 10 U.S.C. § 2262.

"*among other things*, registration, a published substantive agenda, and scheduled speakers or discussion panels." *Id*. (emphasis added). The phrase "among other things" indicates that this list of criteria for a formal conference is by no means exhaustive. Finally, the decision cautions that "[m]eetings discussing business matters internal to an agency or other topics that have little relevance outside of the agency do not constitute formal conferences." *Id*.

It is wise to remember what we pointed out in the beginning of the *Food* section: food must be a means to an end, never an end in itself. One agency official might think: "we are trying to organize this conference, and it turns out that food is necessary for us to accomplish our objective. Is it possible for us to use appropriations to purchase food?" In that case, application of the principles set forth in B-300826 might permit food under limited circumstances. Another official might think "we are trying to organize this conference, and it would be great to have food. Is it possible to craft our objectives so that food is permitted?" We hope that the latter official would reflect upon the trust that Congress and the American people have vested in federal officials and realize why such thinking would be subjected to rightful scorn. Upon such proper reflection, typically the latter official realizes that the food is not necessary to accomplish the agency's objectives and that the interests of the agency and of the taxpayers are better served by using appropriations only for official expenses, leaving employees and other individuals to use their personal funds to satisfy their own needs in the manner they see fit.

GAO once sounded a cautionary note consistent with this spirit:

> "Accordingly, we will continue to scrutinize closely situations that reflect an attempt to manipulate the content of meetings to fit one of our established exceptions rather than furthering a legitimate training function. We note that the purpose of our exceptions to the general rule prohibiting the use of appropriated funds for meals is to allow

> for better and more efficiently trained and informed government employees by covering the cost of meals received as an incident to training sessions or to conferences or meetings. The purpose of our exceptions is not to feed government employees using a 'training' or 'meeting' rubric as a convenient vehicle to achieve that result."

B-249795, May 12, 1993.

Finally, remember that B-300826 describes an agency's discretionary authority to pay for food at specified formal conferences. Agencies need not exercise this authority. Ironically, we find an excellent example of the discretionary nature of this authority in the very agency that was the subject of B-300826: the National Institutes of Health (NIH). Current policy of the Department of Health and Human Services (HHS) (of which NIH is a component) bars the use of appropriated funds to purchase food "whether for conferences or meetings; for meals, light refreshments, or beverages; or for Federal or non-Federal participants" unless the food is a necessary expense and the occasion fits into one of the following four exceptions: training events; award ceremonies; use of official reception and representation funds; or emergencies involving imminent danger to human life or the destruction of federal property. *HHS Policy on the Use of Appropriated Funds for Food*, *available at* www.hhs.gov/grants/contracts/contract-policies-regulations/spending-on-food/index.html (last visited Aug. 24, 2017). All these exceptions are discussed in this publication.

In particular, the HHS policy permitting use of appropriations for food at training events authorizes payment for employee attendance "at a non-HHS government or non-government conference (that constitutes an authorized training program) that includes food, if the registration fee includes the cost of food and the cost of food cannot be separated from the registration fee." Notably, however, HHS bars use of appropriations to "purchase

food and refreshments for HHS funded training events, such as conferences, workshops, symposia, and meeting, authorized under the Government Employee Training Act."

NIH also has a policy concerning use of appropriations for conferences and meeting space. NIH Policy on Promoting Efficient Spending: Use of Appropriated Funds for Conferences and Meeting Space, Food, Promotional Items, and Printing and Publications, Nov. 1, 2015, available at oamp.od.nih.gov/news/NIH-efficient-spending-policy (last visited June 27, 2017). The policy makes no mention of the decision in B-300826. Instead, the NIH policy is in full accord with that of HHS and states that food is not a permissible expense unless one of the exceptions listed in the HHS policy applies. "There is no exception for providing beverages at meetings and conferences hosted or sponsored by NIH." NIH Policy, at 20 (emphasis in original). Further, "[t]he food prohibition absent approval under one of the exceptions, applies regardless of whether the event is a conference or meeting or regardless of whether the event is held in federal or non-federal facilities." NIH Policy, at 20-21.

Agencies considering whether to use appropriations to purchase food for formal conferences would be wise to consider the restraint shown in written policies such as those of HHS and NIH before using the broader authority outlined in B-300826. Though food expenses at a particular formal conference may well be permissible under B-300826, years of experience have shown us that some agency officials confront enormous pressure to fashion this decision into a lunch wagon hauling food that is not truly necessary to carry out a formal conference.

g. Awards ceremonies

Agencies may use appropriations to provide light refreshments at awards ceremonies under the Government Employees' Incentive Awards Act. We discuss this in section C.6.c below.

h. Cultural awareness programs

Under particular circumstances, appropriations are available to purchase food for cultural awareness programs that are part of an agency's efforts to ensure equal employment opportunity. We discuss this issue in detail in section C.6.g below.

i. Cafeterias and kitchen appliances

The government has no general responsibility to provide luncheon facilities for its employees. 10 Comp. Gen. 140 (1930). However, plans for the construction of a new government building may include provision for a lunch room or cafeteria, in which event the appropriation for construction of the building will be available for the lunch facility. 9 Comp. Gen. 217 (1929).

An agency may subsidize the operation of an employees' cafeteria if the expenditure is administratively determined to be necessary to the efficiency of operations and a significant factor in the hiring and retaining of employees and in promoting employee morale. B-216943, Mar. 21, 1985; B-169141, Nov. 17, 1970; B-169141, Mar. 23, 1970. *See also* B-204214, Jan. 8, 1982 (temporarily providing paper napkins in new government cafeteria found to contribute to efficiency of agency operations where employees were using paper towels from lavatories due to a lack of napkins in the cafeteria); GAO, *Benefits GSA Provides by Operating Cafeterias in Washington, D.C., Federal Buildings,* LCD-78-316 (Washington, D.C.: May 5, 1978).

GAO approved an agency's purchase of kitchen appliances, ordinarily considered to be personal in nature, for common use by employees in an agency facility.[43] B-302993, June 25, 2004. The appliances included refrigerators, microwaves, and commercial

[43] This decision represented a departure from earlier cases, which permitted such purchases only where the agency could identify a specific need. *See*, *e.g.*, B-180272, July 23, 1974; B-210433, Apr. 15, 1983; B-276601, June 26, 1997; B-173149, Aug. 10. 1971.

coffee makers. The agency demonstrated that equipping the workplace with these appliances was reasonably related to the efficient performance of agency activities and provided other benefits to the agency, including the assurance of a safe workplace.[44]

GAO advised the agency that it should establish policies for uniform procurement and use of such equipment. In developing a policy, the agency should address the ongoing need for specific equipment throughout the building, the amount of the agency's appropriation budgeted for this purpose, price limitations placed on the equipment purchases, and whether the equipment should be purchased centrally or by individual units within headquarters. It is important that the policy ensure that appropriations are not used to provide any equipment for the sole use of an individual, and that the agency locate refrigerators, microwaves, and coffee makers acquired with appropriated funds only in common areas where they are available for use by all personnel.

It should also be clear that appropriated funds will not be used to furnish goods, such as food or eating utensils, to be used in the kitchen area. These remain costs each employee is expected to bear. For example, appropriations were not available to purchase disposable cups, plates, and cutlery for employee use where the agency did not demonstrate that provision of the items directly advanced its statutory mission or that the benefit accruing to the government through the provision of such items outweighed the personal nature of the expense. B-326021, Dec. 23, 2014. "Appropriations are not available for the personal expenses of an agency's employees unless the agency articulates a reasonable and compelling justification, establishing a clear benefit to the agency, contributing to the fulfillment of express statutory duties, requirements, or functions." *Id*.

[44] For example, "having centralized appliances and therefore fewer extension cords or overloaded circuits will permit [the agency] to better manage the safety of the building." B-302993, at 5.

j. Bottled water

We discuss the issue of whether agencies may purchase bottled water in section C.6.k(4) below.

k. Focus groups

At times, food may be a necessary expense where an agency determines that it will increase participation in and effectiveness of focus groups. The Veterans Benefits Administration (VBA) of the Department of Veterans Affairs (VA) inquired whether it may use appropriated funds to pay for refreshments or light meals at its focus groups. Under 38 U.S.C. § 527(a), the VA is required to "measure and evaluate" its programs, and the VBA has been tasked with collecting this information. While VBA obtains information from a variety of sources, including mail or internet surveys and telephone interviews, VBA has determined that the use of focus groups is the best method of gathering this feedback. VBA also found that the provision of refreshments to the participants is very helpful both in attracting these participants and getting useful information from the focus groups.

In this case, the focus group participants were not VBA employees but rather veterans and family members of veterans served by VBA. GAO concluded that where VBA showed that it needs to offer refreshments and light meals as an incentive to maximize participation by nonemployee veterans and their families in focus groups to fulfill its statutory requirement, VBA could use its appropriated funds to do so. However, GAO cautioned that VBA should provide such incentives pursuant to an appropriate, enforceable policy with procedures for approval to ensure that incentives are only provided when necessary and are used strictly for nonemployee focus groups. B-304718, Nov. 9, 2005. *Compare* B-318499, Nov. 19, 2009 (a Navy command which did not identify a specific statutory objective may not use appropriated funds to pay for lunch for nonfederal participants of a focus group on readiness and quality of life issues).

Another critical consideration is 31 U.S.C. § 1345, which bars the use of appropriations for individuals other than federal employees to attend some meetings. We discuss 31 U.S.C. § 1345 further in section D.5 below.

I. Accomplishment of a statutory responsibility

GAO has, on occasion, permitted agencies to use appropriations for food in certain instances where the agency presents a compelling legal determination that the food was an essential constituent part of the effective accomplishment of a statutory responsibility, notwithstanding any collateral benefit to the individual. For example, under a statutory accident prevention program, the Marine Corps could permissibly establish rest stations on highways leading to a Marine base to serve coffee and doughnuts to Marines returning from certain holiday weekends.[45] B-201186, Mar. 4, 1982. In another case, the National Science Foundation could use appropriated funds for the dinner of a nonfederal award recipient and her spouse at an agency awards ceremony because of the statutory nature of the award. B-235163.11, Feb. 13, 1996.

Similarly, the U.S. Army Garrison Ansbach (Ansbach) asked whether its appropriated funds could be used to purchase food for nonfederal participants at annual antiterrorism training exercises conducted by Ansbach. These exercises are conducted pursuant to Department of Defense and Department of the Army requirements and are intended to help identify and reduce antiterrorism vulnerabilities and test antiterrorism response plans and procedures. The role of the nonfederal participants, which could include contract installation guards and host nation police, fire department, local Red Cross, and city officials, is to provide a real

[45] The decision also concluded that "unless the Marine Corps determines that making the highway rest stations provisions available to non-Marines contributes to Marine safety, any refreshments for non-Marines should be provided on a reimbursable basis only."

world response to the simulated terrorist incident. GAO had no objection to the Ansbach commander's determination to use appropriations to provide food to the federal participants in the training because an actual antiterrorism response could very well require nonstop participation. GAO, recognizing the importance of local cooperation in responding to emergency situations, concluded that Ansbach could provide food to nonfederal personnel so long as the Ansbach commander determined that their participation in the training is essential to accomplishing the required training of Department of Defense and Army employees and to simulating realistic antiterrorism scenarios. B-317423, Mar. 9, 2009. GAO suggested that, in order to enhance the simulated nature of the exercise and to test the delivery apparatus, Ansbach would want the food to resemble those types of meals and snacks that one would expect to be provided during an actual antiterrorism response. *Id.*

In contrast, appropriations for the Forest Service were not available to provide light refreshments for attendees of an educational event. B-310023, Apr. 17, 2008. A Forest Service district participated in National Trails Day, which was an annual event sponsored by a private nonprofit organization dedicated to preserving and promoting hiking. Agency personnel led visitors on hikes and served as guides on walks and instructors for educational activities. The Forest Service district wished to provide snacks for attendees who were, for example, participating in hikes. However, appropriations were not available for this purpose, as the Forest Service did not demonstrate how the provision of refreshments was an essential, constituent part of accomplishing an authorized agency function. It was clear that the Forest Service could effectively carry out the activities it planned for National Trails Day without providing light refreshments.

Another critical consideration is 31 U.S.C. § 1345, which bars the use of appropriations for individuals other than federal employees to attend some meetings. We discuss 31 U.S.C. § 1345 further in D.5 below.

m. Food for persons other than government personnel

Most cases concerning food arose in the context of providing food to government personnel. Occasionally, GAO has issued decisions and opinions concerning the purchase of food for non-government personnel. One of these decisions concerned the purchase of food at formal conferences, which we discuss in section C.5.f above. This subsection discusses several other cases. Many of the remaining decisions discuss whether appropriations are available for what is often dubbed "entertainment" of non-government personnel. Usually, the purchase of food for persons other than government personnel is permissible only pursuant to specific statutory authority. For example, funds were not available to furnish food or refreshments at "recognition ceremonies" for volunteers at Veterans Administration field stations. The ceremonies had been designed as an inducement to the volunteers to continue rendering service. 43 Comp. Gen. 305 (1963). However, expenditures of the same nature were permissible when authorized by specific statutory authority. B-152331, Nov. 19, 1975.

Other decisions and opinions on this subject include:

- Chairman of Philippine War Damage Commission could not be reimbursed for expenses incurred for entertaining distinguished guests in the Philippines, as such expenses were not specifically authorized by law. 26 Comp. Gen. 281 (1946).
- Costs for refreshments for college students at recruiting functions are not reimbursable, unless the costs were included in a lump sum bill with other room facility charges. B-236763, Jan. 10, 1990.
- Free in-flight meals during weather research flight unauthorized for nongovernment personnel. 65 Comp. Gen. 16 (1985).
- Cost of a breakfast meeting with Canadian officials called at the initiative of the Chairman of the Securities and Exchange Commission was not reimbursable. B-138081, Jan. 13, 1959.

- Appropriations available to the judiciary for jury expenses could not be used to buy coffee and refreshments for jurors during recesses in trial proceedings. The situation was analogous to the cases prohibiting the purchase of food from appropriated funds for employees working under unusual conditions. Although statutory authority existed to pay actual subsistence expenses for jurors under sequestration, that authority was not an issue in the case at hand. 57 Comp. Gen. 806 (1978). The relevant appropriation language was subsequently amended to provide for refreshments, and the authority was made permanent in 1989.[46]

- Equal Employment Opportunity Commission appropriations not available to host a reception for Hispanic leaders in conjunction with a planning conference. B-193661, Jan. 19, 1979.

- Providing light refreshments to attendees of National Trails Day events does not contribute materially to the accomplishment of an authorized U.S. Forest Service function and thus appropriations were not allowed for the expense. B-310023, Apr. 17, 2008.

Though Congress sometimes authorizes the purchase of food for persons other than government employees, agencies must be careful not to exceed the bounds of the authority. For example, GAO considered the propriety of using appropriated funds to furnish luncheons to public school officials in conjunction with Marine Corps recruiting programs. B-162642, Aug. 9, 1976. A statute authorized reimbursement of necessary expenses incurred by recruiters. (This statute currently is 37 U.S.C. § 488.) The legislative history of the statute made clear that the provision was intended to allow reimbursement for snacks and occasional meals for recruits, candidates, and their families. GAO noted that it did not consider a planned luncheon involving a formal presentation with a guest speaker as within the intended scope of the statute.

[46] Pub. L. No. 101-162, 103 Stat. 988, 1012 (Nov. 21, 1989).

However, since the statute and implementing regulations were broadly worded, payment in that case was authorized. The decision cautioned against incurring similar expenses in the future unless the regulations were first revised to provide adequate guidelines and limitations.

Another critical consideration is 31 U.S.C. § 1345, which bars the use of appropriations for individuals other than federal employees to attend some meetings. We discuss 31 U.S.C. § 1345 further in section D.5 below.

n. Official reception and representation funds

Expenditures that would otherwise be improper may be authorized under specific statutory authority. Though this section of our publication focuses on food specifically, here we consider appropriations that Congress has specifically made available not only for food but also for entertainment more generally.

Congress has long recognized that many agencies have a legitimate need for items that otherwise would be prohibited as entertainment, and has responded by making limited amounts available for official entertainment to those agencies which can justify the need. Entertainment appropriations originated from the need to permit officials of agencies whose activities involve substantial contact with foreign officials to reciprocate for courtesies extended to them by foreign officials. For example, the State Department would find it difficult to accomplish its mission if it could not spend any money entertaining foreign officials. In fact, some of the early entertainment appropriations were limited to entertaining non-U.S. citizens, and some could only be spent overseas. *E.g.* B-46169, Dec. 21, 1944. Restrictions of this nature have become increasingly uncommon.

Entertainment appropriations may take various forms. Some agencies have their own well-established structures which may include permanent legislation. For example, the State Department has permanent authorization to pay for official entertainment.

22 U.S.C. § 4085. *See also* 22 U.S.C. § 2671 (authorizes expenditures for "unforeseen emergencies" which may include official entertainment in certain contexts). The authority of 22 U.S.C. § 4085 is implemented by means of annual appropriations under a specific heading, such as "Representation Allowances" or "Representation Expenses".[47] State Department representation allowances have been found available for rental of formal evening wear by embassy officials accompanying the Ambassador to the United Kingdom in presenting his credentials to the Queen, 68 Comp. Gen. 638 (1989); hiring extra waiters and busboys to serve at official functions at foreign posts, 64 Comp. Gen. 138 (1984); meals for certain embassy officials at Rotary Club meetings in Tanzania, if approved by the local Chief of Mission, B-232165, June 14, 1989; and reimbursement of Ambassador and Deputy Chief of Mission for cost of renting formal morning dress required by protocol for official occasions, B-256936, June 22, 1995.

The Defense Department also has its own structure. Under 10 U.S.C. § 127, the Secretary of Defense, or of a military department, within the limitations of appropriations made for that purpose, may use funds to "provide for any emergency or extraordinary expense which cannot be anticipated or classified." *See Official Representation Funds,* DOD Instruction 7250.13 (June 30, 2009). When so provided in an appropriation, the official may spend the funds "for any purpose he determines to be proper." 10 U.S.C. § 127(a). *See* 72 Comp. Gen. 279 (1993) (certifying officer processing voucher under 10 U.S.C. § 127 is responsible only for errors made in his own processing of the voucher, and not for the Defense Attaché's prior certification as to the propriety of the payment). Annual Operation and Maintenance appropriations

[47] *E.g.*, Pub. L. No. 114-113, div. K, title I, 129 Stat. 2242, 2705, 2708 (Dec. 18, 2015) (fiscal year 2016).

include amounts for "emergencies and extraordinary expenses."[48] Although the title is not particularly revealing, it has long been understood that official representation expenses are charged to this account. *See* GAO, *Internal Controls: Defense's Use of Emergency and Extraordinary Funds,* GAO/AFMD-86-44 (Washington, D.C.: June 4, 1986); *DOD Use of Official Representation Funds to Entertain Foreign Dignitaries,* GAO/ID-83-7 (Washington, D.C.: Dec. 29, 1982); 69 Comp. Gen. 242 (1990) (reception for newly assigned commander at U.S. Army School of the Americas).

With these two major exceptions, most agencies follow a similar pattern and receive their entertainment funds, if they receive them at all, simply as part of their annual appropriations. The appropriation may specify that it will be available for "entertainment." *See, e.g.,* B-20085, Sept. 10, 1941. Far more commonly, however, the term used in the appropriation is "official reception and representation (R&R)." This has come to be the technical "appropriations language" for entertainment.

While we cannot guarantee that one does not exist somewhere, we have not found a congressional definition of the term "official R&R." The term seems to have originated—or at least became more widespread—in the early 1960s. We identified the first appearance of the term for a number of agencies, and selected two, the Departments of Agriculture and Interior, as illustrative. Both agencies first received "official R&R" funds in their appropriations for fiscal year 1963.[49]

The Department of Agriculture explained that the Secretary frequently finds it necessary to provide a luncheon or similar

[48] *E.g.*, Department of Defense Appropriations Act, 2016, Pub. L. No. 114-113, div. C, 129 Stat. 2242, 2333, 2335 (Army), 2336 (Navy, Air Force, Defense-Wide), 2349 (Inspector General) (Dec. 18, 2015).

[49] Department of Agriculture and Related Agencies Appropriation Act, 1963, Pub. L. No. 87-879, 76 Stat. 1203, 1212 (Oct. 24, 1962); Department of the Interior and Related Agencies Appropriation Act, 1963, Pub. L. No. 87-578, 76 Stat. 335, 345 (Aug. 9, 1962).

courtesy to various individuals and small groups in the conduct of official business, to promote effective working relationships with farm, trade, industry, and other groups that are directly related to accomplishing the department's work. Such official courtesies benefit the government, and the Secretary and Under Secretary of Agriculture should not be required to bear these expenses from their own personal funds as was then the case. In conclusion, the justification observed that "[i]t is unseemly that the hospitality should always be left to the visitor."[50] Similarly, the Department of the Interior explained that its request for "not to exceed $2,000 for official reception and representation expenses" was intended to provide authority to use appropriated funds for expenses incurred by the Secretary "in fulfilling the courtesy and social responsibilities directly associated with his official duties," in situations much like those the Agriculture Department had noted. Such official expenses, the justification asserted, "rightly should be borne by the Government rather than be financed from personal funds."[51]

One point that is clear from these excerpts is that an R&R appropriation, whatever its origins may have been, is not limited to the entertainment of foreign nationals, unless of course the appropriation language so provides. The experience of the former Department of Health, Education, and Welfare (HEW) provides further evidence that, absent some indication to the contrary, Congress does not intend that an "official R&R" appropriation be limited to entertaining foreign nationals. The Secretary of HEW first received an entertainment appropriation in HEW's fiscal year 1960 appropriation act, but it was limited to certain foreign visitors.[52] The language was changed to "official reception and representation" in

[50] *Department of Agriculture Appropriations for 1963: Hearings before the Subcomm. on Department of Agriculture and Related Agencies Appropriations of the House Comm. on Appropriations*, 87th Cong., 2d Sess. pt. 4, at 2090–91 (1962).

[51] *Interior Department and Related Agencies Appropriations for 1963: Hearings on H.R. 10802 before a Subcomm. of the Senate Comm. on Appropriations*, 87th Cong., 2d Sess. 550 (1962).

[52] Pub. L. No. 86-158, § 209, 73 Stat. 339, 355 (Aug. 14, 1959).

HEW's fiscal year 1964 appropriation.[53] The conference report on the 1964 appropriation explained that the change was intended to expand the scope of the appropriation to include U.S. citizens as well as foreign visitors.[54]

It is clear that R&R appropriations have traditionally been sought, justified, and granted in the context of an agency's need to interact with various nongovernment individuals or organizations. Precisely who these individuals or organizations might be will vary with the agency. Of course, the fact that the thrust of the appropriation is the entertainment of nongovernment persons does not mean that government persons are precluded. For example, it has long been recognized that persons from other agencies (and by necessary implication members of the host agency as well) may be included incident to an authorized entertainment function for nongovernment persons. *E.g.,* B-84184, Mar. 17, 1949.

An agency has wide discretion in the use of its R&R appropriation. 61 Comp. Gen. 260, 266 (1982); B-212634, Oct. 12, 1983. As a general proposition, "official agency events, typically characterized by a mixed ceremonial, social and/or business purpose, and hosted in a formal sense by high level agency officials" and relating to a function of the agency will not be questioned. B-223678, June 5, 1989. Accordingly, R&R funds were available for the following:

- Holiday party for government officials and their spouses or guests, held by Secretary of the Interior at the Custis-Lee Mansion. 61 Comp. Gen. 260 (1982), *aff'd upon reconsideration*, B-206173(2), Aug. 3, 1982.

- Party for various government officials and their families or guests held on July 4 by Secretary of Interior to celebrate Independence Day. B-212634, Oct. 12, 1983.

[53] Pub. L. No. 88-136, § 905, 77 Stat. 224, 246 (Oct. 11, 1963).

[54] H.R. Conf. Rep. No. 88-774, at 11 (1963).

- Luncheon incident to "graduation ceremony" for Latin American students being trained by the Bureau of Labor Statistics. B-84184, Mar. 17, 1949.

- Entertainment of British war workers visiting various American cities as guests of the British Ministry of Information. B-46169, Aug. 18, 1945.[55]

- Cost of food and entertainment provided by General Services Administration at grand opening of a government cafeteria "to the extent that the grand opening otherwise qualifies as an 'official reception.'" B-250450, May 3, 1993.

- Cost of meals at "representational" interagency briefings for executive branch employees personally hosted by Director of the Trade and Development Program of the United States Agency for International Development. 72 Comp. Gen. 310 (1993).

- Printed invitation cards and envelopes in connection with an official function at a State Department overseas mission. B-122515, Feb. 23, 1955.

The Veterans Administration could not use its general appropriations to provide refreshments at an awards ceremony for volunteers, but it could use its R&R appropriation. 43 Comp. Gen. 305 (1963). An agency may use either its R&R funds or its general appropriations for refreshments at award ceremonies under the Government Employees' Incentive Awards Act, 5 U.S.C. §§ 4501–4506. 65 Comp. Gen. 738, 741 n.5 (1986).

Notwithstanding the discretion it confers, an R&R appropriation is not intended to permit government officials to feed themselves and one another incident to the normal day-to-day performance of their

[55] The decision modified the result of an earlier decision, B-46169, Dec. 21, 1944, based on a change in the relevant appropriation language. The 1944 decision contains a fuller statement of the facts.

jobs. Thus, GAO has held that R&R funds may not be used to provide food or refreshments at intra-government work sessions or routine business meetings, even if held outside of normal working hours. B-223678, June 5, 1989. *See also* B-250884, Mar. 18, 1993 (the cost of meals provided to government employees during interagency working meetings improperly charged to R&R funds).

A final but significant limitation on the use of representation funds stems from the appropriation language itself—R&R appropriations are made for the expenses of *official* reception and representation activities. There must be some connection with official agency business. Thus, it would be improper to use representation funds for a social function hosted and attended by private parties, such as a breakfast for Cabinet wives. 61 Comp. Gen. 260 (1982), *aff'd upon reconsideration,* B-206173(2), Aug. 3, 1982. Similarly, R&R funds may not be used for entertainment incident to an activity which is itself unauthorized. 68 Comp. Gen. 226 (1989) (entertainment incident to trade show in Soviet Union which agency had no authority to sponsor). The impropriety of the underlying activity necessarily "taints" the entertainment expenditures.

6. Considerations for various categories of expenditures

a. Advertising and dissemination of information on agency activities

When determining whether it has authority to conduct advertising or to disseminate information regarding its activities, an agency must determine that the proposed expenditure is a necessary expense, which is Step 1 of the purpose analysis. Congress has enacted many statutory prohibitions concerning agency communications, which we discuss in section D.1 below. Here we focus on the Step 1 analysis and whether agencies may use appropriations for (1) advertising and promotion; and (2) other information dissemination activities.

(1) Advertising and promotion

Even the casual viewer of commercial television will note that the government is heavily "into" advertising. From the ever-present "Smokey Bear" reminding us that only we can prevent wildfires[56] to Vince and Larry, the Crash Test Dummies,[57] and messages from Medicare featuring the late actor Andy Griffith,[58] the government has sponsored a variety of campaigns. Some may be designed to either encourage or discourage various behaviors, while others present information on government programs and activities. Whether an agency's appropriations are available for advertising, like any other expenditure, depends on the agency's statutory authority.

Whether to advertise and, if so, how far to go with it[59] are determined by the precise terms of the agency's program authority in conjunction with the necessary expense doctrine and general restrictions on the use of public funds such as the various anti-lobbying statutes. *See* B-251887, July 22, 1993 (Forest Service may pay for newspaper advertisements informing the public of activities in the national forests because these activities are within the Service's statutory authority and the advertisements are reasonable ways of disseminating information related to the

[56] Smokey Bear and his famous warning, "Only You Can Prevent Forest Fires," was introduced to Americans in 1944. In response to an outbreak of wildfires in 2000, the campaign was changed to "Only You Can Prevent Wildfires." Whatever his slogan, Smokey is recognized and protected by act of Congress. See 16 U.S.C. § 580p. Mess with Smokey and you can go to jail. 18 U.S.C. § 711.

[57] So enduring are Vince and Larry's contributions to American culture that they are now in the Smithsonian. Smithsonian National Museum of American History, "Vince and Larry dummies 'crash' into the Smithsonian," *available at* americanhistory.si.edu/blog/2010/07/vince-and-larry-dummies-crash-into-the-smithsonian.html (last visited July 5, 2017).

[58] B-320482, Oct. 19, 2010.

[59] Even with specific authority to advertise, agencies still need to be careful. See *Federal Express Corp. v. United States Postal Service*, 151 F.3d 536 (6th Cir. 1998) and *Federal Express Corp. v. United States Postal Service*, 40 F. Supp. 2d 943 (W.D. Tenn. 1999) (involving claims that the U.S. Postal Service engaged in false advertising).

purposes of the Service's appropriation); B-229732, Dec. 22, 1988 (Department of Housing and Urban Development had no authority to incur promotional expenses at a trade show in the Soviet Union when the purpose of the show was to enhance the potential for sale of American products and services in the Soviet Union, a purpose unrelated to HUD's mission).

Some agencies have express promotional authority. For example, the Department of Energy may promote energy conservation. *See* B-139965, Apr. 16, 1979. Similarly, the United States Postal Service has statutory authority to advertise its philatelic services to encourage stamp collecting. B-114874.30, Mar. 3, 1976. Where promotional authority exists, agencies have reasonable discretion, subject to "necessary expense" considerations, in selecting appropriate means. Thus, the Navy could exercise its statutory authorization to promote safety and accident prevention by procuring book matches with safety slogans printed on the covers and distributing them without charge at naval installations. B-104443, Aug. 31, 1951. Another example is the Department of Commerce, which has statutory authority to "foster, promote, and develop the foreign and domestic commerce" of the United States. 15 U.S.C. § 1512. Accordingly, Commerce could contract for an advertising campaign aimed at promoting public understanding of the American economic system, as it "would be reasonable for Commerce to conclude that increased public understanding of how the American economy works would have the effect of fostering, promoting, or developing domestic commerce." B-184648, Dec. 3, 1975.

Activities of the United States Mint furnish additional illustrations. In B-206273, Sept. 2, 1983, GAO considered the Mint's promotional authority under legislation authorizing coins to commemorate the 1984 Los Angeles Summer Olympics. GAO concluded that the Mint could stage media events and receptions, and could give away occasional sample coins at these events, if (1) the expenditures were deemed necessary to further the statutory objectives, (2) a reasonable relationship were found to exist between a given expenditure and a marketing benefit for the program, and (3) promotional expenses were recouped from sales proceeds. In

68 Comp. Gen. 583 (1989), GAO applied the same standards to the commemorative coin program generally.[60] Subsequent Mint legislation expressly authorizes marketing, promotion, and advertising. *See, e.g.,* 31 U.S.C. § 5136.

(2) Dissemination of information

A government agency has a legitimate interest in informing the public about its programs and activities. Just how far it can go depends on the nature of its statutory authority. Certainly there is no need for statutory authority for an agency to issue a press release describing a recent speech by the agency head, or for the agency head or some other official to participate in a radio, television, or magazine interview. However, an agency must ensure that its activities are consistent with statutory prohibitions concerning agency communications, which we discuss in section D.1 below.

A 1983 decision illustrates another form of information dissemination that is permissible without the need for specific statutory support. Military chaplains are required to hold religious services for the commands to which they are assigned. 10 U.S.C. § 3547. Publicizing such information as the schedule of services and the names and telephone numbers of installation chaplains is an appropriate extension of this duty. Thus, GAO advised the Army that it could procure and distribute calendars on which this information was printed. 62 Comp. Gen. 566 (1983). Applying a similar rationale, the decision also held that information on the Community Services program, which provides various social services for military personnel and their families, could be included. *See also* B-301367, Oct. 23, 2003 (affixing decals of the major units assigned to an Air Force base onto a nearby utility company water

[60] This case also held that the scope of legitimate promotional activities could not include the printing of business cards for sales representatives. Business cards are now approved expenditures where they are a necessary expense of agency operations. B-280759, Nov. 5, 1998. There is a lengthy discussion of business cards in this chapter, section C. 6. e.

tower to inform the public of military activity in the area is a permissible use of appropriated funds); B-290900, Mar. 18, 2003 (approving the Bureau of Land Management's use of appropriated funds to pay its share of the costs of disseminating information under a cooperative agreement); B-280440, Feb. 26, 1999 (allowing the Border Patrol's use of appropriated funds to purchase uniform medals that, in part, served to advance "knowledge and appreciation for the agency's history and mission").

Some agencies have specific authority to disseminate information. Such authority will permit a broader range of activities and gives the agency discretion to choose the appropriate means, the selection being governed by the necessary expense doctrine.

The agency may use common devices such as buttons or magnets (*e.g.,* 72 Comp. Gen. 73 (1992)), newsletters (*e.g.,* B-128938, July 12, 1976), or conferences or seminars (*e.g.,* B-166506, July 15, 1975). In one case, the Comptroller General approved a much less conventional means. Shortly after World War II, the Labor Department wanted to publicize its employment services for veterans. It did this by discharging balloons from a float in a parade. Attached to the balloons were mimeographed messages asking employers to list their available jobs. Since the Department was charged by statute with publishing information on the program, the cost of the balloons was permissible. B-62501, Jan. 7, 1947. Other pertinent cases are 32 Comp. Gen. 487 (1953) (publication of Public Health Service research reports in scientific journals); 32 Comp. Gen. 360 (1953) (the recording of Office of Price Stabilization forum discussions to be used at similar meeting in other regions); B-89294, Aug. 6, 1963 (use of motion picture by United States Information Agency); B-15278, May 15, 1942 (photographs); A-82749, Jan. 7, 1937 (radio broadcasts).

Conversely, in 18 Comp. Gen. 978 (1939), radio broadcasts by the then Veterans Administration (VA) were held to violate 31 U.S.C. § 1301(a) because the agency did not have statutory authority to disseminate information about its activities. However, in 1958, Congress gave VA the authority to "provide for the preparation, shipment, installation, and display of exhibits, photographic

displays, moving pictures, and other visual educational information and descriptive material."[61] The Comptroller General found that this authority, now codified in 38 U.S.C. § 703(d), permitted VA to use its medical care appropriation for the rental of booth space at the Oklahoma State Fair and for the purchase of imprinted book matches and imprinted jar grip openers to be distributed at the fair to provide veterans with a number to call to obtain information. B-247563.2, May 12, 1993. GAO found that the Bureau of Engraving and Printing also needed statutory authority to publish a 100-year history to commemorate its centennial because the Bureau is essentially an "industrial and service" establishment and lacked authority to disseminate information. 43 Comp. Gen. 564 (1964).

The line between promotion and information dissemination is occasionally thin, but the concepts are nevertheless different. Thus, an agency may be authorized to disseminate information but not to promote. If so, its "advertising" must be tailored accordingly. For example, the Federal Housing Administration could disseminate information on available benefits or related procedures under a loan insurance program, but could not use its funds for an advertising campaign to create demand. 14 Comp. Gen. 638 (1935). Similarly, when the United States Metric Board was first created, it could provide information, assistance, and coordination for voluntary conversion to metrics but could not advocate metric conversion. *See* GAO, *Getting a Better Understanding of the Metric System—Implications If Adopted by the United States,* CED-78-128 (Washington, D.C.: Oct. 20, 1978); B-140339, June 19, 1979.

b. Attorney's fees

While attorney's fees awarded by courts are discussed in Chapter 14, section C. 3. b (2), this section deals with administrative payments.

[61] Pub. L. No. 85-857, § 233, 72 Stat. 1105, 1116 (Sept. 2, 1958).

Traditionally, the United States has followed what has come to be known as the "American Rule," that is, each party in litigation or administrative proceedings is personally responsible for its own attorney's fees. In other words, in the absence of statutory authority to the contrary, the losing party may not be forced to pay the winner's attorney. *E.g., Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158 (2015); *Buckhannon Board & Care Home, Inc. v. West Virginia Department Of Health & Human Resources,* 532 U.S. 598, 602 (2001); *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240 (1975).

One common application of the American Rule is that a claimant who prosecutes an administrative claim against the United States is not entitled to reimbursement of legal fees, unless authorized by statute. *E.g.,* 57 Comp. Gen. 554 (1978); 49 Comp. Gen. 44 (1969); 37 Comp. Gen. 485, 487 (1958); B-189045, Jan. 26, 1979. To illustrate, a vendor who successfully filed a claim for the payment of goods sold and delivered to a Navy vessel was not entitled to reimbursement of attorney's fees. B-187877, Apr. 14, 1977. Similarly, agencies may not reimburse attorney's fees to a claimant against the United States, unless otherwise allowed by law. B-188607, July 19, 1977. "Fairness" and "decency," however appealing, do not compensate for the lack of statutory authority. 57 Comp. Gen. 856, 861 (1978); 67 Comp. Gen. 574, 576 (1988).

Payments to attorneys also arise in a number of situations that are, strictly speaking, not applications of the American Rule, that is, they do not involve payment of fees to a "prevailing party." The approach in these cases is to look first for statutory authority, and if express statutory authority does not exist, apply the various principles discussed throughout this publication, such as the necessary expense doctrine.

For example, a private attorney sought reimbursement for out-of-pocket expenses he incurred incident to a "special proceeding" initiated by the Nuclear Regulatory Commission (NRC) to investigate charges of misconduct raised by the attorney against NRC staff members, and by the staff members against the attorney. There was no statutory authority to reimburse the attorney, nor

could the payment be justified as a necessary expense since it was not reasonably necessary to carrying out NRC functions. Therefore, payment was unauthorized. B-192784, Jan. 10, 1979. In another case, the Small Business Administration (SBA) could not reimburse a bank for legal fees the bank incurred in protecting its interest in an SBA-guaranteed loan since SBA neither contracted with the attorney nor did it benefit from his services. B-187950, Apr. 26, 1977.

On the other hand, the Justice Department has held that legal fees incurred by a Cabinet nominee in connection with Senate confirmation hearings, for services rendered before the nominating administration took office, could be paid either from Presidential Transition Act appropriations or from private sources. 5 Op. Off. Legal Counsel 126 (1981).

(1) Hiring of attorneys by government agencies

During the first century of the Republic, government agencies who needed lawyers, either as counselors or litigators, simply hired them. Not only was this system expensive (payments from the public treasury are not conducive to reduced fees), it resulted in inconsistencies in the government's legal position. Congress remedied the situation in 1870 by creating the Department of Justice, headed by the Attorney General. Act of June 22, 1870, ch. 150, 16 Stat. 162.

To assure that the objectives of the 1870 legislation would be achieved, Congress included section 17, which: (a) prohibited executive agencies from employing attorneys at the expense of the United States, and (b) prohibited payments to attorneys, except those employed by the Justice Department, unless the Attorney General certified that the services could not be performed by the Justice Department. The two parts of section 17 subsequently became Revised Statutes §§ 189 and 365.

As the federal government grew in size and complexity, it became apparent that the need for centralization of legal services within the Justice Department related primarily to the specialty of litigation.

Thus, with congressional approval, federal agencies regularly employed attorneys to serve as legal advisers. (The term "Attorney-Adviser" is still commonly used to designate staff attorneys in many government agencies.) When title 5 of the United States Code was recodified in 1966, the successors of Revised Statutes §§ 189 and 365 were combined into the new 5 U.S.C. § 3106. This statute, reflecting the evolved state of the law, prohibits agencies, unless otherwise authorized, from employing attorneys "for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested . . ." Agencies are required to refer such matters to the Justice Department.[62] Thus, agencies routinely employ attorneys to provide legal services other than litigation, but may not employ attorneys as litigators, unless they have statutory authority to conduct their own litigation, or unless that authority has been delegated to them by the Attorney General.

Given the existence of the Justice Department and an agency's own staff attorneys, the need for a federal agency to retain private counsel should rarely occur. Indeed, GAO has found that an agency that retained private counsel to provide legal opinions on matters within the Justice Department's jurisdiction was unauthorized, under statutes such as 28 U.S.C. §§ 511–514. *See* 16 Comp. Gen. 1089 (1937); 17 Comp. Gen. 58 (1937).

For example, in B-289701, Feb. 27, 2002, a presidential appointee to the Civil Rights Commission had been prevented from taking his seat when the appointee, whose position he was to assume, refused to give up her seat, arguing that her term had not expired. While the Justice Department filed suit on behalf of the new appointee, the Commission retained private legal counsel to defend the previous appointee. The Department of Justice, citing 28 U.S.C.

[62] Many early decisions will be found dealing with Revised Statutes §§ 189 and 365. *E.g.*, 6 Comp. Gen. 517 (1927); 5 Comp. Gen. 382 (1925). For the most part, these decisions may be disregarded as applying statutory provisions that have since been significantly amended or repealed. However, decisions under Revised Statutes §§ 189 and 365 remain valid to the extent they concern the elements of those statutes which survived with 5 U.S.C. § 3106. *E.g.*, 32 Comp. Gen. 118 (1952).

§ 516,[63] challenged the Commission's right to intervene in the litigation. The Justice Department objected that neither the Commission, nor its officers in their official capacity, have a right to appear in litigation without the permission of the Attorney General, which in this case, had not been granted. GAO found that the Commission had no authority to use appropriated funds to retain counsel in order to intervene in the court case in opposition to Justice.[64]

However, in limited situations, the Comptroller General has held that the retention of private attorneys as experts or consultants, under 5 U.S.C. § 3109, is authorized. For example, in B-192406, Oct. 12, 1978, GAO concluded that the then Civil Service Commission could hire a private law firm, under 5 U.S.C. § 3109, to serve as "special counsel" to the Chairman to investigate alleged merit system abuses, since the matter was not under the jurisdiction of the Justice Department. Similarly, the Navajo and Hopi Indian Relocation Commission could retain a private attorney, under 5 U.S.C. § 3109, as an independent contractor, to handle matters beyond the Justice Department's jurisdiction, where the workload was insufficient to justify hiring a full-time attorney. B-114868.18, Feb. 10, 1978. For similar holdings, *see* 61 Comp. Gen. 69 (1981) (United States Advisory Commission on Public Diplomacy could hire law firm to provide legal analysis of its authority and independence); B-210518, Jan. 18, 1984 (Environmental Protection Agency could retain private counsel to provide independent analysis of issues relating to congressional

[63] "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to the officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516.

[64] While the district court ruled in favor of the previous appointee (and the Commission), the appellate court overturned the district court's order and held in favor of the new appointee. *United States v. Wilson,* 290 F.3d 347 (D.C. Cir. 2002). However, the circuit court did not address whether the Commission had authority to intervene. *Id.* at 352. The court explained: "As the United States has not raised this issue on appeal, . . . we do not decide whether this intervention was permissible." *Id.* The effect of this was to let stand the district court's order granting Commission intervention.

contempt citation of Administrator). *See also* B-133381, July 22, 1977; B-141529, July 15, 1963.

Agencies may have specific authority to retain special counsel in addition to the lawyers on the regular payroll. For example, appropriations for the Federal Communications Commission have traditionally included "special counsel fees." The Comptroller General has construed this authority as permitting contractual arrangements with former employees (as retired annuitants) to perform functions for which they were uniquely qualified. Since the appropriation provision constitutes independent authority, the contracts are not subject to the limitations of 5 U.S.C. § 3109. 53 Comp. Gen. 702 (1974); B-180708, Jan. 30, 1976. Yet, GAO has found that this authority is limited to services of the legal profession, and does not embrace "counsel" in a broader sense. B-180708, July 22, 1975.

However, an agency may not hire private counsel when Congress has appropriated funds specifically for the legal work at issue. In B-290005, July 1, 2002, GAO reported that the Interior Department's Fish and Wildlife Service (FWS) had contracted with outside lawyers to obtain legal services in connection with various issues of personnel, labor law, and discrimination allegations. By law, the Solicitor of the Department of Interior is solely responsible for the legal work of the Department, including the FWS. 43 U.S.C. § 1455. Moreover, the Solicitor receives a separate annual appropriation to fund that work. GAO concluded that FWS's appropriation was not available to obtain outside counsel.

(2) Suits against government officers and employees

At one time, government employees were considered largely immune from being sued for actions they took while performing their official duties. This is no longer true. For a variety of reasons, it is no longer uncommon for a government employee to be sued in his individual capacity for something he did (or failed to do) while performing his job. For example, the Supreme Court held in 1978 that an executive official has only a "qualified immunity" for so-

called "constitutional torts" (alleged violations of constitutional rights). *Butz v. Economou,* 438 U.S. 478 (1978). In any event, regardless of whether the employee ultimately wins or loses, he has to defend the suit and therefore will need professional legal representation.

As a general proposition, GAO considers the hiring of and paying for an attorney to be a matter between the attorney and the client, and this is no less true when the client is a government officer or employee. *E.g.,* 55 Comp. Gen. 1418, 1419 (1976); B-242891, Sept. 13, 1991; B-246294, Feb. 26, 1992. However, GAO's decisions have long recognized another principle as well: where an officer of the United States is sued because of some official act done in the discharge of an official duty, the expense of defending the suit should be borne by the United States. *E.g.,* 6 Comp. Gen. 214 (1926). This section will discuss when appropriated funds may be used for attorney's fees to defend a government officer or employee.

Generally, when a present or former employee is sued for actions performed as part of his official duties, his defense is provided by the Justice Department. In order for a given case to be eligible for Justice Department representation, the Justice Department must determine that the employee's action, which gave rise to the suit, was performed within the scope of federal employment, and that providing representation is in the interest of the United States. *E.g.*, 70 Comp. Gen. 647, 649 (1991).

The role of the Justice Department derives from a number of statutory provisions: 28 U.S.C. §§ 515–519, 543, and 547. *See also* Exec. Order No. 6166, § 5 (1933). These provisions establish the Justice Department as the government's litigator,[65] which usually means representation by Justice Department attorneys.[66] To

[65] For a discussion of the historical evolution and current legal basis of the Attorney General's role as "chief litigator," *see* 6 Op. Off. Legal Counsel 47 (1982).

[66] In addition, an executive agency may call upon the Justice Department for help in performing the legal investigation of any claim pending in that agency. 28 U.S.C. § 514.

reinforce these provisions, 5 U.S.C. § 3106, previously noted, prohibits executive or military agencies from employing attorneys for the conduct of litigation in which the United States or one of its agencies or employees is a party or is interested. Instead, agencies must refer such matters to the Justice Department. The Justice Department has also issued implementing regulations, found at 28 C.F.R. §§ 50.15 and 50.16.[67] This statutory and regulatory scheme is designed to encourage employees to vigorously carry out their duties by assuring them of an adequate defense, at no cost, should they be sued in the course of executing their responsibilities. *Cf*. *Bontkowski v. Smith,* 305 F.3d 757, 760 (7th Cir. 2002) ("It would be absurd to require law enforcement officers to defend at their own expense against likely groundless spite suits by the people whom they have arrested or investigated.").

However, the Attorney General's decision to provide (or not provide) counsel to an individual employee sued for official actions is discretionary and not subject to judicial review. *E.g., Falkowski v. Equal Employment Opportunity Commission,* 783 F.2d 252 (D.C. Cir. 1986), *cert. denied,* 478 U.S. 1014 (1986); *Thomas v. Wilkins*, 61 F. Supp. 3d 13, 15 n.4 (D.D.C. 2014). The Attorney General may take into consideration "how blameworthy or litigation-prone the employee seeking representation may be." *Falkowski,* 783 F.2d at 254.

The Comptroller General has recognized that the statutes cited above authorize the Justice Department to retain private counsel, payable from Justice Department appropriations, if it is determined necessary and in the interest of the United States. *E.g.,* 56 Comp. Gen. 615, 623 (1977); B-22494, Jan. 10, 1942. For example, the Justice Department generally will not provide representation if the

[67] For situations where the Federal Tort Claims Act is the exclusive remedy, *see* 28 C.F.R. pt. 15.

employee is the target of a criminal investigation,[68] but may authorize private counsel at Justice Department expense if a decision to seek an indictment has not yet been made. The Justice Department may also authorize private counsel if it perceives a conflict of interest between the legal or factual positions of different government defendants in the same case. 28 C.F.R. §§ 50.15, 50.16. *See* 56 Comp. Gen. 615, 621–24 (1977);[69] B-150136, B-130441, May 19, 1978; B-130441, May 8, 1978; B-130441, Apr. 12, 1978; 2 Op. Off. Legal Counsel 66 (1978).

Thus, an employee who learns that he is being sued should first explore the possibility of obtaining representation through the Justice Department. Procedures for requesting representation are found in 28 C.F.R. § 50.15(a). If the employee fails to immediately seek Justice Department representation, he may find, as discussed below, that he is stuck footing the bill for his attorney's fees, even in cases where the expense might otherwise have been paid by the government.

If Justice Department representation is unavailable, there are limited situations in which appropriations of the employing agency may be available to retain private counsel. Generally, before an agency can consider using its own funds, Justice Department

[68] *E.g.*, B-251141, May 3, 1993 (Food and Drug Administration's request to use its appropriations to reimburse private attorney fees incurred by several employees incident to a federal criminal investigation of possible insider trader activities was deemed impermissible and FDA should refer matter to Justice for consideration); B-242891, Sept. 13, 1991 (Army may not use appropriated funds to reimburse private legal fees incurred by civilian officers of the U.S. Army Chemical Research, Development and Engineering Center convicted of multiple criminal environmental protection violations committed in the course of pursuing their otherwise official duties relating to the development of chemical warfare systems); *United States v. Dee*, 912 F.2d 741, 744 (4th Cir. 1990), *quoting United States v. Isaacs*, 493 F.2d 1124, 1142–44 (7th Cir. 1974) ("Criminal conduct is not part of the necessary functions performed by public officials.").

[69] The decision in 56 Comp. Gen. 615 dealt with civil actions against employees under a prior version of section 7217 of the Internal Revenue Code (26 U.S.C. § 7217) for improper disclosure of tax returns. The prior version has since been repealed (and another statute has been inserted in its place). The remedy is now a suit for damages against the United States under 26 U.S.C. § 7421.

representation must first be appropriate but unavailable, and representation must be in the interest of the United States. *E.g.,* B-251141, May 3, 1993. The employee's personal interest in the outcome does not automatically preempt a legitimate government interest; the two may exist side-by-side.

One case, 53 Comp. Gen. 301 (1973), dealt with suits against federal judges and other judicial officers.[70] The suits arise in a variety of contexts, often involving collateral attacks on the judges' rulings in original actions. While many of the suits are frivolous, some sort of defense, even if only a *pro forma* submission, is almost always necessary. In many cases, such as actions where no personal relief is sought against the judicial officer, or in potential conflict of interest situations, the Justice Department has determined that it cannot or will not provide representation. The Comptroller General held that judiciary appropriations are available to pay the costs of litigation, including "minimal fees" to private attorneys, if determined to be in the best interest of the United States and necessary to carry out the purposes of the appropriation. However, the Comptroller General added that: (1) the Justice Department must have declined representation, although individual requests are not required for cases falling within the Attorney General's stated policy; (2) the determination of necessity cannot be made by the individual defendant but must be made by the Administrative Office of the U.S. Courts; and (3) the Administrative Office should make full disclosure to the appropriate congressional committees. Under similar circumstances, appropriations for the public defender service are available to defend federal public defenders appointed under the Criminal Justice Act who are sued for actions taken within the scope of their duties. *Id.* at 306.

[70] Subject to the same kinds of exceptions applied to legal representation of other federal employees, the Justice Department is statutorily required to defend federal judges. *E.g.*, *Bryan v. Murphy*, 243 F. Supp. 2d 1375, 1381 (N.D. Ga. 2003) (*citing* 28 U.S.C. § 516).

Nine years after GAO's ruling in 53 Comp. Gen. 301, a statute was added to title 28 of the United States Code authorizing the Administrative Office of the United States Courts to pay the costs (including attorney fees) of defending a Chief Justice, justice, judge, officer, or employee of any United States court who is "sued in his official capacity, or is otherwise required to defend acts taken or omissions made in his official capacity, and the services of an attorney for the Government are not reasonably available pursuant to chapter 31 of this title." Pub. L. No. 97-164, title I, § 116(a), 96 Stat. 25, 32 (Apr. 2, 1982), *codified at* 28 U.S.C. § 463. This statute was intended to address those situations where the Justice Department declines to provide representation to a judicial officer or employee on grounds of conflict of interest or other ethical reasons. *McBryde v. United States,* 299 F.3d 1357, 1362–63, 1366 (Fed. Cir. 2002), *quoting* S. Rep. No. 97-275, at 16 (1981). Generally speaking, this provision does not authorize reimbursement where the judicial officer or employee was engaged in "offensive" rather than "defensive" litigation. *Id.* at 1365–67.

In 55 Comp. Gen. 408 (1975), the United States Attorney had agreed to defend a former Small Business Administration (SBA) employee who was sued for acts performed within the scope of his employment. The U.S. Attorney later withdrew from the case, even though the government's interest in defending the former employee continued. In order to protect his own interests, the employee retained the services of a private attorney. Since the Justice Department had determined that it was in the interest of the United States to defend the employee and had undertaken to provide him with legal representation, the Comptroller General held that SBA could reimburse the employee for legal fees incurred as a result of his obtaining private counsel when representation by the United States subsequently became unavailable. *See also* B-251141, May 3, 1993 ("In limited circumstances, where Justice determines that representation of a federal employee is appropriate but is unable to provide representation, agency appropriations may be used to pay for legal work that Justice determines to be in the government's interest.").

While 53 Comp. Gen. 301 and 55 Comp. Gen. 408 are widely viewed as establishing the concept that, in appropriate circumstances, agency appropriations may be available to pay private attorney's fees to defend an employee, several later cases established some limitations on the concept.

If the employee fails to request Justice Department representation in a timely fashion, the employee may be forced to bear the expense of any private legal fees incurred. In B-195314, June 23, 1980, for example, an employee of the Internal Revenue Service (IRS) was sued for improper disclosure of confidential information. The employee requested Justice Department representation, but not until after she had hired a private attorney to file an answer in order to avoid a default judgment. The Justice Department agreed to provide representation, but declined to pay the private legal fees, since the case was not within either of the situations permitted under the Justice Department regulations. Since the facts could not support a finding that Justice Department representation was appropriate but unavailable, IRS appropriations could not be used either. The need to take prompt action to avoid a default judgment makes no difference since the regulations expressly provide for provisional representation on the basis of telephone contact.

If the actions giving rise to the suit are not within the scope of the employee's official duties, even though related, there is no entitlement to government representation and hence, no legal basis to reimburse attorney's fees. For example, in 57 Comp. Gen. 444 (1978), a Department of Agriculture employee was sued for libel by his supervisor because of allegations contained in letters the employee had written to various public officials. At the employee's insistence, Agriculture wrote to the Justice Department to request representation. However, Agriculture concluded that, while some of the employee's actions had been within the scope of his official duties, others—such as writing letters to the President and to a Senator—were not. Before Justice reached its decision, the employee retained private counsel and was successful in having the suit dismissed. Subsequently, Justice determined that the employee would not have been eligible for representation since Agriculture had been unwilling to say that all of the employee's

actions were within the scope of his official duties. On this basis, GAO found no entitlement to government representation and disallowed the employee's claim for reimbursement of his legal fees.

Similarly, GAO denied a claim for legal fees where an Army Reserve member on inactive duty was arrested by the Federal Bureau of Investigation (FBI), charged with larceny of government property, and the charge was later dismissed. The government property involved consisted of service weapons and ammunition. The member had been authorized to retain weapons and ammunition in his personal possession. In any event, the member's actions did not result from the performance of required official duties, but were, at best, permissible under existing regulations. Therefore, there was no entitlement to either government-furnished or government-financed representation. B-185612, Aug. 12, 1976.

In 70 Comp. Gen. 647, the Smithsonian Institution used federal funds to provide legal services to an Interior employee (on detail at the Smithsonian) who became the subject of federal civil and criminal investigations. After a big-game hunt in China, some hunters and the Interior employee (whom the hunters had paid to serve as their game advisor) were charged with violating the Endangered Species Act. The Interior employee was also charged with conflicts of interest in his financial arrangements. GAO held that the Smithsonian lacked authority to use appropriated funds to pay the employee's attorney. 70 Comp. Gen. at 652. GAO explained:

> "Our cases do not support and were not intended to allow agencies to pursue their own litigative policies. Instead, they recognize the availability of agency appropriations, where otherwise proper and necessary, for uses consistent with the litigative policies established for the United States by the Attorney General. . . . To allow the use of appropriated funds [to defend a

> government employee against a federal criminal investigation and prosecution] would seriously undermine the litigative posture of the Attorney General [and contradict] the clearly expressed intent of the Congress to centralize control of government litigation under the Attorney General, and to restrict the availability of appropriations in order to reinforce that policy."

Id. at 650–51 (citation omitted).

A related situation occurs where an employee incurs legal fees defending against a fine. In section C. 6. i. of this chapter on Fines and Penalties, a distinction is drawn between an action that is a necessary part of an employee's official duties and an action which, although taken in the course of performing official duties, is not a necessary part of them. By logical application of this reasoning, where the fine itself is not reimbursable, related legal fees are similarly non-reimbursable. Thus, in 57 Comp. Gen. 270 (1978), the Comptroller General held that the employing agency could not pay legal fees incurred by one of its employees defending against a reckless driving charge, where the Justice Department had declined to provide representation or to authorize retention of private counsel. *See also* B-192880, Feb. 27, 1979 (nondecision letter); 15 Op. Off. Legal Counsel 57, 63 (1991).

Sometimes, agencies chafe under the maxim (noted above) that agency appropriations are available, where otherwise proper and necessary, for uses consistent with the litigative policies established for the United States by the Attorney General. The decision in 73 Comp. Gen. 90 (1994) offers a case in point. The United States Information Agency (USIA) was sued in a sex discrimination class action. The Justice Department was defending the lawsuit, and required USIA to support its effort by providing a secure suite of offices, office supplies and equipment, and four to six attorneys, the same number of paralegal/document specialists, along with other support staff, all on a full time basis. Normally,

USIA's General Counsel staff included only eight attorneys. For its part, the Justice Department dedicated two full-time attorneys and one full-time paralegal to the task force. Justice refused to allow USIA to contract-out for the additional staff, insisting instead that USIA hire them under temporary appointments. 73 Comp. Gen. at 90–91. USIA asked GAO to require the Justice Department to reimburse USIA for its expenses, which USIA estimated at $4.6 million over fiscal years 1992, 1993, and 1994. Since the Justice Department gets annual appropriations to cover litigative expenses, USIA argued, Justice's annual appropriations had been improperly augmented. *Id.* at 91–92.

GAO replied, "[T]here is no legal or equitable requirement that litigation support costs be shared equally, or even 'proportionately,' between Justice and its client agencies." *Id.* at 94. The expenses at issue represented "no more than the cost to USIA of gathering and presenting to Justice the facts and agency perspectives necessary to allow Justice to represent USIA in court, a typical example of agency support for Justice litigators." *Id.* GAO explained:

> "The limitations on the use of agency appropriations to provide litigative services originated as part of the provisions that created the Justice Department and invested it with general responsibility to act as the government's litigator. . . These provisions were intended to reinforce Justice's control of the conduct of litigation involving the United States, not to bar agencies from using their appropriations to assist in the defense of litigation. Our cases 'recognize the availability of agency appropriations, where otherwise proper and necessary, for uses consistent with the litigative policies established for the United States by the Attorney General.'"

Id. at 93–94, *quoting* 70 Comp. Gen. at 650–51 (*citing* 39 Comp. Gen. 643 at 646–47 (1960)).

Of course, every rule has its exceptions. In B-289288, July 3, 2002, a Department of Defense Dependents Schools (DODDS) employee, who worked at a DODDS school in Japan, had been arrested, charged, and eventually convicted of criminal violations of Japanese law involving the importation and possession of marijuana. Under 10 U.S.C. § 1037, local counsel was retained to defend the employee in the Japanese courts. Read together, the plain terms of section 1037 and the regulations implementing it required DOD to provide legal services to persons "employed by or accompanying [U.S.] armed forces in an area outside the United States," even when the matter is unrelated to and wholly beyond the scope of the employee's official duties. 10 U.S.C. § 1037(a). Funding is to come from "[a]ppropriations available to the military department concerned . . . for the pay of persons under its jurisdiction." 10 U.S.C. § 1037(c). The statute leaves no role for the Justice Department in these matters.

Questions over reimbursement of legal fees also arise in a number of non-judicial contexts. In B-193712, May 24, 1979, GAO concluded that the Central Intelligence Agency (CIA) could reimburse a staff psychiatrist, who had been directed to prepare a psychological profile of Daniel Ellsberg as part of his official duties, for the cost of legal representation before congressional investigating committees and professional organizations. While the Justice Department regulations authorize representation at congressional proceedings on the same basis as in lawsuits (28 C.F.R. § 50.15(a)), this is not an area within Justice's exclusive representation authority. Therefore, while it may be desirable to first request Justice Department representation, failure to do so in this case did not preclude the use of CIA appropriations, based on an administrative determination that the psychiatrist's activities were necessary to carry out authorized CIA functions. As in the judicial context, payment is generally unauthorized where it is not in furtherance of an official agency interest. *See* GAO, *Postal Service: Board of Governors' Contract for Legal Services,* GAO/GGD-87-12 (Washington, D.C.: Feb. 10, 1987) (questioning propriety of

payment of legal fees of Board member incident to congressional investigation of pre-nomination activities).

The Justice Department will not provide representation in administrative disciplinary proceedings because of the potential conflict in the event the employee later sues the government. In one case, GAO concluded that the Nuclear Regulatory Commission (NRC) could retain private counsel to represent two NRC staff members at a disciplinary proceeding where the agency determined that the employees had been acting within the scope of their authority. B-127945, Apr. 5, 1979. *See also* B-192784, Jan. 10, 1979.

In another case, however, 58 Comp. Gen. 613 (1979), the Securities and Exchange Commission (SEC) could not reimburse the legal fees of an SEC employee at a disciplinary hearing even though the proceeding was ultimately resolved in the employee's favor. The distinction is that in the NRC case, the misconduct charge had been raised and pursued by a third party, whereas in the SEC case, while the charge was initially raised by an outside party, it was pursued based on the SEC's independent determination to investigate the allegation. The point of this distinction is that, once the agency determines to investigate the employee, its interests and those of the employee are no longer "aligned." *E.g.,* B-245648.2, July 24, 1992 (even though the administrative investigation was precipitated by a congressional subcommittee, since the IRS conducted it, IRS's interests were no longer aligned with those of its employee, and the attorney fees incurred by the employee as a result of the investigation could not be reimbursed); B-245712.3, May 20, 1992 (Department of Agriculture employee, subject to an Inspector General investigation instigated by a third party, may not be reimbursed for the attorney fees he incurred since the agency, having decided to investigate the employee, no longer had a common interest with him). In other words, the interests of the agency and employee have diverged and it is no longer possible to justify providing representation to the employee as a necessary and appropriate expense of the agency. Also, the determination to provide legal representation must be made at the outset of the proceedings and not at the end based on

the outcome. GAO reached the same result in 70 Comp. Gen. 628 (1991) (Forest Service investigative report leading to criminal trial ending in acquittal on all charges), and in B-212487, Apr. 17, 1984 (Inspector General misconduct investigation).

An agency may use its appropriated funds to provide legal representation for an employee brought before the Merit Systems Protection Board (MSPB) on a complaint by the MSPB Special Counsel, if the agency determines that the employee's conduct was in furtherance of or incident to carrying out his or her official duties, and that providing representation would be in the government's interest. 67 Comp. Gen. 37 (1987); 61 Comp. Gen. 515 (1982). Of course, this principle is not limited to cases pending before the MSPB. *See, e.g.,* B-251141, May 3, 1993 (federal criminal investigation). If the agency makes the required determinations, the expenditure is viewed as a "necessary expense" of the agency or function. While the necessary expense theory is the legal basis, the underlying policy is expressed in the following excerpt:

> "Surely federal employees must be answerable for illegal conduct. Yet it can be in the interest of neither the government as a whole nor the taxpayers we serve to have employees afraid to function out of fear of being bankrupted by a lawsuit arising out of the good faith performance of their jobs."

67 Comp. Gen. at 37–38; *see also* 15 Op. Off. Legal Counsel at 62–63.

Government-financed legal counsel was also held improper at a grievance hearing where the legal liability of the employee was not an issue and the purpose of the hearing was solely to develop facts. 55 Comp. Gen. 1418.

Appropriated funds may not be used to pay legal fees incurred by an "alleged discriminating official" in a discrimination complaint. 61 Comp. Gen. 411 (1982); B-201183, Feb. 1, 1985.

Where reimbursement of legal fees under the above principles is authorized, it is a discretionary payment and not a legal entitlement of the employee. The agency's responsibilities and discretion are summarized in the following paragraph from 67 Comp. Gen. 37, 38 (1987):

> "[I]t should be understood that payment in this type of case is not a legal liability on the part of the agency, but is essentially a discretionary payment. As such, an agency is not required to pay the entire amount of the fees actually charged in any given case. The controlling concept under fee-shifting statutes is a 'reasonable' attorney's fee, and there is a vast body of judicial precedent applying this concept under statutes such as the Back Pay Act and Title VII of the Civil Rights Act. This body of precedent is available to provide guidance to agencies in evaluating the reasonableness of claims. Also, since payment is discretionary, an agency is free to formulate administrative policies with respect to treatment of claims of this type. Of course, any such policies should be applied fairly and consistently."

The preceding cases have all involved legal fees incurred for representation of the employee. A different situation occurred in 59 Comp. Gen. 489 (1980). In 1969, local police raided a Chicago apartment housing members of the Black Panther Party. The raid erupted into violence and two of the occupants were killed. Subsequently, the surviving occupants and the estates of the

deceased sued state law enforcement officials and several agents of the Federal Bureau of Investigation (FBI), alleging violations of civil rights and the Illinois wrongful death statute. The Justice Department represented the federal defendants, who were being sued in their individual capacities.

As the litigation progressed, a possibility emerged that the court might grant the plaintiffs an award of attorney's fees, in part against the FBI agents. The Justice Department asked whether FBI appropriations would be available to reimburse such an award. In the past, the Comptroller General has at times declined to render decisions on questions which are premature and essentially hypothetical. Here, however, in view of the legal strategy proposed by the Justice Department (the case also involved issues raising the potential liability of the United States), it was important to know if the fees could be reimbursed because if they could not, it might be necessary for the defendants to retain private counsel to represent their interests. The Comptroller General resolved the question by applying the necessary expense doctrine. If the FBI made an administrative determination, supported by substantial evidence, that the actions giving rise to the award constituted officially authorized conduct and were taken as a necessary part of the defendants' official duties, it could reimburse the award from its Salaries and Expenses appropriation.

(3) Suits unrelated to federal employees

Finally, the concept of using agency appropriations for legal fees when Justice Department representation is unavailable has arisen in a couple of contexts that are unrelated to suits against government employees. Under 25 U.S.C. § 175, the U.S. Attorneys will generally represent Indian tribes, and under 25 U.S.C. § 13, the Bureau of Indian Affairs may spend money appropriated for the benefit of Indians for general and incidental expenses relating to the administration of Indian affairs. Construing these provisions, the Comptroller General has held that the Bureau of Indian Affairs could use appropriated funds to pay legal fees incurred by Indian tribes in judicial litigation, including intervention actions and cases where the tribe is the plaintiff, when conflict of interest makes

Justice Department representation unavailable. However, the Bureau must first give the Justice Department the option of providing or declining to provide representation. The Bureau may also use appropriated funds for legal fees of Indian tribes in administrative proceedings in which the Justice Department does not participate. 56 Comp. Gen. 123 (1976).

The courts have recognized that this authority carries with it substantial discretion. For example, in *Hopi Tribe v. United States,* 55 Fed. Cl. 81 (2002), suit was brought to recover legal fees and expenses incurred in litigation pursuant to the Navajo-Hopi Settlement Act of 1974. The court held that, under 25 U.S.C. §§ 13, 175, the Justice Department and the Bureau of Indian Affairs both have broad discretion in determining whether to provide legal services or reimbursement for the costs of obtaining them elsewhere. Among other things, the court explained that because Congress appropriates lump sums to Justice and the Bureau for these purposes, the question of how best to use those sums is committed to agency discretion.[71] *Hopi Tribe,* 55 Fed. Cl. at 97–98, *citing Lincoln v. Vigil,* 508 U.S. 182, 192–95 (1993), *quoting both* 55 Comp. Gen. 307, 319 (1975), *and Principles of Federal Appropriations Law,* at 6-159 (2nd Ed. 1992).

(4) Claims by federal employees

(a) Discrimination proceedings

Title VII of the Civil Rights Act of 1964, made applicable to the federal government by the Equal Employment Opportunity

[71] The Office of Legal Counsel (OLC) has wrestled with a related issue: whether the Justice Department may defend tribes or tribal employees against suits for constitutional torts. OLC concluded that the 1990 amendments to the Indian Self-Determination and Education Assistance Act of 1975 cover only those torts for which the Federal Tort Claims Act waives the sovereign immunity of the United States and do not authorize or otherwise address representation of tribes or tribal employees who are sued in their individual capacities for constitutional torts. Opinion of the Office of Legal Counsel, for the Assistant Attorney General Civil Division, *Coverage Issues Under The Indian Self-Determination Act*, Apr. 22, 1998.

Amendments of 1972, broadly prohibits employment discrimination based on race, color, religion, sex, or national origin. Two statutory provisions are relevant to the awarding of attorney's fees. Judicial awards are governed by 42 U.S.C. § 2000e-5(k), which authorizes courts to award reasonable attorney's fees to nonfederal prevailing parties. In addition, 42 U.S.C. § 2000e-16(b) directs the former Civil Service Commission to enforce Title VII in the federal government "through appropriate remedies . . . as will effectuate the policies of this section." The enforcement function was transferred to the Equal Employment Opportunity Commission (EEOC) in 1978.

The concept of administrative fee awards developed largely as the result of a series of court decisions. First, the courts held that a court can award attorney's fees to include compensation for services performed in related administrative proceedings as well as the lawsuit itself. *Parker v. Califano,* 561 F.2d 320 (D.C. Cir. 1977); *Johnson v. United States,* 554 F.2d 632 (4th Cir. 1977). Then, the District Court for the District of Columbia held that Title VII authorized the administrative awarding of attorney's fees. *Patton v. Andrus,* 459 F. Supp. 1189 (D.D.C. 1978); *Smith v. Califano,* 446 F. Supp. 530 (D.D.C. 1978). However, this view was not unanimous. The court in *Noble v. Claytor,* 448 F. Supp. 1242 (D.D.C. 1978), held that there was no authority for administrative awards and that only the court could award fees.

GAO was initially inclined toward the view expressed in the *Noble* decision. *See* B-167015, Apr. 7, 1978. However, GAO reconsidered its position and subsequently announced that it would not object to the issuance of regulations by the EEOC to include the awarding of attorney's fees at the administrative level. B-193144, Nov. 3, 1978; B-167015, Sept. 12, 1978; B-167015, May 16, 1978.

EEOC issued interim regulations on April 9, 1980 (45 Fed. Reg. 24130), and subsequently finalized them. The regulations, found at 29 C.F.R. § 1614.501, provide for awards of reasonable attorney's fees both by EEOC and by the agencies themselves. With the issuance of these regulations, federal agencies now have the requisite authority. B-199291, June 19, 1981; B-195544, May 7, 1980.

Attorney's fees awarded under the EEOC regulations are payable from the employing agency's operating appropriations and not from the permanent judgment appropriation established by 31 U.S.C. § 1304.[72] 64 Comp. Gen. 349, 354 (1985); B-199291, June 19, 1981. *Cf*. B-257334, June 30, 1995 (except as specifically provided by law, the permanent judgment appropriation is not available to pay administrative awards, including administrative settlements for compensatory damages under Title VII).

GAO will not review awards of, nor consider claims for, attorney's fees under Title VII. 69 Comp. Gen. 134 (1989); 61 Comp. Gen. 326 (1982); B-259632, June 12, 1995.

Title VII is not the only statute prohibiting discrimination in federal employment. Discrimination on the basis of age or handicap is prohibited, respectively, by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634, and the Rehabilitation Act of 1973,

[72] As noted above, this chapter does not address the payment of litigative awards, which is covered in Chapter 14. Accordingly, the text here is speaking only about the payment of administrative awards.

We note in passing, however, that 2002 legislation has changed the payment process for litigative attorney fees and other litigative awards rendered against certain federal agencies (including "executive agencies" as defined in 5 U.S.C. § 105) arising from claims of discrimination or whistle-blowing retaliation against federal employees, former federal employees, or applicants for federal employment. Under this law, known as the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002" (or "NoFEAR," for short), these litigative awards will now be paid initially from the permanent, indefinite Judgment Fund appropriation. Within a reasonable time thereafter, the federal agency involved must reimburse the Judgment Fund from its operating appropriations. *See* Pub. L. No. 107-174, § 1(a), 116 Stat. 566 (May 15, 2002), *codified at* 5 U.S.C. § 2301 note. As a result of this law, all awards against federal agencies for discrimination or whistle-blowing retaliation against federal employees, former federal employees, or applicants for federal employment (including associated attorney fee awards)—whether litigative or administrative—will ultimately be paid from agency operating appropriations, which is one of the main goals Congress intended the new law to accomplish. S. Rep. No. 107-143, at 1–3, 7–8 (2002).

29 U.S.C. §§ 701–718. The EEOC has enforcement responsibility for federal employment under these statutes as well as Title VII.[73]

Initially, GAO had held that the EEOC could provide by regulation for the awarding of attorney's fees at the administrative level under the Age Discrimination in Employment Act and the Rehabilitation Act, just as in the Title VII situation. 59 Comp. Gen. 728 (1980). Subsequently, the courts held that the Age Discrimination in Employment Act did not authorize fees at the administrative level, and GAO partially overruled 59 Comp. Gen. 728 in 64 Comp. Gen. 349 (1985). However, that portion of 59 Comp. Gen. 728 dealing with the Rehabilitation Act remains valid. *See also* B-204156, Sept. 13, 1982. This treatment is consistent with the EEOC regulations, which authorize administrative fee awards under Title VII and the Rehabilitation Act, but not the Age Discrimination in Employment Act. *See* 29 C.F.R. § 1614.501(e).

The situation may become more complicated where an employee alleges discrimination on more than one ground. In 69 Comp. Gen. 469 (1990), an agency settled a complaint in which the employee had alleged both age and sex discrimination. Based on the agency's assertion that the result would have been the same if the employee had pursued only the sex discrimination charge, GAO concluded that the agency was not required to "apportion" the attorney's fee claim between the two charges and that the entire fee claim could be paid.

(b) Other employee claims

Prior to October 1978, there was no authority to award attorney's fees to federal employees in connection with claims, grievances, or administrative proceedings involving back pay, adverse personnel actions, or other personnel matters. During this time period, GAO

[73] EEOC is not responsible for the entire Rehabilitation Act. The Architectural and Transportation Barriers Compliance Board is responsible for insuring compliance with the standards prescribed in the Architectural Barriers Act of 1968. 29 U.S.C. § 792.

consistently denied claims for attorney's fees based on the general rule barring the payment of legal fees in the absence of statutory authority. *E.g.,* 52 Comp. Gen. 859 (1973) (administrative grievance proceeding); B-167461, Aug. 9, 1978 (unfair labor practice proceeding); B-184200, Apr. 13, 1976 (reduction in grade); B-183038, May 9, 1975 (improper removal for disciplinary reasons).

In October 1978, the Civil Service Reform Act added two attorney's fee provisions as part of its general overhaul of the system.

First, it authorized the Merit Systems Protection Board to require the employing agency to pay reasonable attorney's fees if the employee is the prevailing party and the Board determines that the fee award is "warranted in the interest of justice." 5 U.S.C. § 7701(g). Fees awarded under this provision are payable directly to the attorney, not the party. [74] *Jensen v. Department of Transportation,* 858 F.2d 721 (Fed. Cir. 1988).

Second, it added an attorney's fee provision to the Back Pay Act, 5 U.S.C. § 5596. Now, if an employee, on the basis of a timely appeal or an administrative determination, including grievance or unfair labor practice proceedings, is found by "appropriate authority"[75] to have suffered a loss or reduction of pay as a result of an "unjustified or unwarranted personnel action," the employee is entitled to recover reasonable attorney's fees in addition to back pay. *Id.* § 5596(b). *See generally* B-258290, June 26, 1995; B-231813, Aug. 22, 1989.

[74] Of course, different statutes often dictate different results with respect to who should receive payment. *Cf., e.g.*, *Heston v. Secretary of Health & Human Services*, 41 Fed. Cl. 41, 45–46 (1998) (distinguishing the result in *Jensen*, *supra*.)

[75] The term "appropriate authority" includes the head of the employing agency, a court, the Office of Personnel Management, the Merit Systems Protection Board (but not the MSPB Special Counsel, *see* 59 Comp. Gen. 107 (1979)), the Comptroller General (*see, e.g.*, 63 Comp. Gen. 170 (1984) and 62 Comp. Gen. 464 (1983)), the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, plus a few others. 5 C.F.R. § 550.803.

Regulations to implement the Back Pay Act are issued by the Office of Personnel Management and are found at 5 C.F.R. part 550, subpart H. Under the regulations, fees may be awarded only if the "appropriate authority" determines that payment is in the interest of justice, applying standards established by the Merit Systems Protection Board under 5 U.S.C. § 7701. 5 C.F.R. § 550.807(c)(1). The standards are set forth in *Allen v. United States Postal Service,* 2 M.S.P.R. 420 (1980), and discussed in *Sterner v. Department of the Army,* 711 F.2d 1563 (Fed. Cir. 1983), and in 62 Comp. Gen. 464. For "[a] review of the case law," see *Abramson v. United States,* 45 Fed. Cl. 149, 151–52 (1999).

GAO will not review decisions awarding or declining to award, nor consider claims for, fees under 5 U.S.C. § 7701. B-257593, Aug. 15, 1994 (GAO has no authority to review any MSPB decision, citing, among others, 61 Comp. Gen. 578 (1982)—disavowing authority to review fee awards under section 7701). *See also* 63 Comp. Gen. at 174; 61 Comp. Gen. 290 (1982). The Back Pay Act regulations provide for review of fee determinations only "if provided for by statute or regulation." 5 C.F.R. § 550.807(g). Thus, absent some statute or regulation to the contrary, GAO will similarly decline to review fee determinations under 5 U.S.C. § 5596 where the "appropriate authority" is someone other than the Comptroller General. 61 Comp. Gen. 290.

While GAO will not "review" such matters, it may provide its opinion on them, when requested by the agency or the accountable officer. For example, in B-253507, Jan. 11, 1994, the National Archives and Records Administration (NARA) asked GAO if it could pay attorney fees as part of an administrative settlement, even though NARA had not determined that an unjustified or unwarranted personnel action had occurred. NARA argued that because the employee could have appealed to the Merit Systems Protection Board and possibly obtained attorney fees (as discussed in the following paragraph), NARA had implied authority to award attorney fees as part of its settlement. GAO disagreed. NARA had no statutory authority to pay attorney fees under the facts and laws applicable to the case. The fact that the employee could have appealed and might have won did not authorize NARA and the

employee to behave as if the employee actually had appealed and won. *Id. See also* B-258290, June 26, 1995 (advance decision, pursuant to 31 U.S.C. § 3529, disapproved payment of attorney fees and other amounts arising from a grievance hearing wherein the agency declined to find an unjustified or unwarranted personnel action); B-257893, June 1, 1995 (certifying officer granted relief from liability, pursuant to 31 U.S.C. § 3528(b)(1)(B), for the erroneous payment which was the subject of B-253507).

Under a provision added in 1989, if an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board (MSPB), and MSPB's decision is based on a finding of a "prohibited personnel practice" (defined in 5 U.S.C. § 2302), "the agency involved shall be liable" to the complainant for reasonable attorney's fees. The same liability applies with respect to appeals from the Board, regardless of the basis of the decision. 5 U.S.C. § 1221(g), added by the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, 30 (Apr. 10, 1989).

Employee claims outside the scope of the Back Pay Act or the MSPB authority remain subject to the general rule prohibiting fee awards except under specific statutory authority. Thus, administrative claims for attorney's fees were *denied* in the following situations:

- Applicant for employment with Nuclear Regulatory Commission successfully challenged adverse information in security investigation file. B-194507, Aug. 20, 1979.

- Nuclear Regulatory Commission employee detailed in violation of the Whistleblower Protection Act (WPA) as retaliation for the disclosure of government illegality, waste, and corruption. Although WPA does provide for attorney fees in certain circumstances, employee used agency grievance procedures not subject to WPA. 72 Comp. Gen. 289 (1993).

- Employee obtained continuance in divorce proceedings. Continuance was necessitated by temporary duty assignment. B-197950, Sept. 30, 1980. *Cf*. 70 Comp. Gen. 329 (1991) (legal

fees incurred to search title, prepare abstracts, conveyances, and other documents required in the chain of conveying property interest from seller to buyer that are normally reimbursable under Federal Travel Regulations (FTR), ¶ 2-6.2c, but may not be reimbursed here as original court order was part of a divorce settlement; modification of divorce order constituted continuation of a litigated matter; litigation costs may not be reimbursed under the FTR); B-242154, Mar. 28, 1991 (FTR does not allow reimbursement of litigation costs, even though employee "sustained a loss that he would not have sustained had he not transferred in the interest of the government").

- A military member's legal fees incident to custody proceedings, and medical insurance expenses for his adopted children are not "qualifying adoption expenses" under section 638 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 638, 101 Stat. 1019, 1106–08 (Dec. 4, 1987), as amended, and may not be reimbursed (but legal fees incident to the actual petition and order of adoption, as well as the amendment of birth certificates for the member's adopted children are reimbursable from agency funds under the Act). B-235606, Feb. 7, 1991.

- Former employee successfully prosecuted administrative patent interference action against National Aeronautics and Space Administration. B-193272, Aug. 21, 1981.

- Fees incurred incident to prosecution of claim for relocation expenses. 68 Comp. Gen. 456 (1989); B-186763, Mar. 28, 1977.

- Employee, selling residence incident to transfer of duty station, incurred legal fees in excess of customary range of charges for services rendered. B-200207, Sept. 29, 1981 (legal fees within customary range of charges are reimbursable; see cases cited). Similarly, see B-252531, Aug. 13, 1993 (attorney fees claimed were duplicative of attorney fees already paid as part of the services provided by the relocation service company).

- Administrative grievance proceeding involving neither an appeal to the Merit Systems Protection Board nor a reduction or denial of pay or allowances. 68 Comp. Gen. 366 (1989); 61 Comp. Gen. 411 (1982); B-253507, Jan. 11, 1994, at n.5.

The same rule applies to expert witness expenses incurred by an employee—they are reimbursable only under specific statutory authority. In 67 Comp. Gen. 574 (1988), a Department of Energy employee had requested an administrative hearing incident to a security clearance. The agency, due to the sudden unavailability of its witness, was forced to reschedule the hearing. The employee's witness, a clinical psychologist, was unable to reschedule his patients to fill the now freed-up time slot, and charged the employee for the 3 hours he had set aside to testify. GAO found no authority to reimburse the employee.

(5) The Criminal Justice Act

The Criminal Justice Act (CJA), 18 U.S.C. § 3006A, was originally enacted in 1964 and substantially amended on several subsequent occasions. Reflecting a series of Supreme Court decisions on the right of a criminal defendant to counsel, the CJA establishes a system of government-financed counsel for indigent defendants in federal criminal cases. In general, any person charged with a felony or misdemeanor, including juvenile delinquency, and who is "financially unable to obtain adequate representation" is eligible for counsel under the CJA. Counsel is to be provided at every stage of the proceeding, from the first appearance before a magistrate through appeal, including appropriate ancillary matters. As the Supreme Court has expanded the right to counsel to encompass every meaningful stage at which significant rights may be affected (*see, e.g., Miranda v. Arizona,* 384 U.S. 436 (1966)), the right to counsel under the CJA has similarly expanded.

The lawyers, who are court-appointed, may be private attorneys appointed on an individual basis or members of a Federal Public Defender Organization or Community Defender Organization established and funded under the Act. The attorneys are paid at rates of compensation specified in the statute. Appropriations are

made to the Judiciary to carry out the CJA and payments are supervised by the Administrative Office of the United States Courts.

(6) Types of actions covered

Originally, GAO had held that the Criminal Justice Act (CJA) did not apply to probation revocation proceedings. 45 Comp. Gen. 780 (1966). Subsequently, following the Supreme Court's holding in *Mempa v. Rhay,* 389 U.S. 128 (1967), GAO modified the 1966 decision to recognize the applicability of the Act to probation proceedings coupled with deferred sentencing. However, GAO continued to hold the Act inapplicable to a "simple" probation revocation proceeding (one not involving deferred sentencing). 50 Comp. Gen. 128 (1970). Two months after the issuance of 50 Comp. Gen. 128, Congress passed Public Law 91-447, substantially amending the CJA. Pub. L. No. 91-447, 84 Stat. 916 (Oct. 14, 1970). One of the changes made by these amendments was to expressly cover probation proceedings. The legislative history of Public Law 91-447 indicates that it was intended to recognize *Mempa*. H.R. Rep. No. 91-1546, at 7 (1970). GAO has not had occasion to issue any further decisions on probation proceedings.

Another change made by the 1970 amendments was to add parole revocation proceedings, with counsel to be provided at the discretion of the court or magistrate. Subsequent legislation made appointment of counsel mandatory, and the Comptroller General held that appropriations under the CJA are available to provide counsel for indigents at parole revocation and parole termination proceedings under the Parole Commission and Reorganization Act. B-156932, June 16, 1977.

Representation may be provided, at the discretion of the court or magistrate, to an indigent prosecuting a writ of *habeas corpus* (28 U.S.C. §§ 2241, 2254, 2255). 18 U.S.C. § 3006A(a)(2). This authority does not extend to civil rights actions brought by indigent prisoners under 42 U.S.C. § 1983. 53 Comp. Gen. 638 (1974); B-139703, June 19, 1975.

In 51 Comp. Gen. 769 (1972), GAO held that the CJA applied to prosecutions brought in the name of the United States in the District of Columbia Superior Court and Court of Appeals. In 1974, Congress passed the District of Columbia Criminal Justice Act (Pub. L. No. 93-412, 88 Stat. 1089 (Sept. 3, 1974)), which established a parallel criminal justice system for the District of Columbia patterned after 18 U.S.C. § 3006A. With the enactment of this legislation, the CJA was amended to remove the District of Columbia courts from its coverage. GAO considered the D.C. statute in 61 Comp. Gen. 507 (1982) and construed it to include sentencing. The result should apply equally to the federal statute inasmuch as the language being construed is virtually identical in both laws.

(7) Miscellaneous cases

When a court appoints an attorney under the Criminal Justice Act (CJA), the government's contractual obligation, and hence the obligation of appropriations, occurs at the time of the appointment, not when the court reviews the voucher for payment, even though the exact amount of the obligation is not determinable until the voucher is approved. Where fiscal year appropriations are involved, the Administrative Office of the U.S. Courts must record the obligation based on an estimate, and the payment is chargeable to the fiscal year in which the appointment was made. 50 Comp. Gen. 589 (1971).

In B-283599, Sept. 15, 1999, the Executive Officer of the DC Courts told GAO that he anticipated fiscal year 1999 appropriations for CJA claims would be exhausted on September 10, 1999. How, he asked, should the courts respond to CJA claims received during the remainder of fiscal year 1999—should the courts suspend approving CJA vouchers in order to avoid violating the Antideficiency Act? GAO answered in the negative, as CJA representation is a mandatory expense. An overobligation entirely attributable to a mandatory spending program, like CJA, would be an overobligation authorized by law and, therefore, not a violation of the Antideficiency Act. *See* 31 U.S.C. §§ 1341(a)(1)(A) and (B). However, this did not mean that the vouchers could be paid

immediately on approval. A legally available funding source would still be required before any authorized overobligations could be liquidated. Fortunately, GAO noted, a bill then pending in Congress would provide funds for this purpose. B-283599. *See also* GAO, *D.C. Courts: Planning and Budgeting Difficulties During Fiscal Year 1998,* GAO/AIMD/OGC-99-226 (Washington, D.C.: Sept. 16, 1999), at 11–13. (For a full discussion of the law governing federal obligations, see Chapter 7.)

An attorney appointed and paid under the CJA does not enter into an employer-employee relationship with the United States for purposes of the dual compensation laws. 44 Comp. Gen. 605 (1965). (This decision predated the 1970 amendments to the CJA, which created the Federal Public Defender Organizations, and would presumably not apply to full-time salaried attorneys employed by such organizations.)

An attorney regularly employed by the federal government who is appointed by a court to represent an indigent defendant, in either federal or state cases, may not be excused from official duty without loss of pay or charge to annual leave. 61 Comp. Gen. 652 (1982); 44 Comp. Gen. 643 (1965).

An attorney appointed under the CJA is expected to use his or her usual secretarial resources. As a general proposition, secretarial and other overhead expenses are reflected in the statutory fee and are not separately reimbursable. However, there may be exceptional situations, and if the attorney can demonstrate to the court that extraordinary stenographic or other secretarial-type expenses are necessary, they may be reimbursed from Criminal Justice Act appropriations. 53 Comp. Gen. 638 (1974).

(8) The Equal Access to Justice Act

A significant diminution of the American Rule occurred in 1980 with the enactment of the Equal Access to Justice Act (EAJA), which authorizes the awarding of attorney's fees and expenses in a number of administrative and judicial situations where fee-shifting had not been previously authorized. *See generally* 28 U.S.C.

§ 2412. This section describes the authority for administrative awards.

The administrative portion of the EAJA is found in 5 U.S.C. § 504. There are four key elements to the statute:

- The administrative proceeding generating the fee request must be an "adversary adjudication," defined as an adjudication under the Administrative Procedure Act in which the position of the United States is represented by counsel or otherwise. 5 U.S.C. §§ 504(a)(1), (b)(1)(C). The definition excludes adjudications to fix or establish a rate or to grant or renew a license, but proceedings involving the suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license are covered if they otherwise qualify.[76] (Application in the context of government procurement is discussed separately later.)

- The party seeking fees must be a "prevailing party other than the United States." 5 U.S.C. § 504(a)(1). The meaning of "prevailing party" is to be determined by reference to case law under other fee-shifting statutes.[77] Of course before you can be a "prevailing party" you must first be a "party," and the law prescribes financial and other eligibility criteria. 5 U.S.C. § 504(b)(1)(B).

- The law is not self-executing. The party must, within 30 days after final disposition of the adversary adjudication, submit an application to the agency showing that it is a prevailing party and meets the eligibility criteria, documenting the amount sought, and alleging that the position of the United States was not "substantially justified." 5 U.S.C. § 504(a)(2). If the United

[76] S. Rep. No. 96-253, at 17 (1979) (report of the Senate Judiciary Committee).

[77] S. Rep. No. 96-253, at 7; H.R. Rep. No. 96-1418, at 11 (1980) (report of House Judiciary Committee).

States appeals the underlying merits, action on the application must be deferred until final resolution of the appeal. *Id.*

- If the above criteria are met, the fee award is mandatory unless the agency adjudicative officer finds that "the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. §§ 504(a)(1), (a)(4).[78] Substantial justification or lack thereof is to be determined "on the basis of the administrative record as a whole, which is made in the adversary adjudication." *Id.* The "position of the agency" includes the agency's action or failure to act which generated the adjudication as well as the agency's position in the adjudication itself. 5 U.S.C. § 504(b)(1)(E). A party who "unduly and unreasonably protracted" the proceedings risks reduction of the award. 5 U.S.C. § 504(a)(3).

The award includes "fees and other expenses." "Fees" means a reasonable attorney's fee, generally capped at $125 per hour unless the agency determines by regulation that cost-of-living increases or other special factors justify a higher rate.[79] 5 U.S.C. § 504(b)(1)(A). The Supreme Court held that "fees" includes any paralegal fees that the prevailing party incurred either through its litigating attorney or independently, so the prevailing party is entitled to recover fees for the paralegal services at the market rate for such services. *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571 (2008). "Other expenses" include such items as expert witness expenses and the necessary cost of studies, analyses, engineering

[78] A position is "substantially justified" if it is "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). *See also Immigration & Naturalization Service v. Jean*, 496 U.S. 154, 157 n.6 (1990); *Dantran, Inc. v. Department of Labor*, 246 F.3d 36, 40–41 (1st Cir. 2001).

[79] *Pierce v. Underwood*, *supra*, identified a number of factors that may not be used as "special factors" to justify exceeding the cap: novelty and difficulty of issues; undesirability of the case; work and ability of counsel (except for counsel with "distinctive knowledge or specialized skill" relevant to the case); results obtained; customary fees and awards in other cases; contingent nature of the fee. *Pierce*, 487 U.S. at 571–74. *See also*, *e.g.*, *Hyatt v. Barnhart*, 315 F.3d 239, 249 (4th Cir. 2002).

reports, etc. 5 U.S.C. § 504(b)(1)(A). *See also Astrue v. Ratliff*, 560 U.S. 586 (2010).

The statute requires agencies to establish, by regulation, uniform procedures for administering the statute, in consultation with the Administrative Conference of the United States (ACUS). 5 U.S.C. § 504(c)(1). In 1986, ACUS published a set of nonbinding model rules, found at 51 Fed. Reg. 16659 (May 6, 1986). Among other things, the supplementary information statement for those rules, advised agencies that the statutory requirement to consult with ACUS will be met by simply notifying ACUS of the publication of proposed regulations, or by sending ACUS a pre-publication draft for review and comment.[80]

Payment of administrative EAJA awards is addressed in 5 U.S.C. § 504(d):

> "Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise."[81]

[80] We have not located any update to these model rules. A 2013 report from the ACUS Chairman stated that "[a] quarter century later, even though the Model Rules have not been updated to reflect more recent amendments to the Act, the 1986 Revision [to the Model Rules] still contains useful guidance, as noted most recently by the Bureau of Consumer Financial Protection when it issued an interim final rule to implement the Equal Access to Justice Act (77 FR 39117, June 29, 2012)." Administrative Conference of the United States, *Report of the Chairman on Agency and Court Awards in FY 2010 Under the Equal Access to Justice Act*, Jan. 9, 2013, *available at* www.acus.gov/report/equal-access-justice-act-awards-fy-2010-report-chairman (last visited July 5, 2017).

[81] This provision was added in 1985. The payment provision in the original EAJA was complex and confusing. The amendment was designed to preclude payment under 31 U.S.C. § 1304, the permanent judgment appropriation.

As with judicial awards under 28 U.S.C. § 2412(d), 5 U.S.C. § 504 awards are payable from agency operating appropriations with no need for specific, line-item, or "earmarked" appropriations.[82]

The obligation of the agency's appropriations occurs when the agency issues its decision on the fee application. 62 Comp. Gen. 692, 699 (1983). This determines the fiscal year to be charged. Sometimes, the logic of this rule eludes an agency which is otherwise striving to be prudent and responsible in the management of its legal responsibilities and fiscal obligations. In B-255772, Aug. 22, 1995, the Justice Department and the National Endowment for the Arts (NEA) sought GAO's guidance regarding whether the NEA could pay an EAJA attorney fee settlement using unobligated NEA appropriations from previous fiscal years. For several years, NEA had realized that a then pending case would eventually require NEA to pay EAJA attorney fees from its appropriations pursuant to 28 U.S.C. § 2412(d)(4). In anticipation of this, NEA began setting aside a portion of its annual appropriations across several fiscal years so that, when the time to pay finally arrived, NEA would have funds adequate to meet its obligations without adversely affecting other NEA operations. However, when the settlement was finally completed, questions arose about whether the funds NEA set aside could legally be used for this purpose. Of course, they could not. As a general principle, "[a] court or administrative award 'creates a new right' in the successful claimant, giving rise to new government liability." B-255772, *quoting* 63 Comp. Gen. 308, 310 (1984). NEA had no obligation to pay the claims until the settlement agreement was final. In the absence of appropriate statutory authority, the funds NEA had set aside in previous fiscal years had expired, and were not legally available to liquidate the obligation of a later fiscal year—the year in which the settlement agreement became final. *Id. See also* B-257061, July 19, 1995 (except as otherwise provided by law, (a) FAA must use appropriations available at time of award to pay attorney fees

[82] Authorities for this proposition are cited in Chapter 14 in our discussion of the judicial portion of EAJA, which has an identical payment provision.

from a Title VII discrimination complaint, and (b) had FAA set aside appropriations in a prior fiscal year, when the complaint was filed, they would not have been available for this purpose).

Section 504 permits fee awards to intervenors who otherwise meet the statutory criteria. 62 Comp. Gen. at 693. As noted in that decision, the Administrative Conference expressed the same position in the preamble to an earlier version of the model rules, although commenting further that intervenors would rarely be in a position to actually receive awards. *Id.* at 693–94. A specific appropriation act restriction on compensating intervenors will override the more general authority of 5 U.S.C. § 504. *Electrical District No. 1 v. Federal Energy Regulatory Commission,* 813 F.2d 1246 (D.C. Cir. 1987); 62 Comp. Gen. 692. *See also Business & Professional People for the Public Interest v. Nuclear Regulatory Commission,* 793 F.2d 1366 (D.C. Cir. 1986) (court agreed with result in 62 Comp. Gen. 692, implicitly accepting premise that EAJA itself could apply to intervenors).

We previously reviewed statutory authorities for awarding attorney's fees in a variety of matters involving federal employees. There are conflicting court rulings concerning whether the Merit Systems Protection Board (MSPB) may award attorney's fees in cases involving employee tenure. The Third Circuit concluded that employees may recover attorney's fees in such cases. *Miller v. United States,* 753 F.2d 270 (3rd Cir. 1985). Subsequently, the Federal Circuit noted that EAJA authorizes the award of attorney fees in an "adversary adjudication" in administrative proceedings. *Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1461 (Fed. Cir. 1986). In turn, "adversary adjudication" is defined in 5 U.S.C. § 554(a) and excludes cases involving the "tenure of an employee." *Id*. Accordingly, the Federal Circuit concluded that MSPB may not award attorney's fees in cases involving the tenure of an employee. *Id*. at 1462. The Federal Circuit noted its disagreement with the Third Circuit's earlier ruling in *Miller*. *Id.* at 1462–1463. *See also Olsen v. Department of Commerce, Census Bureau,* 735 F.2d 558 (Fed. Cir. 1984); *Hoska v. Department of the Army,* 694 F.2d 270 (D.C. Cir. 1982).

Prior to *Gavette*, the MSPB had taken the position that the existence of other fee-shifting statutes made EAJA inapplicable. *Social Security Administration v. Goodman,* 28 M.S.P.R. 120, 126 (1985). However, in view of the implication of *Gavette* that EAJA might apply in cases not involving employee selection or tenure, the MSPB reopened the *Goodman* appeal, found that fees could be awarded in that case under 5 U.S.C. § 7701, and declined to comment further on the applicability of EAJA. *Social Security Administration v. Goodman,* 33 M.S.P.R. 325, 326–27 n.1 (1987). *See also, e.g., NLRB v. Boyce,* 51 M.S.P.R. 295, 300 n.4 (1991).

GAO held in 68 Comp. Gen. 366 (1989) that EAJA did not authorize a fee award to an employee who prevailed in an agency grievance proceeding that did not meet the standard of an "adversary adjudication." *See also* 72 Comp. Gen. 289 (1993) (attorney fee provision of the Whistleblower Protection Act does not apply where employee uses informal agency grievance procedure). (This being the case, it was irrelevant whether or not the grievance involved selection or tenure.)

Where an MSPB decision is appealed to the courts, including a decision involving selection or tenure, the majority view is that EAJA permits the court to award fees for the judicial proceedings, the relevant standard now being a "civil action" under 28 U.S.C. § 2412(d) rather than an "adversary adjudication" under 5 U.S.C. § 504. *See Maritime Management, Inc. v. United States,* 242 F.3d 1326, 1336 (11th Cir. 2001) (fees disallowed for bid protest proceedings before GAO, but allowed in associated civil action). *See also Brewer v. American Battle Monuments Commission,* 814 F.2d 1564 (Fed. Cir. 1987); *Gavette,* 808 F.2d at 1462–65; *Miller,* 753 F.2d at 274–75; *Olsen,* 735 F.2d at 561. Here, however, the *Hoska* case is in disagreement.

To the extent EAJA is inapplicable either to the MSPB or to a court reviewing an MSPB action, all is not necessarily lost to the fee applicant because EAJA is not exclusive in these situations. The MSPB and the courts both may award fees under the Back Pay Act in appropriate cases, and the MSPB additionally has 5 U.S.C.

§ 7701. Thus, for example, *Hoska*, while finding EAJA inapplicable, awarded fees under the Back Pay Act.

(9) Contract matters

(a) Bid protests

Prior to 1984, attorney's fees incurred by a bidder for a government contract in pursuing a bid protest with GAO were not compensable. 57 Comp. Gen. 125, 127 (1977); B-197174, Aug. 25, 1980; B-192910, Apr. 11, 1979. The question arose upon enactment of the Equal Access to Justice Act (EAJA) in 1980. However, since a bid protest at GAO is not an adversary adjudication governed by the Administrative Procedure Act, EAJA was unavailing. *Maritime Management, Inc. v. United States,* 242 F.3d 1326, 1336 (11th Cir. 2001) (fees disallowed for bid protest proceedings before GAO). *See also* 63 Comp. Gen. 541 (1984); 62 Comp. Gen. 86 (1982); B-251668, May 13, 1993; B-211105.2, Jan. 19, 1984.

Under the Competition in Contracting Act of 1984, as amended, GAO may recommend that a protester be reimbursed the costs of filing and pursuing a protest, including reasonable attorney's fees, where it finds that a solicitation or the award of a contract does not comply with statute or regulation. 31 U.S.C. § 3554(c)(1). This is to relieve parties with valid claims of the burden of vindicating the public interests that Congress seeks to promote. 68 Comp. Gen. 506, 508 (1989). The costs and fees are payable from the contracting agency's procurement appropriations. 31 U.S.C. § 3554(c)(3)(A) (contracting agency "shall . . . pay the costs promptly").

GAO's approach under 31 U.S.C. § 3554(c)(1) is to recommend that the contracting agency pay the protest costs and allow the protester and agency to negotiate the appropriate amount. If the parties cannot agree, GAO will determine the amount. 4 C.F.R. §§ 21.8(d), (e), and (f). A protester seeking to recover the costs of pursuing its protest must submit sufficient evidence to support its monetary claim; the amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be

reasonable. B-240327.3, Dec. 30, 1994. *See, e.g.,* B-291657, Feb. 11, 2003.

GAO's bid protest authority is not exclusive. A protester may also seek resolution with the contracting agency, file a bid protest at the Court of Federal Claims after having its protest denied at GAO, or go directly to the Court of Federal Claims in lieu of filing a protest at GAO. 31 U.S.C. § 3556. Once a case is in court, 31 U.S.C. § 3554(c) is inapplicable, and the court may consider a fee application under the judicial portion of EAJA. *E.g., Essex Electro Engineers, Inc. v. United States,* 757 F.2d 247 (Fed. Cir. 1985); *Laboratory Supply Corp. of America v. United States,* 5 Cl. Ct. 28 (1984). *See generally, The Equal Access to Justice Act: Practical Applications to Government Contract Litigation*, 2012 Army Law. 4 (Apr. 2012).

Bid protest disputes often give rise to operational delays. Occasionally, an agency may pay money to protestors to withdraw protests simply so that the agency may proceed with its procurement operations. This practice is known as "Fedmail." GAO, *ADP Bid Protests: Better Disclosure and Accountability of Settlements Needed*, GAO/GGD-90-13 (Washington, D.C.: Mar. 30, 1990), at 8, 30; Maj. Nathanael Causey and others, *1994 Contract Law Developments—The Year in Review*, 1995 Army Lawyer 3 (1995), n. 50. Typically, the payment is for bid protest preparation expenses, including legal fees. GAO/GGD-90-13, at 31. Public policy favors the settlement of disputes, and agencies may settle protests and pay damages in the form of bid protest costs. 71 Comp. Gen. 340 (1992). GAO does not oppose monetary settlements that reimburse a protestor's bid preparation costs if an agency determines that it likely will be held responsible for such costs and is unable to correct the procurement. GAO/GGD-90-13, at 31. However, GAO stated in GAO/GGD-90-13 that there is no basis for any settlement that an agency may offer solely to avoid operational delays resulting from a protest. Accordingly, GAO in a subsequent decision concluded that a particular Fedmail payment lacked legal authority and could not be made:

> "We do not believe that in making appropriations available to an agency for the procurement of goods and services, Congress intended those funds to be available to allow the agency to obtain the withdrawal of a meritorious protest without taking appropriate corrective action. In addition, . . . [w]e are not aware of any statute that would permit the Army to pay attorney fees in the circumstances of this case."

71 Comp. Gen. at 342.

(b) Contract disputes

Under the original (1980) version of the Equal Access to Justice Act (EAJA), the Court of Appeals for the Federal Circuit held that: (1) a court, reviewing a decision of an agency board of contract appeals, could, under the judicial portion of EAJA, make a fee award covering services before both the board and the court, but that (2) boards of contract appeals were not authorized to independently make EAJA fee awards. *Fidelity Construction Co. v. United States,* 700 F.2d 1379 (Fed. Cir. 1983), *cert. denied,* 464 U.S. 826 (1983).

The 1985 EAJA amendments legislatively overturned *Fidelity* to the extent it held 5 U.S.C. § 504 inapplicable to boards of contract appeals. *E.g., Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008), *Ardestani v. Immigration & Naturalization Service,* 502 U.S. 129, 138 (1991); *Dantran, Inc. v. Department of Labor,* 246 F.3d 36, 45 (1st Cir. 2001); *Texas Instruments, Inc. v. United States,* 991 F.2d 760, 767 (Fed. Cir. 1993). Specifically, the law amended the definition of "adversary adjudication" to expressly include appeals to boards of contract appeals under the Contract Disputes Act. The 1985 amendments also added language to 28 U.S.C. § 2412(d) to make it clear that fee awards are authorized when a contractor appeals a contracting officer's decision directly to a court instead of to a board of contract appeals, as authorized by the

Contract Disputes Act. (As noted in the preceding paragraph, appeals to court from board decisions were already covered.) The fees recovered under this authority are limited to services provided after the contracting officer's decision and do not include services provided in order to argue the matter before the contracting officer. *See Levernier Construction, Inc. v. United States,* 947 F.2d 497, 500–03 (Fed. Cir. 1991).

(10) Public participation in administrative proceedings: funding of intervenors

A number of regulatory agencies conduct administrative proceedings and take actions that have a direct public impact, a prime example being licensing. An important concern has been that the agency may not receive a balanced presentation of viewpoints. The reason is that the industries being regulated usually have adequate resources to ensure representation of their interests, while lack of resources may preclude participation by various non-industry "public interest" representatives.

The Comptroller General has considered questions of intervenor funding. An "intervenor" in this context means someone who is not a direct party to the proceedings. Stated briefly, the rule is that an agency may use its appropriations to fund intervenor participation, including attorney's fees, if:

- Intervenor participation is authorized, either expressly by statute or by necessary implication derived from a regulatory or licensing function;
- The agency determines that the participation is reasonably necessary to a full and fair determination of the issues before it; and
- The intervenor could not otherwise afford to participate.

This is essentially an application of the "necessary expense" doctrine discussed previously in this chapter. Thus, intervenor funding does not require express statutory authority, but it must

relate to accomplishing the objectives of the appropriation sought to be charged, and of course must not be otherwise prohibited. The agency must have authority to encourage or accept intervenor participation in connection with an authorized function for which its appropriations are available. In this sense, it may be said that intervenor funding must have a statutory foundation.

Historically the concept of intervenor funding emerged in the early 1970s. In 1970, the Federal Trade Commission (FTC) held that an indigent respondent in an FTC hearing was entitled to government-furnished counsel. *American Chinchilla Corp.,* 1970 Trade Reg. Rep. ¶ 19059. Following the *Chinchilla* case, the FTC asked whether it could pay certain related expenses for the indigent respondent, such as transcript costs and attorney's expenses. It also asked whether it could pay the same expenses when incurred by an indigent intervenor rather than the respondent.

In the first of the intervenor cases, B-139703, July 24, 1972, GAO answered "yes" to both questions. Noting that FTC had statutory authority to grant intervention "upon good cause shown," the Comptroller General responded to the intervenor question as follows:

> "Thus, if the Commission determines it necessary to allow a person to intervene in order to properly dispose of a matter before it, the Commission has the authority to do so. As in the case of an indigent respondent, and for the same reasons, appropriated funds of the Commission would be available to assure proper case preparation."

A few years later, the Nuclear Regulatory Commission asked whether it was authorized to provide financial assistance to participants in its adjudicatory and rulemaking proceedings. Finding that NRC had statutory authority to admit intervenors, the Comptroller General applied the "necessary expense" rationale of B-139703, and answered "yes." B-92288, Feb. 19, 1976.

In this decision, GAO explained why the "American rule" as set forth in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240 (1975),[83] does not apply to bar the payment of attorney's fees. The distinction is that the American rule limits the power of a court or an agency to require an unwilling defendant to pay the attorney's fees of a prevailing plaintiff or intervenor. In cases like B-139703 and B-92288, an administrative body, exercising its rulemaking function, is attempting to encourage public participation in its proceedings. It does this by willingly assuming representation costs for intervenors who would otherwise be financially unable to participate, in order to obtain their input for a balanced rulemaking effort. Only by obtaining a balanced view can the agency perform its function of protecting the public interest.

Next, in a letter to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, GAO advised that the rationale of B-92288 applied equally to nine agencies under the Subcommittee's jurisdiction. The nine were: Federal Communications Commission, Federal Trade Commission, Federal Power Commission, Interstate Commerce Commission, Consumer Product Safety Commission, Securities and Exchange Commission, Food and Drug Administration, Environmental Protection Agency, and National Highway Traffic Safety Administration. B-180224, May 10, 1976.

GAO pointed out in the same letter that there were several possible ways of providing assistance to qualifying participants:

- Provision of funds directly to participants.
- Modification of agency procedural rules so as to ease the financial burdens of public participation.

[83] The Supreme Court reiterated the "American Rule" recently in *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158 (2015) and *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 602 (2001).

- Provision of technical assistance by agency staff. (However, this cannot include assigning staff members to participants to help them with their advocacy positions.)

- Provision of legal assistance by agency staff, but again not as advocates.

- Creation of an independent public counsel. (However, the public counsel cannot be beyond the agency's jurisdiction and control.)

- Creation of a consumer assistance office, as long as it remains under the agency's jurisdiction and control and does not act as an advocate.

In subsequent decisions and opinions, GAO examined aspects of the programs of several specific agencies. In each case, GAO consistently applied the rationale of the earlier decisions. The cases are:

- Environmental Protection Agency: 59 Comp. Gen. 424 (1980); B-180224, Apr. 5, 1977;

- Federal Communications Commission: B-139703, Sept. 22, 1976;

- Food and Drug Administration: 56 Comp. Gen. 111 (1976);

- Nuclear Regulatory Commission: 59 Comp. Gen. 228 (1980); and

- Economic Regulatory Administration (a component of the Department of Energy): B-192213-O.M., Aug. 29, 1978; GAO, *Department of Energy's Procedures in Funding Intervenors in Proceedings before the Economic Regulatory Administration,* EMD-78-111 (Washington, D.C.: Oct. 2, 1978).

While the decisions have consistently upheld the legality of intervenor funding under the necessary expense theory, GAO has nevertheless emphasized the desirability of an agency's seeking

specific statutory authority to embark on a public participation program. *E.g.,* B-180224, May 10, 1976; B-92288, Feb. 19, 1976. Congress has acted in several instances, authorizing intervenor funding in some cases and prohibiting it in others.

For example, the Environmental Protection Agency has intervenor funding authority under the Toxic Substances Control Act, 15 U.S.C. § 2605(c), and the Consumer Product Safety Commission has such authority under the Consumer Product Safety Act, 15 U.S.C. § 2056(c). Similarly, from 1975 until recently, the Federal Trade Commission was given specific authority to fund intervenor participation by the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, formerly 15 U.S.C. § 57a(h).[84] Under this legislation, payments for legal services could not exceed the costs actually incurred, even though the participant used "house counsel" whose rate of pay was lower than prevailing rates. 57 Comp. Gen. 610 (1978).

Restrictions in appropriation acts have prohibited intervenor funding programs for several agencies. For example, a provision in the Nuclear Regulatory Commission's (NRC) 1981 appropriation prohibited the use of funds for the expenses of intervenors. The Comptroller General construed this restriction as prohibiting the NRC from adopting a "cost reduction program" of providing transcripts and other documents free to intervenors. B-200585, Dec. 3, 1980. However, NRC could reduce the number of copies of documents required to be filed. *Id.* Also, NRC could decide to provide free transcripts to all parties, intervenors included, without violating the restriction. B-200585, May 11, 1981. Other cases construing the NRC restriction, or successor versions, are *Business & Professional People for the Public Interest v. Nuclear Regulatory Commission,* 793 F.2d 1366 (D.C. Cir. 1986); 67 Comp. Gen. 553 (1988); and 62 Comp. Gen. 692 (1983).

[84] This authority was repealed in 1994. *See* Pub. L. No. 103-312, § 3, 108 Stat. 1691 (Aug. 26, 1994).

Appropriation act restrictions have also prohibited intervenor funding by the Economic Regulatory Administration and the Federal Energy Regulatory Commission (FERC). A case involving the FERC prohibition is *Electrical District No. 1 v. Federal Energy Regulatory Commission,* 813 F.2d 1246 (D.C. Cir. 1987). In addition, the conference committee on the 1980 appropriation for the National Highway Traffic Safety Administration and the former Civil Aeronautics Board directed that no funds be allocated by these agencies for intervenor funding programs.[85]

A restriction contained solely in legislative history and not carried into the statutory language itself is not legally binding on the agency. The history of the NRC prohibition will illustrate this. For fiscal year 1980, the prohibition was expressed in committee reports but not in the appropriation act itself. Accordingly, GAO told NRC that, while it would be well advised to postpone its program, the restriction was not legally binding. 59 Comp. Gen. 228 (1980). For fiscal year 1981, the prohibition was written into NRC's appropriation act. Similarly, the restriction noted above for the transportation agencies later "graduated" to a general provision in the statute.[86]

One court has disagreed with the GAO decisions. *Greene County Planning Board v. Federal Power Commission (Greene County IV),* 559 F.2d 1227 (2nd Cir. 1976), *cert. denied,* 434 U.S. 1086 (1976).[87] There, after several years of litigation, the plaintiff Board had finally prevailed in its attempt to compel relocation of a proposed high kilovolt power line through a scenic portion of the county. The only question remaining was the ability of the Federal Power

[85] H.R. Rep. No. 96-610, at 9, 14 (1979) (on H.R. 4440, 1980 appropriations bill for Department of Transportation and related agencies).

[86] *E.g.*, Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-164, § 306, 103 Stat. 1069, 1092 (Nov. 21, 1989).

[87] The Greene County litigation produced several published decisions: 455 F.2d 412 (2nd Cir. 1972), 490 F.2d 256 (2nd Cir. 1973), 528 F.2d 38 (2nd Cir. 1975), and the decision cited in the text, known as "Greene County IV."

Commission (FPC) to reimburse the plaintiff's attorney's fees. (Though not "indigent," the counsel fees had drained a disproportionate amount of the county's resources.) The FPC had denied reimbursement on the grounds that the Board was protecting its own, not the public, interest and because it thought it lacked authority to reimburse the fees. After first concluding that the issue should be remanded to the FPC so that it could determine the propriety of reimbursement in accordance with the Comptroller General's decisions, the Second Circuit Court of Appeals granted a rehearing *en banc*. On rehearing, the majority opinion held that the FPC lacked authority to reimburse the attorney's fees. *Greene County IV,* 559 F.2d at 1238.

Subsequently, both GAO and the Justice Department's Office of Legal Counsel took the position that *Greene County IV* applied only to the former Federal Power Commission (FPC), and not to other federal agencies or even to the agencies which succeeded to the FPC's responsibilities. 59 Comp. Gen. 228; 2 Op. Off. Legal Counsel 60 (1978). In addition, the United States District Court for the District of Columbia has likewise determined that *Greene County IV* does not extend generally to all agencies. *Chamber of Commerce v. United States Department of Agriculture,* 459 F. Supp. 216 (D.D.C. 1978), upholding the authority of the Department of Agriculture to fund a consumer study on the impact of certain proposed rules.

Thus, to determine whether a given agency has intervenor funding authority, it is necessary first to examine the legislation, including appropriation acts, applicable to that agency, as well as pertinent judicial decisions. In the absence of statutory direction one way or the other, and if there are no judicial decisions on point, it is then appropriate to apply the necessary expense rationale of the GAO decisions.

The later decisions somewhat refined the standards expressed in the earlier cases. For example, in order to constitute a "necessary expense," the participation does not have to be absolutely indispensable in the sense that the issues could not be decided without it. It is sufficient for the agency to determine that a particular

expenditure for participation can reasonably be expected to contribute substantially to a full and fair determination of the issues. 56 Comp. Gen. 111. This is consistent with the application of the necessary expense doctrine in other contexts as discussed throughout this chapter. Assuming the requisite statutory basis for intervention exists, the determination of necessity must be made by the administering agency itself, not by GAO. *Id. See also* B-92288, Feb. 19, 1976.

The standard of the participant's financial status was discussed in 59 Comp. Gen. 424 (1980). While the participant need not be literally indigent, the authority to fund intervenor participation extends only to individuals and organizations which could not afford to participate without the assistance. In making this determination, the agency should consider the income and expense statements, as well as the net assets, of an applicant. An applicant does not qualify for assistance merely because it cannot afford to participate in all activities it desires. The applicant is expected to choose those activities it considers most significant and to allocate its resources accordingly.

Some of the earlier cases held that advance funding was prohibited by 31 U.S.C. § 3324. 56 Comp. Gen. 111; B-139703, Sept. 22, 1976. However, in view of the Federal Grant and Cooperative Agreement Act of 1977, an agency with statutory authority to extend financial assistance in the form of grants may be able to utilize advance funding in its public participation program. A 1980 decision, 59 Comp. Gen. 424, applied this concept to the program of the Environmental Protection Agency.

The decisions have all dealt with participation in the agency's own proceedings. There would generally be no authority to fund intervenor participation in someone else's proceedings, for example, participation by a state agency in a state utility ratemaking proceeding. B-178278, Apr. 27, 1973 (nondecision letter).

Finally, the GAO decisions in no way imply that an agency is compelled to fund intervenor participation. They hold merely that, if

the various standards are met, an agency has the authority to do so if it wishes. *See* B-92288, Feb. 19, 1976.

A summary and discussion of intervenor funding through early 1981 may be found in GAO, *Review of Programs for Reimbursement for Public Participation in Federal Rulemaking Proceedings,* PAD-81-30 (Washington, D.C.: Mar. 4, 1981). *See also* Rollee H. Efros, "Payment of Intervenors' Expenses in Agency Regulatory Proceedings," *Cases in Accountability: The Work of the GAO* (Washington, D.C.:1979), at 171–81.

c. Awards

(1) Government Employees' Incentive Awards Act

Several statutes authorize the making of awards in various contexts. Perhaps the most important is the Government Employees' Incentive Awards Act, enacted in 1954[88] and now found at 5 U.S.C. §§ 4501–4506. The Act authorizes an agency to pay a cash award to an employee who by his or her "suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paper work" or performs a special act or service in the public interest related to his or her official employment. 5 U.S.C. § 4503. A provision added in 1990, 5 U.S.C. § 4505a, authorizes cash awards for employees with "fully successful" performance ratings.[89] Cash awards may not exceed $10,000; however, if head of an agency certifies that the meritorious effort is "highly exceptional and

[88] 68 Stat. 1112. This was an expansion of similar but more limited authority enacted in 1946 (60 Stat. 809).

[89] Section 207 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), contained in section 529 of the fiscal year 1991 Treasury, Postal Service, and General Government Appropriation Act, Pub. L. No. 101-509, 104 Stat. 1389, 1457 (Nov. 5, 1990), provided this authority. The authority is effective only to the extent funds are provided in appropriation acts. FEPCA § 301.

unusually outstanding," then the cash award may be higher, but not in excess of $25,000.[90] 5 U.S.C. § 4502. The agency may also incur "necessary expenses" in connection with an incentive award. *Id.* Awards and related expenses under the Act are paid from appropriations available to the activity or activities benefited. The Office of Personnel Management prescribes implementing regulations. 5 U.S.C. § 4506. OPM's regulations are found in 5 C.F.R. pt. 451.

The Incentive Awards Act applies to civilian agencies, civilian employees of the various armed services, and specified legislative branch agencies. 5 U.S.C. § 4501. Within the judicial branch, it applies to the United States Sentencing Commission.[91] *Id.* While it does not apply to members of the armed forces, the Defense Department has very similar authority for military personnel in 10 U.S.C. § 1124. Because of the similarity between the two statutes, GAO case law applies equally to award ceremonies conducted under the authority of 10 U.S.C. § 1124.

GAO has issued a number of decisions, discussed in the following pages, that interpret the Incentive Awards Act. Five overarching principles are apparent from these decisions:

(1) only federal employees may receive awards under the Act;
(2) both cash and non-cash awards are permissible;

[90] The Secretary of Defense may grant a cash award up to $25,000 without making such certifications. 5 U.S.C. § 4502(f).

[91] The Sentencing Commission had not been covered prior to a 1988 amendment to the statute. *See* 66 Comp. Gen. 650 (1987). The Administrative Office of the United States Courts is no longer covered by the statute. Pub. L. No. 101-474, § 5(f), 104 Stat. 1100 (Oct. 30, 1990). The District of Columbia also is no longer covered. When the District of Columbia Home Rule Act was enacted into law, Pub. L. No. 93-198, 87 Stat. 774 (Dec. 24, 1973), the Act provided for the continuation of federal laws applicable to the District of Columbia government and its employees (that for the most part were in title 5 of the United States Code) until such time as the District enacted its own laws covering such matters. The District has adopted a number of laws exempting its employees from various provisions of title 5, including section 4501. D.C. Code § 1-632.02(a)(4).

(3) agencies may pay for travel, food, and miscellaneous expenses if they are related to an award;
(4) awards for money-saving employee suggestions must be for suggestions that save government money; and
(5) awards are at an agency's discretion.

(a) Only federal employees may receive awards under the Act

First, as a preliminary matter, awards are limited to government employees.[92] Since no similar authority exists for persons other than government employees, an award may not be made to a nongovernment employee who submits a suggestion resulting in savings to the government. B-160419, July 28, 1967. *See also* B-224071-O.M., Aug. 3, 1987 (GAO appropriations not available for cash awards to contract security guards); B-176600-O.M., Aug. 18, 1978 (appropriations of agencies funding the Joint Financial Management Improvement Program not available to make cash awards to individuals other than federal employees). An agency may make an award to an employee on detail from another agency. 33 Comp. Gen. 577 (1954). An agency may also make an award to one of its employees for service to a Federal Executive Board. B-240316, Mar. 15, 1991. *See also* 70 Comp. Gen. 16 (1990).

(b) Cash and non-cash awards are permissible

Second, awards under the Act may take forms other than cash. Thus, the Army Criminal Investigation Command could award marble paperweights and walnut plaques to Command employees, including those who had died in the line of duty, if the awards conformed to the Act and applicable regulations. 55 Comp. Gen. 346 (1975). In situations not covered by the statute (*e.g.,* purchase of paperweights and walnut plaques to be given to nongovernment persons to recognize cooperation and enhance community relations), however, such awards would be personal

[92] Those who are not government employees might receive a reward (rather than an award) under certain circumstances. See section C. 6. p. .

gifts and therefore improper. *Id*. Similarly authorized as non-monetary awards are desk medallions (B-184306, Aug. 27, 1980); telephones (67 Comp. Gen. 349 (1988)); jackets bearing agency insignia (B-243025, May 2, 1991); coffee mugs and pens (B-257488, Nov. 6, 1995); tickets to local sporting events or amusement parks (B-256399, June 27, 1994); and meals or gift certificates for meals (B-271511, Mar. 4, 1997). Administrative leave can also be awarded if and to the extent authorized in Office of Personnel Management's (OPM) implementing regulations. 5 U.S.C. § 4502(e). *See also* B-208766, Dec. 7, 1982. Whether the award is monetary or nonmonetary, the act or service prompting it must be related to official employment. 70 Comp. Gen. 248 (1991) (the Incentive Awards Act does not authorize giving T-shirts to Combined Federal Campaign contributors). *See also* 71 Comp. Gen. 145 (1992) (contractor in 70 Comp. Gen. 248 not entitled to payment for shirts provided to government). Awards under the Act are discretionary on the part of the agency and must be consistent with any agency policy. Further, although cost or the appearance thereof has no legal bearing upon the permissibility of an award under the Incentive Awards Act, these issues are relevant, necessary concerns for agencies.

The Act does not authorize cash awards based merely on length of service or upon retirement. However, noncash awards are permissible. For example, the Department of Agriculture wanted to present to retiring members of its Office of Inspector General engraved plastic holders containing their credentials. GAO found this authorized by the Act. 46 Comp. Gen. 662 (1967). It is not appropriate to make an incentive award because an employee was sparing in his use of sick leave. 67 Comp. Gen. 349 (1988), *cited in National Association of Government Employees Local R1-109,* 53 F.L.R.A. 271, Aug. 15, 1997.

(c) Agencies may pay for travel, food, and miscellaneous expenses if they are related to an award

The Incentive Awards Act authorizes agencies to "pay a cash award to, and incur necessary expense for the honorary recognition

of" employees. The concept of a necessary expense is, within limits, a relative one based on the relationship of the expenditure to the particular appropriation or program involved. Thus, while a necessary relationship may not exist between expenses related to an award and the day-to-day purposes for which an agency's appropriation is available, an agency may determine that a particular expense materially enhances the effectiveness of a ceremonial function under the Incentive Awards Act. 65 Comp. Gen. 738 (1986). This is specifically true in the case of an awards ceremony, which is a valid component of the agency's statutorily authorized awards program.[93] *Id.*; *see also* B-167835, Nov. 18, 1969 (Incentive Awards Act authorized the National Aeronautics and Space Administration to fund part of the cost of a banquet at which the President was to present the Medal of Freedom to the Apollo 11 astronauts). As with awards themselves, these miscellaneous expenses are discretionary on the part of the agency and must be consistent with any agency policy. Further, although cost or the appearance thereof has no legal bearing upon the permissibility of an award under the Incentive Awards Act, these issues are relevant, necessary concerns for agencies.

Accordingly, agencies may use appropriations for a variety of expenses related to an award under the Incentive Awards Act, including:

- Light refreshments. 65 Comp. Gen. 738 (1986) (the Social Security Administration could use its operating appropriations, apart from its limited entertainment appropriation, to provide refreshments at its annual awards ceremony); B-270199, Aug. 6, 1996 (cake at a Pension Benefit Guaranty Corporation awards ceremony).

[93] This decision partially modified an earlier case, where GAO concluded that the cost of refreshments at an awards ceremony under the Incentive Awards Act were payable only from specific entertainment appropriations. B-114827, Oct. 2, 1974. *See also* 43 Comp. Gen. 305 (1963) (citing entertainment appropriations as the only funding source for the cost of refreshments at an awards ceremony for nongovernment employees).

- Complete meals. B-270327, Mar. 12, 1997 (payments for luncheons spanning a range from take-out sandwiches to a luncheon cruise); B-288536, Nov. 19, 2001 (Bureau of Indian Affairs was permitted to pay for the cost of a buffet luncheon at an incentive awards ceremony); 70 Comp. Gen. 16 (1990) (agency could pay a fee, which included a luncheon, for attendance at a Federal Executive Board regional award ceremony by agency employees who had been selected for awards and their supervisors); B-235163.11, Feb. 13, 1996 (National Science Foundation annual awards dinner).

- Decorations. B-247563.4, Dec. 11, 1996 (floral centerpiece for use at awards ceremony).

- Travel for the award recipient. 70 Comp. Gen. 440 (1991).

- Travel for the award recipient's spouse. 69 Comp. Gen. 38 (1989), overruling 54 Comp. Gen. 1054 (1975); B-235163.11, Feb. 13, 1996. Travel and miscellaneous expenses may also be paid to a surviving spouse to receive an award on behalf of a deceased recipient. B-111642, May 31, 1957.

- Travel and miscellaneous expenses of an attendant, whether or not a family member, where the recipient has a disability and may not travel unattended. 55 Comp. Gen. 800 (1976).

The Act does not authorize "necessary expenses" incident to the receipt of an award from a nonfederal organization. 40 Comp. Gen. 706 (1961). *See, e.g.,* B-258216, July 27, 1995 (agency's payment for airline tickets for mother and brother of a deceased employee to attend nongovernmental awards ceremony honoring deceased employee not authorized). However, in limited situations where an award from a nonfederal organization is closely related to the recipient's official duties, it may be possible to pay certain related expenses on other grounds. For example, appropriations available to an agency for travel expenses are also available "for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of

the functions or activities." 5 U.S.C. § 4110. Thus, appropriations may be available if the employee is traveling to a meeting at which she will happen to receive an award. *See* 55 Comp. Gen. 1332 (1976).

The purpose of awards ceremonies is to foster public recognition of employees' meritorious performance and allow other employees to honor and congratulate their colleagues. 65 Comp. Gen. at 740. This purpose would not be served where the awards recipients and the donor were the only participants in the event. B-247563.4, Dec. 11, 1996. Therefore, the Incentive Awards Act does not authorize refreshments "in connection with an event or function designed to achieve other objectives simply because the agency distributes awards as part of the event or function." *Id*. For instance, the Department of Veterans Affairs Medical Center's use of appropriated funds for a breakfast at which the Medical Center Director presented awards was improper because it lacked public recognition of the award recipients. *Id*. The record indicated that (1) only those employees specifically recognized and the Medical Center Director participated in the event, and (2) the employees' contributions were not otherwise publicized within the Medical Center community. However, the Medical Center's use of its appropriation to purchase light refreshments for an annual picnic and a Valentine's Day Dance were authorized, as the agency presented performance award certificates and years of service awards at the events. GAO cautioned that where an agency combines awards receptions with social events, "the expenditures should be subject to greater scrutiny than expenditures made in connection with more traditional awards ceremonies." *Id*.

As one case illustrates, agencies have discretion when determining what (if any) refreshments to serve at an awards ceremony. In recognition of excellent agency performance, the Defense Reutilization and Marketing Service (DRMS) designated a worldwide "celebration day" on which it hosted luncheons for all DRMS employees and provided each employee a specially designed "Bucks Bunny" and "Reut Rabbit" T shirt, as well as 4 hours of administrative leave. B-270327, Mar. 12, 1997. DRMS guidance authorized each DRMS location to spend up to $20 per

person for accommodations and "incidental refreshments" in connection with the awards ceremonies. GAO considered the DRMS awards program in light of OPM's regulations implementing the Incentive Awards Act at 5 C.F.R. pt. 451, which, the decision concluded, "purposely leave it up to the agencies to design their award programs and make their own award decisions." GAO concluded that it was required to "respect and defer" to OPM's regulatory decisions and implicit delegation of authority to agencies to make implementing decisions so long as such decisions were consistent with essential requirements of the Act. The coverage of the "celebration day" was "broader than we have typically encountered in … prior decisions"; however, "unless arbitrary and capricious, differences in degree do not invalidate the decisions made." The submitted vouchers were approved. *See also* B-288536, Nov. 19, 2001.

(d) Awards for money-saving employee suggestions must be for suggestions that save government money

Fourth, where an award is based on a suggestion resulting in monetary savings, the savings must be to government rather than nongovernment funds. 36 Comp. Gen. 822 (1957). In one case, a suggestion for changes in procedures that would decrease administrative expenses of state employment security offices would effect a savings to an appropriation for unemployment service administration grants to the states. Therefore, the appropriation was available to make an award to the employee who made the suggestion. 38 Comp. Gen. 815 (1959).

In another example, an employee made a suggestion that resulted in monetary savings to his own agency, but the savings would be offset by increased costs to other agencies. The decision concluded that, if the agency wanted to make an award on the basis of tangible benefits, it must measure tangible benefits to the government; that is, it must deduct the increased costs to other agencies from its own savings. However, the agency could view the suggestion as a contribution to efficiency or improved operations

and make a monetary award based on intangible benefits. B-192334, Sept. 28, 1978.

(e) Awards are at an agency's discretion

Finally, the making of an award—and therefore the refusal to make an award—under the Incentive Awards Act is discretionary. *Rosano v. United States,* 9 Cl. Ct. 137, 144–45 (1985), *aff'd,* 800 F.2d 1126 (Fed. Cir. 1986), *cert. denied,* 480 U.S. 907 (1987). As such, it is reviewable only for abuse of discretion. *E.g., Shaller v. United States,* 202 Ct. Cl. 571, *cert. denied,* 414 U.S. 1092 (1973). A labor relations arbitrator may order an agency to prepare and submit an award recommendation, but cannot order the agency to actually make the award. 56 Comp. Gen. 57 (1976). Also, even where an agency commits itself to making an award if it adopts a suggestion, the agency does not have to pay interest on the award if it is delayed. B-202039, Apr. 3, 1981, *aff'd upon reconsideration,* B-202039, May 7, 1982.

(2) Other awards statutes

In addition to the Incentive Awards Act, several other statutes authorize various types of awards. Some examples are:

- 5 U.S.C. § 5384: authorizes lump-sum cash performance awards to members of the Senior Executive Service. Some representative decisions are 68 Comp. Gen. 337 (1989), 64 Comp. Gen. 114 (1984), and 62 Comp. Gen. 675 (1983).

- 10 U.S.C. § 1125 and 14 U.S.C. § 503: authorize the Defense Department and the Coast Guard, respectively, to award trophies and badges for certain accomplishments. *See* 71 Comp. Gen. 346 (1992) (Air Force purchase of belt buckles as awards for participants in "Peacekeeper Challenge" competition permissible under 10 U.S.C. § 1125). The Coast Guard statute includes cash prizes. The statutes have been narrowly construed as limited essentially to proficiency in arms and related skills. 68 Comp. Gen. 343 (1989) (Coast Guard);

27 Comp. Gen. 637 (1948) (discussing predecessor of 10 U.S.C. § 1125).

- 5 U.S.C. §§ 4511–4513: Inspector General of an agency may make cash awards to employees whose disclosure of fraud, waste, or mismanagement results in cost savings for the agency. For an agency without an Inspector General, the agency head is to designate an official to make the awards. The President may make the awards where the cost savings accrue to the government as a whole.

(3) Decisions that predate the Government Employees' Incentive Awards Act

A number of decisions predate the Government Employees' Incentive Awards Act. That Act has since subsumed these decisions in many situations; however, these decisions remain relevant in situations outside the scope of the Incentive Awards Act.

A number of these older decisions established that, absent specific statutory authority, appropriations generally could not be used to purchase such items as medals, trophies, or insignia for the purpose of making awards. The rationale follows that of the gift cases.[94] Similar subsequent cases barred the purchase of medals for winners of athletic events (5 Comp. Gen. 344 (1925)); annual trophies for Naval Reserve bases for efficiency (15 Comp. Gen. 278 (1935)); and a plaque to present to a state to recognize 50 years of achievement in forestry (45 Comp. Gen. 199 (1965)). Funds were available, however, where the awarding of the medals had been authorized in virtually concurrent legislation. 10 Comp. Gen. 453 (1931).

As with the gift cases, an occasional exception was found based on an adequate justification under the necessary expense doctrine. In

[94] The prohibition does not apply to a government corporation with the authority to determine the character and necessity of its expenditures. 64 Comp. Gen. 124 (1984). (The expenditure in the case cited was to be made from donated funds.)

one example, prompted perhaps by wartime considerations, it was permissible to purchase medals or other inexpensive insignia (but not cash payments) to be awarded to civil defense volunteers for heroism or distinguished service. B-31094, Jan. 11, 1943. Similarly, an appropriation whose purposes included "accident prevention" was available to purchase medals and insignia (but not to make monetary awards) to recognize mail truck drivers with safe driving records. 17 Comp. Gen. 674 (1938). There was sufficient discretion under the appropriation to determine the forms "accident prevention" should take. However, the discretion in recognizing safe job performance did not extend to distributing "awards" of merchandise selected from a catalogue. B-223608, Dec. 19, 1988.[95] Though the Incentive Awards Act authorizes cash awards and certain types of non-cash honorary awards, it does not authorize merchandise awards. *Id*. Furthermore, OPM's guidance explicitly stated that "merchandise prizes cannot be granted in lieu of cash." *Id*. The same decision disapproved the distribution of ice scrapers imprinted with a safety message, based on the lack of adequate justification. In another case, trophies for Toastmasters participants were disallowed as there had "been no justification provided to support the view that [the] expense [was] necessary and incident to the public speaking training." B-223447, Oct. 10, 1986.

d. Books and periodicals

Expenditures for books and periodicals are evaluated under the necessary expense rule. Through applying the necessary expense rule, GAO found that agencies could purchase books and periodicals in the following cases:

[95] Merchandise in that case was distributed to more than 80 percent of the workforce at one project. We note that the Government Employees' Incentive Awards Act only authorizes awards for an employee who by his or her "suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paper work" or performs a special act or service in the public interest related to his or her official employment. 5 U.S.C. § 4503.

- The American Battle Monuments Commission could use its Salaries and Expenses (S&E) appropriation to buy books on military leaders to help it decide what people and events to memorialize. 27 Comp. Gen. 746 (1948).[96]

- The National Science Foundation could subscribe to a publication called "Supervisory Management" to be used as training material in a supervisory training program under the Government Employees Training Act. If determined necessary to the course, the subscription could be paid from the Foundation's S&E appropriation. 39 Comp. Gen. 320 (1959).

- The Interior Department was permitted to purchase newspapers to send to a number of Inuit families in Alaska. Members of the families had been transported to Washington state to help in fighting a huge fire, and the newspapers were seen as necessary to keep the families advised of the status of the operation and also as a measure to encourage future volunteerism. B-171856, Mar. 3, 1971.

- The Interior Department's Mining Enforcement and Safety Administration could subscribe to the "Federal Employees News Digest" if determined to be necessary in carrying out the agency's statutory functions. 55 Comp. Gen. 1076 (1976). Subsequently, when the Federal Employees News Digest came under some criticism, it became necessary to explain that a decision such as 55 Comp. Gen. 1076 is neither an endorsement of a particular publication nor an exhortation for agencies to buy it. It is merely a determination that the purchase is legally authorized. B-185591, Feb. 7, 1985.

[96] Decisions in this area prior to 1946 applying a stricter standard, such as 21 Comp. Gen. 339 (1941) and 22 Comp. Dec. 317 (1916), should be disregarded as they reflected prohibitory legislation enacted on March 15, 1898 (30 Stat. 316) and repealed in 1946.

e. Business cards

We recognize that with the prevalence today of electronic communications, the use of business cards has dropped over the years, although they remain in some use particularly in face-to-face meetings. Nevertheless, the history of the business card decisions may be illustrative by analogy when analyzing other expenses under the necessary expense rule.

For many years, GAO considered business cards to be inherently personal in nature, and therefore, a personal expense that was not payable from appropriated funds, absent specific statutory authority. *See* B-246616, July 17, 1992. This rule had its origins in decisions of the Comptroller of the Treasury, who concluded in 1913 that business cards were more for personal convenience than necessity and, therefore, that appropriations were not available to pay for them. 20 Comp. Dec. 248 (1913).[97] Consistent with this precedent, GAO frequently concluded that business cards were not a necessary expense. 68 Comp. Gen. 467 (1989); B-195036, July 11, 1979; B-149151, July 20, 1962. In 1998, however, we concluded that an agency, applying a necessary expense analysis, may reasonably determine that its appropriations are available to obtain business cards for employees who regularly deal with the public or organizations outside their immediate office. B-280759, Nov. 5, 1998.

In a case involving a variation on business cards, the Board for International Broadcasting wanted to use what it termed "transmittal slips" to accompany the distribution of its annual report. B-173239, June 15, 1978. The "transmittal slip" resembled a business card and contained the words "With the compliments of (name and title), Board for International Broadcasting." It was not necessary to decide whether the "slips" were business cards or not, because

[97] "[I]n official life it has been the practice for the official himself to furnish his own cards, the salaries in most instances being adequate for such expenditures," the Comptroller chided. 20 Comp. Dec. at 250.

44 U.S.C. § 1106 expressly provides that documents distributed by an executive department or independent establishment may not contain or include a notice that they are being sent with "the compliments" of a government official. Use of the transmittal slips was therefore unauthorized.

f. Contests

(1) Entry fees

An agency may pay an entry fee for a contest if the agency can justify the expenditure under Step 1 of the necessary expense analysis. There must be a reasonable, logical relationship between the contest entry fee and the purpose for which the appropriation is available. In addition, any benefit of the contest, such as prize money, must flow to the government rather than to individual employees.[98] For example, the National Oceanic and Atmospheric Administration (NOAA) wished to pay a fee to enter agency publications into a contest held by an association of editors. NOAA's director of public affairs noted that NOAA had broad statutory authority to publish materials on weather, geodesy,[99] and similar matters, and that the contest judges would evaluate NOAA's publications, thus helping the agency improve the quality of its work. In addition, the agency, rather than individual employees, would receive any prize money. Accordingly, NOAA's appropriations were available to pay the entry fee. B-172556, Dec. 29, 1971.

In a similar case, a Natural Resources Conservation Service (NRCS) employee sought reimbursement of fees he incurred when

[98] An agency must consider the miscellaneous receipts statute when determining how to handle receipt of the proceeds. Please see Chapter 6, *Availability of Appropriations: Amount*.

[99] Geodesy is the science of "accurately measuring and understanding the Earth's geometric shape, orientation in space, and gravity field." NOAA, *What is geodesy?*, *available at* https://oceanservice.noaa.gov/facts/geodesy.html (last visited Aug. 3, 2017).

he entered NRCS publications in an awards contest that recognizes professional skill and excellence in developing public outreach materials, and employs communications professionals as judges to provide critique and detailed feedback. The contest made awards in the name of the agency for six of the nine NRCS entries. NRCS has statutory authority to disseminate information, so participation in the contest and the feedback provided could aid in NRCS's review of its outreach programs. B-317891, May 26, 2009. Therefore, NRCS could reimburse the employee for the contest fees if it made an administrative determination that participation in the contest served the agency's mission. *Id. See also* B-164467, Aug. 9, 1971 (Bureau of Mines could use its appropriations to enter an educational film it produced in an industrial film festival where entry was made in the Bureau's name, awards would be made to the Bureau and not to any individuals, and there was adequate justification that entry would further the Bureau's function of promoting mine safety).

In contrast, appropriations are not available to pay entry fees where the prizes would be awarded to individual employees rather than an agency. B-164467, June 14, 1968.

Payment of contest entry fees are permissible only where the contest advances an objective for which the appropriation is available. Contest fees that primarily meet the personal needs of employees are not payable from appropriated funds. For example, agencies may not pay fees for employees to participate in competitive fitness activities or sporting events, as these expenses are personal to the employees. We discuss this issue further in section C.6.k below.

(2) Government-sponsored contests

As with contest entry fees, an agency may sponsor its own contest if the agency can justify the expenditure under Step 1 of the necessary expense rule. There must be a reasonable, logical relationship between the contest and the purpose for which the appropriation is available. Of course, establishing this relationship is most straightforward where Congress has provided an agency

with specific statutory authority to sponsor a contest. *See, e.g.,* 51 U.S.C. § 20144 (NASA), 10 U.S.C. § 2374a (Department of Defense); 42 U.S.C. § 16396 (Department of Energy).

If an agency lacks such specific statutory authority, it must ensure that any prize money it pays bears a reasonable, logical relationship to the authorized purposes of the appropriation. For example, prizes were awarded to enrollees at a Job Corps Conservation Center in a contest to suggest a name for the Center newspaper. The expenditure was permissible because the enabling legislation authorized the providing of "recreational services" for the enrollees and the contest was viewed as a permissible exercise of administrative discretion in implementing the statutory objective. B-158831, June 8, 1966.

In another case, the National Park Service sponsored a cross-country ski race in a national park, and awarded trophies to the winners. The cost of the trophies could not be charged to appropriations for management, operation, and maintenance of the national park system. However, the Park Service also received appropriations for recreational programs in national parks, and the trophies could properly have been charged to that account. B-214833, Aug. 22, 1984. *See also* B-230062, Dec. 22, 1988.

An agency may not sponsor a contest if there is not a sufficient nexus between the purpose of the appropriation and the agency-sponsored contest. For example, the Navy wanted to use its appropriation for naval aviation to sponsor a competition for the design of amphibious landing gear for Navy aircraft. Cash prizes would be awarded for the two most successful designs. The Comptroller General noted the risk that "one or both of the two designs . . . may thereafter prove to be of no use or value whatever" because, for example, they might be unsuitable. Thus there was a possibility that the prize money awarded would vastly exceed the value of the work the government ultimately obtained. In addition, the appropriation contemplated that the ultimate design

and development work would be performed by Navy personnel. Therefore, appropriations were not available to sponsor the competition. 5 Comp. Gen. 640 (1926).[100] *See also* B-247563.3, Apr. 5, 1996 (Department of Veterans Affairs purchase of restaurant gift certificates and a silk plant "for distribution as prizes during Women's Equality Week" was not permissible, as agency did not establish how the expenditure advanced its observation of Women's Equality Week).

Many decisions have concluded that appropriations are available for agencies to sponsor such contests. Thus, the Arlington Memorial Bridge Commission wanted to invite several firms to submit designs for a portion of the Arlington Memorial Bridge. Each design accepted by the Commission would be purchased for $2,000, estimated to approximate the reasonable cost of preparing a design. Since the $2,000 was reasonably related to the cost of producing a design, GAO viewed the proposal as amounting to a direct purchase of the satisfactory designs and distinguished 5 Comp. Gen. 640 on that basis. A significant factor was that the bridge was intended not merely as a functional device to cross the river but "as a memorial in which artistic features are a major, if not the primary, consideration." A-13559, Apr. 5, 1926.

This decision was followed in a later case that held that the Marine Corps could offer a set sum of $1,000 for an acceptable original design for a service medal:

> "Competition in the purchase of supplies or articles for Government use in its most common form is for the purpose of securing specified supplies or articles at

[100] About 60 years later, Congress and the President enacted the Competition in Contracting Act of 1984, which generally requires federal agencies to engage in full and open competition to procure goods and services. Pub. L. No. 98-369, div. B, title VII, §§ 2701-2753, 98 Stat. 494, 1175 (July 18, 1984). CICA, as amended, is codified in various sections of titles 10 and 41 of the United States Code. *See also* B-408319, June 7, 2013 (dismissing a protest challenging an agency's selection of winners of a contest because the transaction does not involve the award or proposed award of a contract).

> the lowest possible price. Where, however, the purpose is the selection of the most suitable and artistic design . . . the primary value of the subject being in its design, the ordinary procedure may be reversed and the amount to be expended fixed in advance at a sum considered to be the reasonable value of the services solicited and the bidders requested to submit the best design which they can furnish for that sum."

9 Comp. Gen. 63 (1929), at 65.

Several later decisions also concluded that appropriations were available to sponsor contests and competitions where artistic design was involved. *See* 19 Comp. Gen. 287, 288 (1939) (design of advertising literature for savings bonds); 18 Comp. Gen. 862 (1939) (plaster models for Thomas Jefferson Memorial); 14 Comp. Gen. 852 (1935) (bronze tablets and memorials for Boulder Dam); A-37686, Aug. 1, 1931 (monument at Harrodsburg, Kentucky, as first permanent settlement west of the Allegheny Mountains); A-35929, Apr. 3, 1931 (ornamental sculptured granite columns for the Arlington Memorial Bridge).

Other cases involving agency-sponsored contests include:

- The National Oceanic and Atmospheric Administration (NOAA) could pay a $5 reward to fishermen returning "fish tags" to the government. The National Marine Fisheries Service issued such "fish tags," displaying questions about the circumstances under which the fish in question was caught, a return address, and the word "reward." When returned by fishermen, the fish tags provided NOAA with information on the history and migration rates of the tagged fish. The fishermen received a reward of $5.00 for the return of each fish tag. 70 Comp. Gen. 720 (1991). The agency was statutorily required to conduct research supporting fishery management and, therefore, was required to obtain information from the public.

Since the fish tag awards facilitated development of the needed information, the cost of the awards was reasonably necessary to the agency's accomplishment of an authorized purpose. *Id.* at 722. It was also permissible for NOAA to expand its reward program to include the alternative of participating in an annual drawing for a limited number of large cash prizes. *Id.* at 723.

- The General Services Administration's Public Buildings Service (PBS) proposed using appropriated funds to pay for prizes in a drawing held in connection with customer satisfaction surveys. B-286536, Nov. 17, 2000. In order to develop customer satisfaction information, PBS distributed such customer surveys to employees of tenant-agencies in buildings it managed. PBS proposed the use of the Federal Buildings Fund to provide prizes to survey recipients whose names PBS chose in a drawing. Citing 70 Comp. Gen. 720 and B-230062, above, GAO observed that it had concluded in several instances that "agencies may use appropriated funds to provide prizes to individuals to further the collection of information necessary to the accomplishment of the agency's statutory mandate." This case differed in that PBS proposed to make awards to federal employees, rather than to the general public as in the cited cases. This was not determinative, however, since the federal employees would not be receiving prizes for what they already were required to do, and therefore they were "akin to the general public." There was "a direct connection between the purpose of the Fund and the use of prizes to increase the response rate to customer satisfaction surveys." Therefore, GAO had no objection to PBS's use of the Federal Buildings Fund for this purpose.

The government has been sponsoring more and more contests in recent years. In September 2009, President Obama released his *Strategy for American Innovation*, which called for agencies to spur innovation by using policy tools like prizes and challenges. OMB, *Guidance on the Use of Challenges and Prizes to Promote Open Government,* M-10-11 (Mar. 8, 2010).

g. Cultural awareness programs

One area that has generated several decisions, and a change in GAO's position, has been equal employment opportunity special emphasis or cultural awareness programs. The issue first arose in a 1979 case. The Bureau of Mines, Interior Department, in conjunction with the Equal Employment Opportunity Commission, sponsored a program of live entertainment for National Hispanic Heritage Week. 58 Comp. Gen. 202 (1979). The program consisted of a lecture and demonstration of South American folk music, a concert, a slide presentation, and an exhibit of Hispanic art and ceramics, among other things. The decision concluded that, while the Bureau's Spanish-Speaking Program was a legitimate component of the agency's overall Equal Employment Opportunity (EEO) program, appropriated funds could not be used to procure entertainment. This holding was followed in two more cases, B-194433, July 18, 1979, and B-199387, Aug. 22, 1980.

In 1981, however, GAO reconsidered its position. The Internal Revenue Service asked whether it could certify a voucher covering payments for a performance by an African dance troupe and lunches for guest speakers at a ceremony observing National Black History Month. The Comptroller General held the expenditure proper in 60 Comp. Gen. 303 (1981). The decision stated:

> "[W]e now take the view that we will consider a live artistic performance as an authorized part of an agency's EEO effort if, as in this case, it is part of a formal program determined by the agency to be intended to advance EEO objectives, and consists of a number of different types of presentations designed to promote EEO training objectives of making the audience aware of the culture or ethnic history being celebrated."

Id. at 306. Further, the lunches for the guest speakers could be paid under the travel statute, 5 U.S.C. § 5703, if they were in fact away from their homes or regular places of business. The prior inconsistent decisions were overruled.[101]

In 1982, the decision at 60 Comp. Gen 303 was expanded to include small "samples" of ethnic foods prepared and served during a formal ethnic awareness program as part of the agency's equal employment opportunity program. B-199387, Mar. 23, 1982. In that particular program, the attendees were to pay for their own lunches, with the ethnic food samples of minimal proportion provided as a separate event. Thus, the samples could be distinguished from meals or refreshments, which remain unauthorized. (The decision did not specify how many "samples" an individual might consume in order to develop a fuller appreciation.) Compare that situation to the facts in another case, where GAO found that the U.S. Army Corps of Engineers' appropriation was not available to pay for the costs of food offered at the Corps' North Atlantic Division's February 2003 Black History Month program. B-301184, Jan. 15, 2004. GAO reasoned that the time of the program, the food items served, and the amount of food available, indicated that a meal, not a sampling of food, was offered.

In 1999, the Comptroller General clarified that 60 Comp. Gen. 303 does not require that a program or event have specific advance written approval in a formal agency issuance to be considered a formal Equal Employment Opportunity program for which funds are available. "What is required it that the agency, through an authorized official, determines that the planned performance advances EEO objectives." B-278805, July 21, 1999.

Equality in all aspects of federal employment is now a legal mandate. An agency is certainly within its discretion to determine

[101] A few years later, the Comptroller General also determined that transportation costs of an employee participating in a cultural program are not authorized unless the employee is participating in the program as a performer or making some other type of direct contribution to the EEO event. B-243862, July 28, 1992.

that fostering racial and ethnic awareness is a valid—perhaps indispensable—means of advancing this objective. This being the case, it is not at all far-fetched to conclude that certain expenditures that might be wholly inappropriate in other contexts, like entertainment and food, could reasonably relate to this purpose. Thus, hiring an African dance troupe could not be justified to further an objective of, for example, conducting a financial audit or constructing a building or procuring a tank, but the relationship changes when the objective is promoting cultural awareness.

In light of this, it is clear why, in 1985, GAO distinguished the cultural awareness cases and concluded that the Army could not use appropriated funds to provide free meals for handicapped employees attending a luncheon in honor of National Employ the Handicapped Week. 64 Comp. Gen. 802. This is not to say that an agency's EEO program should not embrace the disabled—on the contrary, it can, should, and is required to—but merely that "[u]nlike ethnic and cultural minorities, handicapped persons do not possess a common cultural heritage" within the intended scope of the cultural awareness cases. *Id.* at 804 (quoting from the request for decision).

Similarly, in 2004, GAO advised that serving refreshments purchased with appropriated funds to local children as part of the Forest Service's "Kid's Fishing Day" did not promote cultural awareness. While it may have been important that children learn to fish and appreciate the outdoors, such a goal did not advance federal EEO objectives. B-302745, July 19, 2004.

h. Entertainment for persons other than government personnel

(1) Entertainment authorized by law

Occasionally Congress provides statutory authority for agencies to pay for the entertainment of individuals who are not government personnel. For example, Congress appropriates small amounts to many agencies for official reception and representation expenses, which we discuss further in section C.5.n above. These funds can

be used for entertainment expenses, such as hosting events for foreign dignitaries.

Though official reception and representation funds provide the most clear statutory authority to provide entertainment, on rare occasion other statutes may provide the necessary authority. For example:

- Congress made an appropriation to "enable the President, through appropriate agencies of the Government, to provide for emergencies affecting the national security and defense and for each and every purpose connected therewith." GAO concluded that this language permitted the entertainment of foreign government officials incident to the gathering of intelligence for national security. B-22307, Dec. 23, 1941.

- The Foreign Assistance Act of 1961, as amended, authorized funds for an informational program to give foreign military trainees a greater exposure to American culture. 22 U.S.C. §§ 2151 *et seq.* (1970). To implement the program, the Department of Defense set up a program whereby officers would serve as escorts for foreign military trainees to impart to them an active appreciation of American values and ideals. The case involved a voucher submitted by a civilian employee of the Navy for expenses incurred as escort officer for a group of twelve senior foreign naval officers being trained in the United States. B-182357, Dec. 9, 1975. The voucher included visits to a variety of restaurants, night clubs, and bars. One of the items was a visit to the Boston Playboy Club. The claimant justified the visit as "symbolic of the United States" and "one of the most enjoyable experiences" the trainees had during their stay in America. Apparently, to get more symbolism, the party returned for a second visit. In reviewing the case, the Comptroller General noted that, under the statutory program, the funds could have been given directly to the trainees to be spent as they desired, and the agency would therefore have considerable discretion in spending the money for the trainees. In addition, the regulations provided "no guidance whatsoever" on the limits of the program. Somewhat reluctantly, the Comptroller General was forced to conclude that "the lack of

adequate guidance to the escort officer leaves us no alternative but to allow him credit for the expenses incurred."

(2) Entertainment not specifically authorized by law

In the absence of specific statutory authorization, appropriations generally are not available for entertainment for persons other than government personnel. Appropriations may be available if the agency may establish that the entertainment is an essential constituent part of the effective accomplishment of a statutory responsibility. For example, the National Park Service had the authority to provide for "interpretive demonstrations" at Park Service sites. [102] 16 U.S.C. § 1a-2(g). The Park Service could properly include some level of entertainment in the demonstrations, as long as it was sufficiently related to the significance of the particular site. Thus, there was no objection to the 1988 Railroader's Festival at the Golden Spike National Historic Site, which included musical entertainment by a band specializing in railroad and nineteenth century western American music. 68 Comp. Gen. 544 (1989). Similarly within this authority was the decoration of a historic ranch house at the Grant-Kohrs Ranch National Historic Site to "interpret" how the ranch celebrated Christmas during the frontier era. B-226781, Jan. 11, 1988. However, an "open house" with refreshments and a visit by Santa Claus had "too indirect and conjectural a bearing" on the Park Service's mission and was therefore unauthorized. *Id.*

While the Park Service decisions illustrate the rare instances in which appropriations may be used to entertain non-government personnel, many other decisions show that such expenses generally are impermissible:

[102] The National Park Service's statutory authority to provide for "interpretive demonstrations" was later repealed in December 2014. Pub. L. No. 113-287, 128 Stat. 3272.

- Expenditures by two Army officers for entertaining officials of foreign governments while making arrangements for an around-the-world flight were disallowed. 5 Comp. Gen. 455 (1925).

- Appropriations were held unavailable for dinners and luncheons for "distinguished guests" given by a commissioner of the Philippine War Damage Commission. 26 Comp. Gen. 281 (1946).

- The Department of Housing and Urban Development used its research and technology appropriations for entertainment expenses incident to a trade show it sponsored in the Soviet Union. Since HUD had no authority to sponsor the show, the related expenditures were improper. Even if the trade show itself had been authorized, the research and technology appropriations still would not have been available for entertainment, although HUD could then have used its "official reception and representation" funds. 68 Comp. Gen. 226 (1989).

- Funds were not available for a Fourth of July fireworks display held by a Navy station which was justified as a community relations measure. While good community relations may be desirable for all government agencies, fireworks are not necessary to the operation and maintenance of the Navy. B-205292, June 2, 1982.

Other early decisions on point are: 5 Comp. Gen. 1018 (1926); B-85555, June 6, 1949; and A-10221, Oct. 8, 1925.

Food and entertainment frequently go hand-in-hand; we discuss food further in section C.5 above. We discuss entertainment of federal personnel in section C.4.e above.

i. Fines and penalties owed by federal employees

As we will discuss later in this chapter, the federal government is immune from paying taxes, fines, or penalties to state and local

governments. However, this immunity does not extend to federal employees. In general, appropriations are not available to pay fines or penalties of employees, even if they are carrying out official business when they incur the fine. The theory is that, while an employee may have discretion to perform a given task, the range of permissible discretion does not include violating the law. If the employee chooses to violate the law, he is acting beyond the scope of his authority and must bear any resulting liability as his personal responsibility. Under certain circumstances, however, appropriations are available to pay or reimburse the fine if such payment passes muster under the necessary expense rule; that is, if the payment bears a logical, reasonable relationship to the purpose for which the appropriation was made.

Several cases on traffic fines illustrate that, in general, appropriations are not available to pay fines and penalties of federal employees. The cases frequently involve traffic violations. In general, appropriations are unavailable to pay or reimburse traffic fines. Holding that a government employee ticketed for parking a government vehicle in a "no parking" zone could not be reimbursed, the Comptroller General stated:

> "[T]here is not known to this office any authority to use appropriated moneys for payment of the amount of a fine imposed by a court on a Government employee for an offense committed by him while in the performance of, but not as a part of, his official duty. Such fine is imposed on the employee personally and payment thereof is his personal responsibility."

B-58378, July 31, 1946. The rule applies to forfeitures of collateral as well as fines. B-102829, May 8, 1951.

In another case, a government employee double-parked a government vehicle to make a delivery. While the employee was inside the building, the inner vehicle drove away, leaving the

government vehicle unattended in the middle of the street, whereupon it was ticketed. Citing B-58378 and B-102829, the Comptroller General held that the employee could not be reimbursed from appropriated funds for the amount of the fine.[103] 31 Comp. Gen. 246 (1952).

GAO has applied the rule even in a case where the employee could establish that the speedometer on the government vehicle was inaccurate. B-173660, Nov. 18, 1971. While at first glance this might seem like a harsh and unfair result, it in fact was not, at least in that particular case. In that case, the employee was ticketed for driving at 85 m.p.h. The speedometer at the time read a mere 73 m.p.h. Conceding the established inaccuracy of the speedometer, the employee nevertheless, by observing other vehicles on the road and applying common sense, should have suspected that he was driving at an excessive rate of speed.

Further, in the case involving a possessory interest tax, a tax on the rental interest in government owned property, B-251228, the Forest Service was not permitted to pay penalties and interest assessed against an employee for a delay in payment of the tax due while the employee-occupied government-owned quarters. The penalties and interest were considered to be personal liabilities of the employee and not the federal government.

The very statement of the rule as quoted above from B-58378 suggests that there may be situations in which reimbursement is permissible. The exception occurred in 44 Comp. Gen. 312 (1964). In connection with the case of *Sam Giancana v. J. Edgar Hoover,* 322 F.2d 789 (7th Cir. 1963), an agent of the Federal Bureau of Investigation (FBI) was ordered by the court to answer certain questions. Based on Justice Department regulations and specific instructions from the Attorney General, the FBI agent refused to

[103] For other cases involving motor vehicle violations, see 57 Comp. Gen. 270 (1978); B-250880, Nov. 3, 1992; B-238612, Apr. 16, 1990; B-168096-O.M., Aug. 31, 1976; B-173783.188, Mar. 24, 1976 (nondecision letter).

testify and was fined for contempt of court. The contempt order was upheld in *Sam Giancana v. Marlin W. Johnson,* 335 F.2d 372 (7th Cir. 1964). Finding that the employee had incurred the fine by reason of his compliance with Department regulations and instructions and that he was without fault or negligence, GAO held that the FBI could reimburse the agent from its Salaries and Expenses appropriation under the "necessary expense" doctrine.[104]

Subsequently, some people thought that 31 Comp. Gen. 246 and 44 Comp. Gen. 312 appeared inconsistent, and GAO has discussed the two lines of reasoning in several later decisions. The distinction is this: in 31 Comp. Gen. 246, the offense was committed while performing official duties but it was not a necessary part of those duties. The employee could have made the delivery without parking illegally. The fine in 44 Comp. Gen. 312 was "necessarily incurred" in the sense that the employee was following his agency's regulations and the instructions of his agency head. Thus, the actions that gave rise to the contempt fine could be viewed as a necessary part of the employee's official duties, although certainly not in the sense that it would have been physically impossible for the employee to have done anything else.

Applying these concepts, the Comptroller General held in B-205438, Nov. 12, 1981, that the Federal Mediation and Conciliation Service could reimburse a former employee for a contempt fine levied against him for refusal to testify, pursuant to agency regulations and instructions, on matters discussed at a mediation session at which he was present while employed by the agency.

Reimbursement was denied, however, in B-186680, Oct. 4, 1976. There, a Justice Department attorney was fined for contempt for missing a court-imposed deadline. The attorney had been working under a number of tight deadlines and argued that it was

[104] B-239556, Oct. 12, 1990 and B-242786, Jan. 31, 1991 substantially supported the rule stated in *Giancana* and explained the rationale behind it drawing a distinction between criminal and civil contempt and the punitive nature of the awards.

impossible to meet them all. However, he had not been acting in compliance with regulations or instructions, had exercised his own judgment in missing the deadline in question, and the record did not support a determination that he was without fault or negligence in the matter. Therefore, the case was governed by 31 Comp. Gen. 246 rather than 44 Comp. Gen. 312.

The two lines of cases were discussed in the specific context of traffic violations in B-107081, Jan. 22, 1980, a response to a Member of Congress. Summarizing the rules discussed above, the Comptroller General pointed out that they applied equally to law enforcement personnel. However, the Comptroller General alluded to one situation in which reimbursement might be authorized—a parking fine incurred by a law enforcement official as a necessary part of an official investigation. An example might be parking an unmarked undercover vehicle during a surveillance where there was no other feasible alternative. Compare 38 Comp. Gen. 258 (1958) concerning the reimbursement of parking meter fees.

Similar reasoning applies with respect to penalties in the form of liquidated damages assessed against a government employee who fails to either use or cancel airline reservations in accordance with the carrier's applicable tariff. If the charges are unavoidable in the conduct of official travel or are incurred for reasons beyond the traveler's control and acceptable to the agency concerned, they may be reimbursed from the agency's travel appropriations. However, if the charges are neither unavoidable in the performance of official business nor incurred for reasons beyond the employee's control and acceptable to the agency, they are personal to the employee and may not be reimbursed. 41 Comp. Gen. 806 (1962).

In 70 Comp. Gen. 153 (1990), GAO recognized that the government may reimburse an employee for the payment of a fine or penalty where the government has agreed to do so by contract. In this case, the Selective Service System had leased vehicles under a contract with a commercial vendor in the District of Columbia. The government had agreed to "hold [the] lessor harmless" for any fine or penalty imposed on the vehicles. One of the vehicles received a ticket for failure to have a current safety

inspection sticker. Although the lessor was arguably responsible for the ticket, the government employee had paid the ticket and was seeking reimbursement. GAO therein stated that:

> "[T]he government's immunity from state or municipal fines is inapplicable when the legal incidence of the fine is not imposed directly on the government but, instead, is imposed on the lessor, and the fine is merely a measure of damages for the government's failure to comply with the terms of its agreement and against which the government has agreed to indemnify the lessor."

The case was returned to the Selective Service System to make a determination as to whether, under D.C. law, the lessor was liable for the ticket.

j. Gift giving

An agency frequently wants to use gifts to attract attention to the agency or to specific programs. For example, an agency might want to use gifts as recruiting tools, to commemorate an event, or to inform the public or agency employees about the agency. Appropriated funds may not be used for personal gifts, unless, of course, there is specific statutory authority. B-307892, Oct. 11, 2006 (under 10 U.S.C. § 2261, Navy may use appropriated funds to purchase gifts for sailors to commemorate their reenlistment subject to regulations issued by the Secretary of Defense). *See also* 68 Comp. Gen 226 (1989). To state the rule in this manner is to make it appear rather obvious. If, for example, a General Counsel decided it would be a nice gesture and improve employee morale to give each lawyer in the agency a Thanksgiving turkey, few would argue that the expense should be borne by the agency's appropriations. Appropriated funds could not be used because the appropriation was not made for this purpose (assuming, of course, that the agency has not received an appropriation for Thanksgiving turkeys) and because giving turkeys to lawyers is not reasonably

necessary to carry out the mission at least of any agency that now exists. Most cases, however, are not quite this obvious or simple.

The cases generally involve the application of the necessary expense doctrine. In making the analysis, it makes no difference whether the "gift items" are given to federal employees or to others. In many of the cases in which GAO has found funds unavailable, there was a certain logic to the agency's justification, and the amount of the expenditure usually was small. The problem is that, were the justification put forward by the agency deemed sufficient, there would be no stopping point. If a free ashtray might generate positive feelings about an agency or program or enhance motivation, so would a new car or an infusion of cash into the bank account. The rule prohibiting the use of appropriated funds for personal gifts reflects the clear potential for abuse. Because a necessary expense analysis is, of course, case specific, it is impossible to draw a line identifying those "gift items" that are acceptable and those that are not. That certainly is evident from the discussion that follows.

It is important that anyone confronting a "gift" issue scrutinize the case law carefully to appreciate distinctions that may not be apparent at first read. For example, a certifying officer for the Small Business Administration (SBA) asked GAO for a decision on an expenditure for decorative ashtrays that were distributed to federal employee participants of a conference sponsored by that agency. By passing out ashtrays, the agency intended that they would generate conversation concerning the conference and thereby further the SBA's objectives by serving as a reminder of the purposes of the conference. The decision held that the justification given by the agency was not sufficient because the recipients of the ashtrays were federal officials who were already charged by law to cooperate with the objectives of the SBA. Thus, there was no necessity that ashtrays be given away. The ashtrays were properly designated as personal gifts. 53 Comp. Gen. 770 (1974).

Contrast the SBA decision, however, with a 1993 Veterans Affairs decision. GAO approved the distribution of imprinted book matches and imprinted jar grip openers by the Department of Veterans

Affairs (VA) at the Oklahoma State Fair. The VA distributed these to provide veterans with a number to call to obtain information. VA's appropriation explicitly authorized it to create exhibits and other material to accomplish its mission. This case stated the general rule regarding the use of appropriated funds to purchase gifts:

> "Under the 'necessary expense rule,' an agency may not purchase items in the nature of gifts or souvenirs unless there is a direct link between the items and the purpose of the appropriation charged. Stated differently, in order to justify purchasing novelty items or personal gifts with appropriated funds, an agency must demonstrate that the items will directly further its mission."

Applying this rule to the VA's matches and jar openers, GAO concluded that it was "entirely appropriate for the [VA] to attempt to attract the attention of those attending the event," and that the means chosen were "appropriate for the objective to be accomplished." B-247563.2, May 12, 1993.

In this section, we provide a short discussion of decisions in which we concluded that the item at issue was a gift. We follow that with a discussion of decisions in which we found that items ordinarily considered to be gifts were connected to carrying out the agency's mission. The discussion, of course, does not identify all of our gift decisions and the discussion does not substitute for a full analysis of these decisions. We encourage the reader to use the discussion as a tool for honing his or her research.

We determined that specially-made key chains, which were distributed to educators who attended seminars sponsored by the Forest Service, were personal gifts despite the Department of Agriculture's claim that their distribution would generate future responses from participants. 54 Comp. Gen. 976 (1975). That decision stated:

> "The appropriation . . . proposed to be charged with payment for the items in question is available for '. . . expenses necessary for forest protection and utilization . . .' Since the appropriation is not specifically available for giving key chains to individuals, in order to qualify as a legitimate expenditure it must be demonstrated that the acquisition and distribution of such items constituted a necessary expense of the Forest Service."

The decision concluded that the key chains were not necessary to implement the appropriation and were, therefore, improper expenditures.

The following cases are additional illustrations of expenditures which were found to be in the nature of personal gifts and therefore improper:

- T-shirts stamped with Combined Federal Campaign logo to be given to employees contributing a certain amount. 70 Comp. Gen. 248 (1991).

- Pens, scissors, and shoe laces purchased by the then Veterans Administration (VA) to be given to potential employees for recruiting purposes, which were nothing more than "favorable reminders of VA" and did not facilitate VA's acquisition of information necessary to its recruiting efforts. B-247563.3, Apr. 5, 1996.

- Baseball caps purchased by the Department of Energy to be given to nonemployees for personnel recruitment purposes. B-260260, Dec. 28, 1995.

- Gift certificates to local restaurants and silk plants distributed by the VA in celebration of Women's Equality Week, where there was no evidence of how these items advanced the agency's celebration. *Id.*

- Winter caps purchased by National Oceanographic and Atmospheric Administration to be given to volunteer participants in weather observation program to create "*esprit de corps*" and enhance motivation. B-201488, Feb. 25, 1981.

- Photographs taken at the dedication of the Klondike Gold Rush Visitor Center to be sent by the National Park Service as "mementos" to persons attending the ceremony. B-195896, Oct. 22, 1979.

- Jackets and sweaters as holiday gifts to corpsmen at a Job Corps Center with the intent of increasing morale and enhancing program support. B-195247, Aug. 29, 1979.

- Novelty plastic garbage cans containing candy in the shape of solid waste, which were distributed by the Environmental Protection Agency to attendees at an exposition. 57 Comp. Gen. 385 (1978).

- "Sun Day" buttons procured by the General Services Administration (GSA) and given out to members of the public to show GSA's support of certain energy policies. B-192423, Aug. 21, 1978.

- Agricultural products developed in Department of Agriculture research programs (gift boxes of convenience foods, leather products, paperweights of flowers imbedded in plastic) to be given to foreign visitors and other official dignitaries. B-151668, June 30, 1970.

- Cuff links and bracelets to be given to foreign visitors by the Commerce Department to promote tourism to the United States. B-151668, Dec. 5, 1963; B-151668, June 28, 1963 (same case).

The following is a discussion of expenditures that, although they resemble personal gifts, GAO agreed with the agencies' justifications that they advanced statutory responsibilities. For example, the purchase and distribution of pieces of lava rocks to visitors of the Capulin Mountain National Monument was a

necessary and proper use of the Department of the Interior's appropriated funds. The appropriation in question was for "expenses necessary for the management, operation, and maintenance of areas and facilities administered by the National Park Service . . . ." The distribution of the rocks furthered the objectives of the appropriation because it was effective in preserving the Monument by discouraging visitors from removing lava rock elsewhere in the Monument. Thus, the rocks were not considered to be personal gifts. B-193769, Jan. 24, 1979.

- Currency readers for blind and visually impaired individuals as part of the Bureau of Engraving and Printing's compliance with a federal district court order to provide such individuals with meaningful access to U.S. currency. GAO concluded that BEP's proposed approach was consistent with BEP's statutory mission, as clarified by the court, and was thus a necessary expense of its appropriation.

- Items containing images of protected waterfowl as part of the U.S. Fish and Wildlife Service's ongoing conservation strategy under the Endangered Species Act. B-318386, Aug. 12, 2009. The population of two threatened waterfowl species had been declining in Alaska for a number of years as a result of hunting, partially due to the hunters' inability to distinguish the protected species from those related waterfowl that are legal to hunt, notwithstanding numerous FWS education efforts. Having had no impact on mortality rates in past years, FWS proposed to undertake an aggressive education strategy that would include purchasing caps and other items that contain images of the protected waterfowl and simple conservation messages. FWS would then distribute these items at public outreach meetings where agency staff would speak about waterfowl conservation.

- $25 gift cards as an incentive to encourage 220 individuals to complete and return a survey regarding a statutorily required program. B-310981, Jan. 25, 2008. *But see* B-323122, Aug. 24, 2012 (Consumer Product Safety Commission may not use its appropriation to distribute $5 gift cards to individuals who subscribe to a product safety website. GAO found that, while

the Web site itself may further the Commission's mission, the Commission failed to establish how gift card distribution was essential to achieve the Commission's statutory responsibility to increase the flow of information to hard-to-reach populations.).

- Medals to be worn by uniformed employees of the Border Patrol to commemorate the Border Patrol's 75th anniversary. B-280440, Feb. 26, 1999. GAO noted that the medals would be part of the agents' uniform and observed that "[t]he medals convey as well as serve an institutional purpose—*i.e.*, reminding the public and agency staff of the Border Patrol's . . . history and mission and promoting the stability and longevity of the agency."

- "No Red Tape" buttons for employees to wear at work to promote institutional goals. B-257488, Nov. 6, 1995. GAO noted that the buttons had "no intrinsic value" to the recipients and served solely to assist the achievement of agency objectives.

- Buttons and magnets procured by the Environmental Protection Agency and inscribed with messages related to indoor air quality. 72 Comp. Gen. 73 (1992). GAO specifically found that the buttons and magnets, "unlike a container of candy, a key chain, or an ice scraper," had "no real use other than to convey a message." 72 Comp. Gen. at 74. Also key was the "direct link between the items and an authorized agency function," which involved conveying a message to increase public awareness of indoor air quality. *Id.*

- Complimentary specimens of commemorative coins and medals to U.S. Mint customers whose orders have been mishandled. 68 Comp. Gen. 583 (1989). GAO noted that customers who do not receive what they paid for may be disinclined to place further orders. Thus, the goodwill gesture of giving complimentary copies to these customers would directly contribute to the success of the Mint's commemorative sales program.

- Framed recruiting posters, procured by the Army, as “prizes” in drawings at national conventions of student organizations. B-230062, Dec. 22, 1988. The students had to fill out cards to enter the drawings, and the cards would provide leads for potential recruits.

This section discusses gift *giving*. For discussion on whether an agency may *receive and accept* a gift, see section E.3. in Chapter 6, *Availability of Appropriations: Amount*.

k. Health care and health-related items

The Comptroller General’s case law on health care (that is, services) and health-related items (that is, personal property) for federal employees dates back over ninety years. *See*, *e.g.*, 3 Comp. Gen. 433 (1924). These decisions and opinions establish that health care and health-related items are personal expenses that employees are generally expected to bear in the absence of statutory authority providing otherwise. Over the past several decades, Congress has indeed enacted many comprehensive statutes concerning health care and health-related items for federal employees. Some of these statutes and cases pertain to health care and health-related items for ailments that arose outside of the federal workplace. Others concern items or services that may protect employees from hazards they encounter within the workplace. These statutes provide that the federal government may or even must purchase some services or items under certain circumstances.

Therefore, when determining whether appropriations are available for health care or health-related items for federal employees, one must consider a web of statutes and cases. This section will first discuss two statutes that are relevant in a large number of cases: the Rehabilitation Act of 1973, which establishes a federal policy in support of nondiscriminatory employment of individuals with a disability, and 5 U.S.C. § 7901, under which agencies may establish employee programs related to health. Also relevant to this discussion is the Occupational Safety and Health Act of 1970 (OSHA), which authorizes the purchase of many items of protective

clothing. We discuss OSHA in section C.4.b above, which also discusses other authorities under which agencies may purchase protective apparel for employees.

Next we will discuss a principle that has emerged in Comptroller General case law, which is that it is the government's responsibility to provide a safe, sanitary, and appropriately-equipped workplace for its employees.

When evaluating the permissibility of a particular health care or health-related item expense, first consider the applicability of one of these statutes or principles. If the expense does not pass muster under any of these criteria, the last rule to apply is the longstanding principle of the necessary expense rule, as refined for personal expenses, which is that appropriations are available if the expense advances the purpose of the appropriation and if it primarily benefits the government, despite incidental benefit to the employee.

(1) The Rehabilitation Act of 1973

The Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701 *et seq.*, establishes a federal policy in support of nondiscriminatory employment of individuals with a disability. Consistent with that policy, the federal government, its contractors, and federally funded entities are prohibited from discriminating against employees who have physical or mental impairments that substantially limit one or more major life activities but who can perform the essential functions of the position they hold (or apply for), with or without reasonable accommodation. 29 U.S.C. § 791; 29 C.F.R. §§ 1614.203, pt. 1630. The Act requires covered federal agencies to assume an affirmative leadership role in promoting the employment of qualified disabled individuals. 29 U.S.C. § 791(b); *see also* 29 U.S.C. § 701(b)(2).

Although the Americans with Disabilities Act of 1990[105] does not apply to most federal employers,[106] the ADA's standards are used to determine whether agencies are in compliance with the Rehabilitation Act's requirements for employment of qualified individuals with disabilities. 29 U.S.C. § 791(f).[107] Under Equal Employment Opportunity regulations, federal agencies are required to make "reasonable accommodations" for the known physical or mental limitations of qualified employees with disabilities, unless the accommodation(s) would impose an undue hardship on the agency's program. 29 C.F.R. §§ 1630.9(a), 1614.203(b). *See* B-291208, Apr. 9, 2003; B-243300, Sept. 17, 1991.

While GAO has no jurisdiction over substantive claims brought against federal agencies under the Rehabilitation Act, we have responded to agency inquiries concerning the propriety of using appropriated funds for expenditures or informal settlement awards under the Act. Questions occasionally arise concerning whether an agency's provision of a proposed, or requested, accommodation complies with federal appropriations principles (*see, e.g.,* B-240271, Oct. 15, 1990); whether an expense claimed by an employee is reimbursable or must be borne by the employee (*see, e.g.,* 68 Comp. Gen. 242 (1989)); or whether an item or service may appropriately be provided under the Rehabilitation Act as a reasonable accommodation, even though not initially viewed as such (*see, e.g.,* B-291208, Apr. 9, 2003). We discuss these three decisions, and others, below.

In addressing these questions, we recognize that agencies may expend appropriated funds to accomplish the purposes of the

[105] Pub. L. No. 101-336, title I, § 101, 104 Stat. 330 (July 26, 1990), codified at 42 U.S.C. §§ 12101 *et seq*.

[106] 42 U.S.C. § 12111(5)(B)(i); 29 C.F.R. § 1630.2(e)(2)(i). Some legislative branch entities are covered under the ADA. 42 U.S.C. § 12209.

[107] Congress enacted the Rehabilitation Act in 1973. It modeled the now more familiar Americans With Disabilities Act on the Rehabilitation Act, adopting the same definition of "disability" and its interpretation by courts. 42 U.S.C. § 12201(a). *See Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 193–94 (2002).

Rehabilitation Act when acting under the Act's authority and the regulatory standards that govern its application. B-240271, Oct. 15, 1990. An expenditure that might be viewed as personal in nature but for the Rehabilitation Act is a proper use of an agency's appropriation when incurred in satisfaction of the Act's requirements.

Thus, in B-240271, GAO advised that the purchase of a motorized wheelchair for a quadriplegic employee who spent half of his time on official travel could be regarded as a "reasonable accommodation" under 29 C.F.R. § 1630.9, on condition that the wheelchair remain the property of the government.

The Rehabilitation Act has also been held applicable to parking expenses, in certain circumstances. As a general matter, parking incident to an employee's commute between his residence and permanent duty station is a personal expense (*see* section C.13.k). However, if severely disabled employees must pay parking costs higher than those paid by non-disabled employees working at the same facility,[108] the agency can subsidize the difference. 63 Comp. Gen. 270 (1984); *see also* B-291208, Apr. 9, 2003, discussed in detail in this chapter, section C.13.j.

The costs of structural changes to an employee's home were not considered a reasonable accommodation under the Rehabilitation Act. The employee had argued that the changes were required as a result of his assignment to a new permanent duty station. Even though the modifications were necessary to facilitate his mobility, they were made to his privately owned property, and therefore, did not constitute a "reasonable accommodation" under the statute or regulations. B-266286, Oct. 11, 1996.

In another case, the cost of local lodging was not considered a reasonable accommodation under the Rehabilitation Act. B-318229, Dec. 22, 2009. An employee who suffered from chronic

[108] For example, the disabled employee may have to park closer to the facility at higher rates.

lower back pain, a condition that made it very difficult for the employee to sit for long periods of time, had to travel to local work sites within the local travel area of the employee's official duty station. The employee asked for reimbursement for lodging near the work sites to minimize the time driving back and forth from the employee's home, where the employee teleworked, to the work sites. GAO pointed out that there is, however, a statutory limitation on local lodging, and that this travel is more akin to a commute, which is not covered by the Rehabilitation Act. GAO concluded that the agency's appropriations were not available to pay for local lodging as a reasonable accommodation under the Rehabilitation Act, and suggested that the agency consider other available accommodations that would not require the employee to drive and that would not require the agency to circumvent statutory lodging limitations. *Id.*

Finally, one decision involved the Rehabilitation Act but, unlike the other cases in this section, its particular concern was not federal employees. B-324588, June 7, 2013. A federal court had ruled that the Department of the Treasury violated section 504 of the Act, which concerns discrimination under government programs or activities that receive federal financial assistance. We discuss this decision further in section C.6.j above.

(2) Employee programs related to health: 5 U.S.C. § 7901

By virtue of legislation enacted in 1946 and now found at 5 U.S.C. § 7901, each agency is authorized to establish a health service program to promote and maintain the physical and mental fitness of employees under its jurisdiction. The statute expressly limits authorized health service programs to (1) treatment of on-the-job illness and dental conditions requiring emergency attention; (2) pre-employment and other examinations; (3) referral of employees to private physicians and dentists; and (4) preventive programs relating to health.

(a) Treatment of on-the-job illness and dental conditions

Many agencies now provide on-site health centers under the authority of section 7901 for their employees. These centers offer a variety of services, including immunizations, health screenings, and emergency medical care. The Federal Occupational Health division of the U.S. Department of Health and Human Services serves more than 360 federal agencies[109] via Economy Act agreements, for instance.[110]

Medical treatment not within the scope of 5 U.S.C. § 7901 remains a personal expense of the employee. Thus, the cost of an ambulance called by an agency medical officer to take an employee to a hospital could not be paid from appropriated funds. B-160272, Nov. 14, 1966.

(b) Pre-employment and other examinations

Prior to the enactment of section 7901, a pre-employment physical examination, the purpose of which was to determine an applicant's eligibility for a federal job, generally was the applicant's responsibility and could not be charged to appropriated funds. 22 Comp. Gen. 243 (1942). However, in certain situations, such examinations passed muster under the necessary expense rule and could be paid from appropriations. Thus, in 22 Comp. Gen. 32 (1942), GAO told the Army that it could use its appropriations to provide periodic physical examinations to detect arsenic poisoning in civilian workers in a chemical warfare laboratory. The decision noted that instances of arsenic poisoning "might have a depressing

[109] Federal Occupational Health, *About FOH*, *available at* foh.psc.gov/about.html (last visited Jan. 10, 2017).

[110] Under the Economy Act, Federal Occupational Health recovers the actual costs of providing health services to customer agencies. Federal Occupational Health, *Doing Business with FOH and Interagency Agreements (IAAS)*, *available at* foh.psc.gov/about/agreements.html (last visited Jan. 10, 2017); *see* 31 U.S.C. § 1535 (authorizing interagency transactions).

effect on the morale of fellow workers"[111] and might make it more difficult to find qualified people to do the work.[112] In another case, a Department of Labor employee joined the Army during World War II. He received a medical discharge, and thereafter applied for reinstatement to his former Labor Department position. By law, Congress authorized restoration of an employee upon return from active military duty in his former position, contingent upon the employee presented a satisfactory physical examination. GAO advised that the agency could pay for a physical examination which it required prior to reinstatement. 23 Comp. Gen. 746 (1944).

In 1946, Congress enacted 5 U.S.C. § 7901. Now, agencies have specific authority to include medical examinations, including pre-employment examinations, without charge to applicants, in the health programs they are authorized to establish. 30 Comp. Gen. 493 (1951). While the statute authorizes establishment of government programs, it does not authorize the reimbursement of privately incurred expenses. Thus, an applicant who declines to use an available government doctor for a pre-employment examination and instead chooses to have it performed by a private doctor may not be reimbursed. 31 Comp. Gen. 465 (1952).

In situations not covered by the statute, the "primary benefit of the government" test continues to apply. Thus, based on the earlier precedents, the cost of medical examinations by private physicians was approved in the following cases:

- 30 Comp. Gen. 387 (1951) (physical examinations of Department of Agriculture employees engaged in testing repellents and insecticides for use by the armed forces; no government medical facilities available).

[111] The morale of the poisoned workers would not be particularly enhanced either.

[112] While this may sound heartless, the expenditure could be justified only if it was determined to be necessary to carry out the objects of the appropriation, and the appropriation in this instance was for chemical warfare service, not for employee health.

- 41 Comp. Gen. 531 (1962) (annual physical examinations for Saint Lawrence Seaway Development Corporation employees engaged in strenuous physical work, often under severe weather conditions; no public health facilities in area).

The examinations in both of the above cases could have been included in an authorized health service program, discussed below. As noted, however, facilities were not available in either case. Thus, since the examinations were for the primary benefit of the government, appropriated funds were available to have them performed by private physicians. *See also* 73 Comp. Gen. 219 (1994) (National Transportation Safety Board could reimburse air safety investigators for the costs of physical exams required to obtain a Federal Aviation Administration (FAA) medical certificate if the agency's public health facility has no FAA-certified physician); B-286137, Feb. 21, 2001 (U.S. Geological Survey could pay for eye examinations for employees whose work requires visual acuity, but may not pay for their prescription eyeglasses, which are personal and useful to employees who need them inside, as well as outside, the workplace).

In 65 Comp. Gen. 677 (1986), the Navy could pay for a medical examination required for a private individual joining a government research exercise under invitational travel orders. Although government medical facilities were presumably available, there was no need to note this fact in the decision. Since the individual was neither a government employee nor an applicant for a government job, she could not be required to use the government facility and, since the Navy wanted her participation, it could not very well expect her to bear the expense.

Conversely, in B-253159, Nov. 22, 1993, the costs of medical examinations performed by private physicians for two Centers for Disease Control and Prevention employees and their dependents were not reimbursable because the examinations were neither required by the agency nor for the benefit of the government. The two employees and their dependents obtained the examinations in preparation for their relocation to assignments outside the United States. *See also A. Carter, Jr.,* GSBCA No. 15435, 01-1 B.C.A.

¶ 31,404 (Apr. 9, 2001) (Department of Defense should reimburse its civilian employee for dependents' immunizations and may reimburse him for dependents' physical examinations, which were both required to obtain return visas to the United States, if the Navy determines that the examinations were primarily for the benefit of the government).

(c) Referral of employees to private physicians and dentists

Agencies may provide some counseling services to employees and refer them to private treatment providers. For example, in 57 Comp. Gen. 62 (1977), the Comptroller General held that the Environmental Protection Agency was authorized by 5 U.S.C. § 7901 to procure diagnostic and preventive psychological counseling services for its employees. The service could encompass problem identification, referral for treatment or rehabilitation to an appropriate service or resource, and follow-up to help an employee readjust to the job during and after treatment, but could not include the actual treatment and rehabilitation. Actual treatment and rehabilitation remain the employee's responsibility.

In B-198804, Dec. 31, 1980, GAO refused to expand the holding in 57 Comp. Gen. 62 to permit an agency to pay the expenses of alcoholism treatment and rehabilitation for one of its employees. Treatment and rehabilitation, as stressed in 57 Comp. Gen. 62, are the employee's responsibility. It made no difference that the employee had been erroneously advised that the expenses would be covered by her health insurance and had already incurred the expenses, since the government cannot be bound by the unauthorized acts or representations of its agents.

In certain circumstances, agencies may be able to provide referral services to nongovernment employees as well. In those cases, agencies would not be relying on 5 U.S.C. § 7901, which is statutorily limited to federal employees. Instead, agencies would need to determine that the services are a "necessary expense" of the appropriation. For instance, in B-270446, Feb. 11, 1997, the provision of psychological assessment and referral services for

Customs Service employees' family members was determined to be for the primary benefit of the government. The Service's Employee Assistance Program may render these services for family members adversely affected by work-related activities of, or traumatic incidents involving death or serious injury to, an employee in the line of duty carrying out the agency's law enforcement activities. *Cf*. 71 Comp. Gen. 527 (1992) (a federal agency may not use appropriated funds to provide space for eldercare facilities for the adult relatives of agency employees, but may provide employee referral and counseling programs).

(d) Preventive programs relating to health

OPM issues guidance and regulations on health preventive programs under 5 U.S.C. § 7901 in the federal workplace. OPM states that "worksite health and wellness interventions include, but are not limited to, health education, nutrition services, lactation support, physical activity promotion, screenings, vaccinations, traditional occupational health and safety, disease management, and linkages to related employee services." OPM, *Health & Wellness*, *available at* www.opm.gov/policy-data-oversight/worklife/health-wellness/#url=Overview (last visited Nov. 9, 2016).

The Comptroller General has issued relevant decisions on health preventive programs. For example, as discussed above, agencies may provide counseling services for work-related problems or for personal problems that affect employees' work performance and morale. 57 Comp. Gen. 62 (1977). The Comptroller General has also advised that an agency could, upon determining that it will be in the government's interest to do so, provide immunization against specific diseases, like the flu, without charge to employees. 47 Comp. Gen. 54 (1967).

Federal agencies are authorized under 5 U.S.C. § 7901 to establish smoking cessation programs for their employees, and may use their operating appropriations to pay the costs. 68 Comp. Gen. 222 (1989). In light of the body of evidence of the health hazards of smoking, the decision reasoned, programs to help employees quit

smoking are clearly "preventive programs relating to health" for purposes of the statute.[113]

Physical fitness programs may qualify as preventive health programs under 5 U.S.C. § 7901. In addition, it may be possible to justify some programs under the necessary expense concept without the need to invoke the statute. For example, in 63 Comp. Gen. 296 (1984), GAO applied the necessary expense doctrine to conclude that Bureau of Reclamation funds were available for physical exercise equipment to be used in a mandatory physical fitness program for firefighters.

In 64 Comp. Gen. 835 (1985), GAO considered the scope of a permissible fitness program under section 7901, concluding that a program could include comprehensive physical fitness evaluations and laboratory blood tests. Based on the statute alone, it could also include physical exercise. However, regulations then in effect precluded use of appropriated funds for physical exercise as part of a health service program. The decision further noted, as 63 Comp. Gen. 296 had held, that physical exercise costs incident to a mandatory program necessitated by the demands of designated positions could be paid as a necessary expense without the need to rely on 5 U.S.C. § 7901. *See also* B-216852, Mar. 6, 1985 (discussing GAO's own authority to establish a fitness program); B-216852, Dec. 17, 1984.

Subsequent to 64 Comp. Gen. 835, the Office of Personnel Management revised its regulations to include physical fitness programs and facilities as permissible preventive health services. Based on the revised regulations, an agency may now use appropriated funds to provide access to a private fitness center's exercise facilities, although both GAO and OPM caution that expenditures of this type should be carefully monitored and should

[113] The 1989 decision modified 64 Comp. Gen. 789 (1985), which had found smoking cessation programs unauthorized. The 1985 case had correctly held that such programs were not a form of "medical care," but had failed to properly evaluate them as preventive programs.

be undertaken only where all other resources have been considered and rejected. 70 Comp. Gen. 190 (1991). However, appropriated funds are not authorized for payment of: (1) membership fees to a contracted private fitness center in advance of employees' use of facilities (B-288013, Dec. 11, 2001); or (2) registration fees for employee members of an agency's on-site fitness center to participate in local competitive fitness or sports activities. Participation in such events is generally a personal activity, not an essential part of a government-sponsored preventive health program. 73 Comp. Gen. 169 (1994).

(3) Federal Employees Health Benefits Act of 1959

The cost of employee health insurance is a personal expense and, therefore, must be borne by the employee unless there is statutory authority permitting the government to pay. In the Federal Employees Health Benefits Act of 1959, Congress established a health benefits program to provide health insurance for federal employees and other beneficiaries. The government's contribution is paid from appropriations available to the employing agency. 5 U.S.C. § 8906(f). Appropriations are not available, however, to reimburse an employee for the cost of purchasing health insurance outside of the authorized health benefits program. B-323449, Aug. 14, 2012.

(4) The government's provision of a safe, sanitary workplace

Appropriated funds are available to provide certain basic, fundamental needs of the federal work environment and to maintain the safety and health of federal premises. In 2003, GAO said:

> "Without question, an agency may use appropriated funds to satisfy basic fundamental needs such as potable water, clean air, and sufficient light. It would be unreasonable to suggest that appropriations are not available for

> maintaining certain facilities such as restrooms. Similarly, we think that it would be irresponsible to conclude that appropriations are not available to exercise the degree of supervisory care to maintain safe premises that our society expects of the owner/occupants of those premises, particularly in the face of exigent circumstances like those we confront today. For that reason, we would not object to an agency, either as an owner of the work premises or as an occupant and supervisor of the premises, using its appropriations to supply appropriate equipment and services to maintain the safety and healthiness of those premises in response to legitimately anticipated dangers and exigencies."

B-301152, May 28, 2003. In this case, GAO concluded that its own appropriation was available to purchase protective hoods for use in a terrorist attack involving explosives or chemical or biological weapons. GAO could purchase the hoods not only for employees but also to protect anyone who may be in the building when the hoods are needed:

> "Consistent with societal expectations rooted in common law, and as reflected in our decisions, the cases and statutes discussed as well as the federal government's response to recent and Cold War threats, when viewed together, evidence the government's willingness to provide not only for the safety and health of government employees and their work environment, but also for maintaining the safety and health of the premises. In considering

> the availability of an agency's appropriations for operational expenses, it is important to factor into our consideration notice of what our society expects of its employers."

Id.

One basic example is drinking water. Appropriations are available to federal agencies so they may provide their employees with safe, clean drinking water. 21 Comp. Dec. 739 (1915). Once the government has met its responsibility to provide safe clean water, any additional expense to satisfy employee taste or preference is personal to the employee. In particular, appropriations generally are not available to pay for bottled water where the public water supply is safe for drinking purposes. 17 Comp. Gen. 698 (1938); 22 Comp. Dec. 31 (1915). However, an agency may purchase bottled water where a building's water supply is unpotable. For example, a problem with the water supply system in a building caused lead content to exceed the Environmental Protection Agency's "maximum contaminant level" and justified the purchase of bottled water for employees until the problems with the system could be resolved. B-247871, Apr. 10, 1992. *See also* B-324781, Dec. 17, 2013 (an agency that had numerous problems with its potable water supply as the result of water main breaks, a building explosion, and repeated instances of contaminated water may use it appropriations to purchase bottled water for use in responding to these legitimately anticipated dangers and exigencies). In contrast, GAO denied relief to a certifying officer who improperly approved payments for bottled water for employees where there was no evidence that drinking water in the building posed a health risk. B-303920, Mar. 21, 2006. For remote work sites that have no access to potable water, it is within the agency's discretion to decide how best to provide its employees with access to potable water, whether by providing coolers or jugs for transporting water or by providing bottled water. B-310502, Feb. 4, 2008. *See also* B-318588, Sept. 29, 2009.

As the bottled water case law demonstrates, compelling evidence of a threat or danger to health, safety, or security of employees and others present on government premises is determinative, not the personal preferences of agency officials and employees. In another case, an employee union argued that an agency should provide disposable eating ware to employees, and an arbitrator asserted that the provision of such items would help prevent employee illness. B-326021, Dec. 23, 2014. However, no one presented any compelling evidence that the disposable cutlery was an effective means to prevent the spread of disease. To the contrary: a document from the Department of Health and Human Services advised that "[s]eparation of eating utensils for use by a patient with influenza is not necessary, as long as they are washed with warm water and soap." *Id*. Furthermore, "employees could easily bring their own disposable cups, plates, and cutlery when they bring their own meals to work." *Id*. Thus, the provision of such cutlery was an impermissible personal expense that would primarily benefit employees, rather than an expense incurred for employee safety that the government is expected to bear. B-326021, Dec. 23, 2014.

(5) Some other health-related decisions

As we have noted in various discussions above, if a health-related expense is not within the scope of any particular statute, we apply the necessary expense rule, and the test is whether the use of appropriations for a given expense primarily benefits the government, notwithstanding the collateral benefit to the individual. 22 Comp. Gen. 32 (1942); *see also* 57 Comp. Gen. 62 (1977); 53 Comp. Gen. 230 (1973).

Cases applying the necessary expense rule to health-related expenditures include:

- Appropriated funds could not be used to purchase regular eyeglasses for employees who work at video display terminals. 63 Comp. Gen. 278 (1984). *See also* B-286137, Feb. 21, 2001 (U.S. Geological Survey may not purchase ordinary prescription eyeglasses for operators of the National Aerial Photography Program and the Optical Science Laboratory). In contrast, the

U.S. Geological Survey could permissibly purchase special filter spectacles for employees working with instruments used in map making, as the spectacles would improve employee productivity, were not useful outside of the workplace, and employees could not reasonably be expected to furnish them. 45 Comp. Gen. 215 (1965).

- Agency may purchase drugs and their administration by private doctor for employees exposed to spinal meningitis in line of duty; otherwise, agency would have risked having to quarantine the employees and close the facility. 23 Comp. Gen. 888 (1944).

- Weather Bureau may purchase X-rays for personnel being assigned to Alaska, to ensure the personnel would not spread tuberculosis to the local residents. B-108693, Apr. 8, 1952.

- Agency may rent an amplifying device to be attached to an official telephone for use by an employee with a hearing impairment. The device was seen as a means of obtaining the best results from available personnel. 23 Comp. Gen. 831 (1944).[114]

- Agency could purchase a motorized wheelchair for use by an employee. Normally a wheelchair is the employee's personal expense. In this case, however, the employee had his own non-powered wheelchair and needed a motorized wheelchair only because the agency had not complied with the Architectural Barriers Act of 1968. The wheelchair would, of course, become the property of the government and was approved only as a temporary expedient pending compliance with the statute. 56 Comp. Gen. 398 (1977).

[114] This decision was issued prior to the enactment of the Rehabilitation Act of 1973 , which requires federal agencies to provide reasonable accommodations to an employee with a disability, unless the agency can demonstrate that the accommodation would impose an undue hardship. 29 U.S.C. § 791; 29 C.F.R. § 1630.9(a).

In a different type of analysis, GAO concluded that an agency could use appropriations to purchase a heavy-duty chair for an employee who needed extra physical support due to his stature; the employee had broken 15 regular chairs. While the particular type of chair in question was necessitated by the employee's physical condition, it is nevertheless the case that an office chair is not "personal equipment" but is an item the government is normally expected to provide for its employees. The purchase was therefore authorized. B-215640, Jan. 14, 1985.

I. Miscellaneous items incident to the federal workplace

The following is a list of miscellaneous issues that GAO decisions have discussed in relation to the federal workplace.

- **Community support activities.** GAO has viewed certain civic, charitable, and similar community support activities involving limited use of agency resources and employee time as permissible expenses. This authority, however, is limited and does not extend to certain activities. The following is a list of cases discussing community support activities:

  - Agencies may spend their appropriations, within reason, to cooperate with government-sanctioned charitable fund-raising campaigns, including such things as permitting solicitation during working hours, preparing instructions, and distributing materials. 67 Comp. Gen. 254 (1988) (Combined Federal Campaign). *See also* B-155667, Jan. 21, 1965; B-154456, Aug. 11, 1964; B-119740, July 29, 1954.

  - Some use of employee time and agency equipment could occur to assist with adopt-a-school programs. 71 Comp. Gen. 469 (1992); B-277678, Jan. 4, 1999.

  - Appropriations are not available to give T-shirts to Combined Federal Campaign contributors. 70 Comp. Gen. 248 (1991).

- An agency may not use its appropriations to pay for food at a Combined Federal Campaign (CFC) event unless the agency can present compelling empirical evidence demonstrating that food would likely generate or increase contributions to the CFC. B-325023, July 11, 2014.

- **United States Savings Bond campaign.** An agency may use its general operating appropriations to fund limited promotional material in support of the United States savings bond campaign. B-225006, June 1, 1987.

- **Support of federal credit unions.** Support that agencies are authorized by law to provide to federal credit unions may, if administratively determined to be necessary, include automatic teller machines. 66 Comp. Gen. 356 (1987). The justification was adequate in that case because the facility in question operated on three shifts, seven days a week and the credit union could not remain open to accommodate workers on all shifts.

- **Credit bureau reports.** The Salaries and Expenses appropriation of the Internal Revenue Service (IRS) could be used to procure credit bureau reports if the reports were administratively determined to be necessary in connection with investigating applicants for employment with the IRS. B-117975, Dec. 29, 1953.

- **Credit monitoring services.** Customs and Border Protection's (CBP) Salaries and Expenses appropriation was not available to pay for credit monitoring services for its employees in the New Orleans area who, as a result of Hurricane Katrina, were victims of identity theft. Neither government action nor inaction compromised the employees' identities, and in this case the CBP employees individually, not the government, would be the primary beneficiaries of the proposed credit monitoring, which was considered part of the employees' overall management of their personal finances. B-309604, Oct. 10, 2007. In contrast, in a later case, a data breach caused by government action or inaction compromised employees' or private citizens' identities.

The Nuclear Regulatory Commission (NRC) asked whether, in the event of such a breach, payment for credit monitoring services would be permissible as a cost-effective means of addressing the adverse consequences resulting from the government's mistaken disclosure of an employee's or private citizen's personal information. Recognizing that Congress has required agencies to address breaches and mitigate risks when government action or inaction mistakenly compromises personal information, GAO concluded that the purchase of credit monitoring services for affected individuals would constitute a means of mitigating the risks as long as the agency determined that it was necessary under the particular circumstances. B-310865, Apr. 14, 2008.

- **Employee counseling and referral programs related to elder care.** In 1992, the IRS was authorized to undertake employee counseling and referral programs related to eldercare. The expenditure was justified under 5 U.S.C. § 7901, which authorized "preventive programs related to health." 71 Comp. Gen. 527 (1992). Similar mental health referrals are discussed at length in section C.6.k above. IRS was not authorized to provide the actual elder care, as discussed in section C.4.c above.

- **Outplacement assistance.** Outplacement assistance to employees may be regarded as a legitimate matter of agency personnel administration if the expenditures are found to benefit the agency and are reasonable in amount. 68 Comp. Gen. 127 (1988); B-272040, Oct. 29, 1997. The Government Employees Training Act authorizes training in preparation for placement in another federal agency under conditions specified in the statute. 5 U.S.C. § 4103(b). Similarly, employee retirement education and retirement counseling, including individual financial planning for retirement, fall within the legitimate range of an agency's discretion to administer its personnel system and therefore are legitimate agency expenses. B-301721, Jan. 16, 2004.

- **Protection of government officials under threat.** Otherwise unrestricted operating appropriations are available to protect a government official who has been threatened or is otherwise in danger, if the agency determines that the risk impairs the official's ability to carry out his or her duties and hence adversely affects the efficient functioning of the agency. For example, the U.S. Customs Service was authorized to use appropriated funds to purchase home and automobile security devices for agents where they were needed as a result of the agent's law enforcement activities. B-251710, July 7, 1993. *See also* 71 Comp. Gen. 4 (1991). Also, certain officials, specified in 18 U.S.C. § 3056(a), are entitled to Secret Service protection. 54 Comp. Gen. 624 (1975), *modified by* 55 Comp. Gen. 578 (1975).

- **Honorariums.** Payment of an honorarium to an invited guest speaker (other than a government employee) is permissible under a necessary expense rationale. *See* A-69906, Mar. 16, 1936 (payment of an honorarium by an agency of the District of Columbia government was found to be an allowable administrative expense). *See also* B-20517, Sept. 24, 1941.

- **Document notarization fees.** Fees for the notarization of documents are properly payable from appropriated funds where no government notary is available. B-33846, Apr. 27, 1943.

- **Reimbursement to the Civil Service Retirement Fund.** An agency's appropriations are not available to reimburse the Civil Service Retirement Fund for losses due to overpayments to a retired employee resulting from the agency's erroneous processing of information. 54 Comp. Gen. 205 (1974).

m. Office furnishings (decorative items)

An agency's appropriations are available without question to furnish the space it occupies with such necessary items as desks, filing cabinets, and other ordinary office equipment. Questions as to the availability of an appropriation occasionally arise when the item to be procured is decorative, rather than utilitarian.

The availability of appropriations for certain decorative items has long been recognized. The Comptroller of the Treasury advised the Secretary of the Treasury that "paintings suitable for the decoration of rooms" were within the meaning of the term "furniture." Therefore, an appropriation for the furnishing of public buildings was available to purchase cases and glass coverings for paintings of deceased judges. The paintings had been donated to the government for display in a courtroom. 7 Comp. Dec. 1 (1900).

The Comptroller followed this decision and held that Treasury appropriations were available to buy portraits as furniture for the Ellis Island immigration station if administratively determined "necessary for the public service." 9 Comp. Dec. 807 (1903).

Citing both of these decisions, the Comptroller General concluded that the appropriation for Salaries and Expenses of the Tax Court was available for portraits of the Chief Judges of the Tax Court, to be hung (the portraits, not the judges) in the main courtroom. B-178225, Apr. 11, 1973. Similarly, the Tax Court could purchase artwork and other decorative items for judges' individual offices. 64 Comp. Gen. 796 (1985).

Other decisions approving the use of appropriated funds for decorative items are B-143886, Sept. 14, 1960 (oil painting of agency head for "historical purposes" and public display); B-121909, Dec. 9, 1954 ("solid walnut desk mount attached to a name plate"); B-114692, May 13, 1953 (framing of Presidential Certificates of Appointment for display in the appointee's office).

Music can perform a similar function: making a workspace more pleasant and, therefore, more productive. In one case, an agency noted that pre-programmed "incentive music" (known more informally as "elevator music") can increase employee productivity by creating a pleasantly stimulating and efficient work atmosphere. Ultimately, the increased productivity can lead to savings to the government. Accordingly, GAO assented to the use of appropriations to pay for such music. 51 Comp. Gen. 797 (1972).

Purchase of decorative items for federal buildings is now covered in the Federal Property Management Regulations, 41 C.F.R. § 101.26.103-2. The regulations authorize expenditures for pictures, objects of art, plants, flowers (both artificial and real), and other similar items. However, such items may not be purchased solely for the personal convenience or to satisfy the personal desire of an official or employee. In addition, in recent years Congress has enacted temporary, but recurring, government-wide prohibitions on the use of appropriated funds to pay for the painting of portraits of specified federal officials. B-327671, Feb. 19, 2016.

The regulation was discussed and the rule restated in 60 Comp. Gen. 580 (1981). Decorative items may be purchased if the purchase is consistent with work-related objectives and the items to be purchased are not "personal convenience" items.[115] The determination of "necessity" is within the agency's discretion, subject to the regulations. The regulations apply equally to space leased by an agency in a privately owned building. *See also* 64 Comp. Gen. 796 (1985); 63 Comp. Gen. 110, 113 (1983).

As noted, generally, one type of permissible decorative item is flora. A restriction in a 1980 appropriation act prohibited the use of funds for plant and flower maintenance contracts. The Comptroller General construed this provision to apply only to the office space to which particular federal employees were actually assigned, since the provision's legislative history suggested that it was not intended to apply to outdoor plants or to plants in common areas that were not the assigned work space of any particular employee or group of employees. 59 Comp. Gen. 428 (1980).

[115] The decision also noted that the items must be for permanent rather than "seasonal" use. 60 Comp. Gen. at 582. The rule prohibiting use of appropriated funds for seasonal (e.g., holiday) decorations has since been modified. *See* 67 Comp. Gen. 87 (1987), discussed in section C. 4. f. (2) .

n. Photographs

Early decisions stated an absolute rule forbidding the use of appropriations for the cost of photographs of individual employees in the absence of express statutory authority. The rule was intended to prevent the use of public funds for the personal publicity of a particular individual. For example, an agency occasionally received requests from newspapers and other media outlets for photographs of an agency official who delivered speeches. These photographs were of a personal nature, so appropriations were not available to pay for them. 31 Comp. Gen. 452 (1952). In another case, an agency improperly disseminated to the press photographs of a new agency official upon his appointment. B-111336, Sept. 16, 1952.

Later decisions did not state the rule in absolute terms but instead stated that appropriations are not available for the photographs "in the absence of a definite indication as to the necessity for the expenditures in the accomplishment of some purpose for which the appropriation of funds was made." 47 Comp. Gen. 321 (1967). This is, of course, simply a restatement of the necessary expense rule. For example, the Equal Employment Opportunity Commission (EEOC) noted that newspapers tended to situate stories more prominently if accompanied by a photograph, and that greater publicity about EEOC's work helped it accomplish its statutory mission. It was, therefore, permissible for EEOC to distribute to the press photographs of an EEOC official when he delivered public speeches. [116] 47 Comp. Gen. 321; *see also* B-123613, June 1, 1955; B-114344, May 19, 1953; B-47547, Feb. 15, 1945. Similarly, distribution of photographs of a department store display was a proper means of carrying out a statutory function of encouraging public cooperation toward economic stabilization. B-113464, Jan. 29, 1953; *see also* B-175434, Apr. 11, 1972; B-113026, Jan. 19, 1953; B-15278, May 15, 1942.

[116] The decision further pointed out that the expense was chargeable to the fiscal year in which the photographs were taken rather than the year in which they were actually used.

Photographs for use on identification cards or badges are permissible when administratively determined necessary to protect government property or for security reasons. 23 Comp. Gen. 494 (1944); 20 Comp. Gen. 566 (1941); 20 Comp. Gen. 447 (1941); 2 Comp. Gen. 429 (1923). Also, while at one time, travel regulations did not provide for the reimbursement of passport photographs, 9 Comp. Gen. 311 (1930), the regulations were subsequently amended and passport photographs for official travel are now reimbursable under 41 C.F.R. § 301-12.1. *See* 52 Comp. Gen. 177 (1972).

Of course, the rules pertaining to gifts applied and still apply to photographs. For instance, a group photograph of interagency participants in a training symposium, sent free to participants, was impermissible. B-149493, Dec. 28, 1977. Similarly, the National Park Service could not permissibly take photographs at the dedication of the Klondike Gold Rush Visitor Center to be sent as "mementos" to persons attending the ceremony, as this would constitute an impermissible personal gift. B-195896, Oct. 22, 1979.

o. Postage

Agencies are required to reimburse the Postal Service for mail sent by or to them as penalty mail.[117] Reimbursement is to be made "out of any appropriations or funds available to them." 39 U.S.C. § 3206(a). This statute amounts to an exception to the general purpose statute, 31 U.S.C. § 1301(a), in that the expenditure may be charged to any appropriation available to the agency. Penalty mail costs do not have to be charged to the particular bureau or activity that generated the cost. 33 Comp. Gen. 206 (1953). By virtue of this statutory authority, the use of appropriations for one component of an agency to pay penalty mail costs of another component funded under a separate appropriation does not constitute an unauthorized transfer of appropriations. 33 Comp.

[117] Penalty mail means official mail, other than franked mail, which is authorized by law to be transmitted in the mail without prepayment of postage. 39 U.S.C. § 3201(1).

Gen. 216 (1953). The same principle applies to reimbursement for registry fees. 36 Comp. Gen. 239 (1956).

p. Rewards

This section discusses when appropriated funds may be used to offer and pay rewards. As a general proposition, an agency needs statutory authority to use its appropriated funds for this purpose. Exactly how explicit this statutory authority has to be depends somewhat on the nature of the information or services for which the reward is contemplated and its relationship to the authority of the paying agency. In cases where an agency does not have specific statutory authority, the agency must determine whether the reward is justified under a necessary expense analysis.

(1) Contractual basis

Where a reward is based on the "necessary expense" theory rather than on explicit statutory authority, generally there must be an offer of reward, of which both parties have knowledge, and acceptance of the offer (here, performance of the service). *See, e.g.,* 26 Comp. Gen. 605 (1947); 3 Comp. Gen. 734 (1924). *See also* 70 Comp. Gen. 720 (1991). The rationale is that "no person by his voluntary act can constitute himself a creditor of the Government." 20 Comp. Dec. 767, 769 (1914). The offer may be in the form of a "standing offer" promulgated by regulation. *See, e.g.,* B-131689, June 7, 1957 (Treasury Decision constituted the offer for an Internal Revenue Service reward); 28 C.F.R. pt. 7 (a "standing offer" by the Attorney General for rewards for the capture, or information leading to the capture, of escaped federal prisoners).

Consistent with contract theory in general, it is also possible for an offer to be implied from practice or course of conduct. For example, a reward was payable to an informer under the prohibition laws without a specific offer. 4 Comp. Gen. 255 (1924). The informer was a member of a "gang of whiskey thieves" and "[u]nder such conditions no specific agreement for compensation is generally made, but with a man of such character there is, and practically must be, to obtain the information, an understanding that there will

be compensation." *Id.* at 256. The course of conduct and standing offer concepts were combined in a case involving a reward for finding a lost Navy torpedo. A-23019, May 24, 1928. In view of the prevailing understanding in the area and past practice, the Navy's regulations were viewed as "implicitly" making a standing offer.

Similarly, where a reward is based on express statutory authority and the statute either is discretionary or authorizes the agency to "offer and pay" a reward, there must be an offer before the agency can make payment. 41 Comp. Gen. 410 (1961) (14 U.S.C. § 643); 20 Comp. Dec. 767 (1914) (apprehension of a deserter). On the other hand, if a statute provides for a reward as a matter of entitlement, the reasons for requiring an offer are less compelling; the terms of the statute and any implementing regulations will determine precisely how and when the "contract" comes into existence. *E.g., Merrick v. United States,* 846 F.2d 725 (Fed. Cir. 1988), discussed in section C.6.p(2)(a) below in connection with the Internal Revenue Service statute.

The decisions reach inconsistent conclusions concerning whether the claimant must have knowledge of the offer where a reward is based upon express statutory authority. Cases involving the apprehension of deserters, a subject that we discuss in more detail later in this section, have concluded that performance of the service gives rise to an obligation on the part of the government to pay the offered reward notwithstanding the claimant's lack of knowledge of the offer when he performed the service. 27 Comp. Dec. 47 (1920); 20 Comp. Dec. 767 (1914); B-41659, May 26, 1944. On the other hand, cases involving the finding of lost property have held that knowledge is required. Thus, a reward the Navy had offered for the discovery of a lost airplane was denied where the person discovering the airplane had no knowledge of the offer at the time he performed the service. 26 Comp. Gen. 605 (1947). This ruling was followed in a later case, in which the Coast Guard could not pay a reward under 14 U.S.C. § 643 to one who had no knowledge of the published offer. 41 Comp. Gen. 410 (1961). In that case, GAO acknowledged that there was a line of cases indicating that the rule of contract did not apply with respect to rewards offered pursuant to statute but stated that "such cases appear to represent

the minority view." *See also* A-35247, Apr. 1, 1931 (escaped prisoner). The latter group of decisions applying contract principles purports to be based on the "great weight of authority." 26 Comp. Gen. at 606.

Since reward payments for information furnished to the government are in the nature of compensation for services rendered rather than personal gratuities, the right to file a claim for the reward vests at the time the compensation is earned (*i.e.,* the services performed). Consequently, that right is not defeated where the informant dies prior to filing a claim or receiving the reward. For example, GAO approved the payment of a reward to the legal representative of an informant's estate for information furnished under the predecessor of 19 U.S.C. § 1619, even though the informant had not filed a claim prior to his death. 5 Comp. Gen. 665 (1926); *see also* 2 Comp. Dec. 514 (1896) (customs); B-131689, June 7, 1957 (internal revenue); B-129886, Dec. 28, 1956 (internal revenue).

(2) Rewards to informers

The majority of our case law regarding rewards discusses payments to informers. If information is "essential or necessary" to the effective administration and enforcement of the laws, a reward may be offered if it can be tied in to a particular appropriation under the "necessary expense" theory.[118] In that situation, the statutory authority does not have to expressly provide for the payment of rewards. If, however, the information is merely "helpful or desirable," then more explicit statutory authority is needed. Since the distinction is difficult to administer as a practical matter,

[118] Some of the "contest" cases, discussed above in section C. 6. f. , do not concern payment of "rewards" to "informers," yet nonetheless use a "necessary information" analysis. *See, e.g.*, 70 Comp. Gen. 720 (1991) (National Oceanic and Atmospheric Administration could pay cash prizes to certain fortunate fisherman returning "fish tags" to the government); B-286536, Nov. 17, 2000 (Public Buildings Service could use appropriated funds to pay for prizes in a drawing held in connection with customer satisfaction surveys, in order to develop customer satisfaction information).

statutory authority has been granted in many situations to pay rewards for specific categories of information, as discussed above.

The Comptroller General addressed the issue in 8 Comp. Gen. 613, 614 (1929), stating:

> "An appropriation general in terms is available to do the things essential to the accomplishment of the work authorized by the appropriation to be done. As to whether such an appropriation may properly be held available to pay a reward for the furnishing of information, not essential but probably helpful to the accomplishment of the authorized work, the decisions of the accounting officers have not been uniform. The doubt arises generally because such rewards are not necessarily in keeping with the value of the information furnished and possess elements of a gratuity or gift made in appreciation of helpful assistance rendered."

While the reward in that particular case was permitted, the decision announced that specific legislative authority would be required in the future. *See also* 9 Comp. Gen. 309 (1930); A-26777, May 22, 1929.

Whether a reward to an informer is necessary or merely helpful depends largely on the nature of the agency's organic authority and its appropriations language. For example, the Forest Service is responsible for protecting the national forests "against destruction by fire and depredations." 16 U.S.C. § 551. A 1971 case addressed the question of rewards in light of this organic authority and appropriations language making funds available for expenses necessary for "forest protection and utilization." Under this authority, information relating to violations (such as deliberately set

forest fires, theft of timber, unauthorized occupancy, and vandalism) could be considered necessary rather than just helpful, and the Forest Service could therefore offer rewards to informers without more specific statutory authority. B-172259, Apr. 29, 1971; *see also* 5 Comp. Dec. 118 (1898). The ruling was extended to cover "endorsements" (the "endorsement" by an informant of an undercover agent to help him gain acceptance with the suspects). B-172259, Aug. 2, 1972.

Similarly, the Commerce Department could pay rewards to informers as a necessary expense under a provision of the Export Control Act of 1949, ch. 11, § 6, 63 Stat. 7 (Feb. 26, 1949), which authorized the obtaining of confidential information incident to enforcement of the act. B-117628, Jan. 21, 1954.

The rule was also applied in a 1951 case, in which GAO advised the Treasury Department that rewards to informers for information or evidence on violations of the revenue, customs, or narcotics laws could be offered under an appropriation for the necessary expenses of law enforcement. B-106230, Nov. 30, 1951. As long as the information was necessary and not just helpful, more specific appropriations language was not needed. The result would be different if the agency did not have specific law enforcement authority. A.D. 6669, May 15, 1922.

Congress has provided agencies with explicit statutory authority to pay rewards to informers in a variety of situations.[119] Two notable

[119] In addition to the statutes discussed in the text, other examples are: 16 U.S.C. § 668 (capturing, buying or selling of bald eagles); 16 U.S.C. § 1540(d) (violations of Endangered Species Act); 16 U.S.C. § 2409 (violations of Antarctic Conservation Act of 1978); 18 U.S.C. § 1751(g) (information concerning presidential assassinations or attempted assassinations); 18 U.S.C. § 3056 (violations or potential violations of laws enforced by the Secret Service); 21 U.S.C. § 886 (violations of Drug Abuse Act); 39 U.S.C. § 404(a)(7) (violations of postal laws); 50 U.S.C. § 47a (illegal introduction, manufacture, acquisition, or export of special nuclear material or atomic weapons or conspiracies relating thereto).

grants of statutory authority involve the Internal Revenue Service and the Customs Service.

(a) Payments to informers: Internal Revenue Service

One reward to informers most people are familiar with is the reward offered by the Internal Revenue Service (IRS) for the detection of tax cheats. While the pertinent Internal Revenue Code provision does not use the term "reward," the provision and its predecessors authorize the payment of sums deemed necessary "for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws." 26 U.S.C. § 7623. The statute sets forth circumstances in which the IRS shall or may pay the informer a reward based on a percentage of the amount recovered. In certain cases, the IRS may award the informer such sums as it considers appropriate, taking into account the significance of the informer's information and the role of the informer in contributing to the action. The statute caps this amount at 10 percent of the collected proceeds resulting from the action. *See also* 3 Comp. Gen. 499 (1924) (considering an earlier version of this statutory scheme).

The determinations of whether to pay a reward under these circumstances and, if so, its amount are discretionary and, short of a showing of no rational basis, are not reviewable by the courts or by GAO. *Saracena v. United States,* 508 F.2d 1333 (Ct. Cl. 1975) (addressing earlier version of statute providing that the IRS is "authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as [it] may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law" and IRS regulation capping reward at ten percent of the proceeds recovered); *Krug v. United States,* 168 F.3d 1307 (Fed. Cir. 1999), *aff'g* 41 Fed. Cl. 96 (1998); *Informant v. United States,* 46 Fed. Cl. 1 (2000); B-131689, June 7, 1957; B-10761, June 29, 1940; B-5768, Sept. 18, 1939; A-96942, Aug. 23, 1938. *See also Perri v. United States*, 340 F.3d 1337, 1343 (Fed. Cir. 2003) (determination

of whether to pay an award from the Asset Forfeiture Fund and its amount is within the discretion of the Attorney General).

The discretionary language of the IRS statute has been held to constitute an "indefinite reward offer." The informant responds by his conduct, and an "enforceable contract" arises when the parties fix the amount of the reward. *Merrick v. United States,* 846 F.2d 725 (Fed. Cir. 1988); *Cambridge v. United States*, 558 F.3d 1331 (Fed. Cir. 2009); *see also Lewis v. United States,* 70 F.3d 597, 601 (Fed. Cir. 1995) (applying a "similar statute" that authorized Customs Service informer awards).

In general, the government cannot contract with another party through an agent. This rule helps prevent fraud upon the government in the procurement process. However, it was permissible for the IRS to contract with an attorney who served as the agent for an unnamed informant, because the reward to the unnamed informant did not implicate the reasons for the rule barring contracts through an agent. B-137762.32, July 11, 1977; *see also* B-117628, Jan. 21, 1954. However, Treasury regulations required that the informant's identity be disclosed before any claim could actually be paid. Therefore, disclosure would be necessary if and when a reward became payable but not before then.

An additional issue in that case was when an agency has to record an obligation under 31 U.S.C. § 1501(a). B-137762.32, July 11, 1977. No contractual liability to make payment exists until IRS has evaluated the worth of the information and has assessed and collected any underpaid taxes and penalties. This is when the appropriate IRS official determines that a reward should be paid and its amount, and it is at this point that a recordable obligation arises.

IRS may also make "support and maintenance" payments to informers under its general investigation and enforcement authority. The Comptroller General held that IRS could not make payments to an informer who was simultaneously being paid by the Justice Department under its Witness Protection Program, because the existence of a specific appropriation for an object precludes the use

of a more general appropriation that would otherwise be available. B-183922, Aug. 5, 1975. However, IRS could make the payments if administratively determined to be necessary after the informer had been disenrolled from the Justice Department's program.

(b) Payments to informers: Customs Service

The Customs Service also has statutory authority to pay rewards. A person (other than a government employee) who detects and seizes any vessel, vehicle, aircraft, merchandise, or baggage subject to seizure and forfeiture under the customs or navigation laws, or who furnishes original information, leading to a monetary recovery, may be paid a reward not to exceed 25 percent of the amount recovered, provided that the reward shall not exceed $250,000 in any case. 19 U.S.C. § 1619. Rewards are payable from "appropriations available for the collection of the customs revenue." *Id.* § 1619(d).

This reward is in the nature of compensation for services rendered rather than a personal gratuity. 5 Comp. Gen. 665 (1926). The statute has been deemed mandatory in the sense that an informant who complies with its terms has a legal and judicially enforceable claim for the reward. *Doe v. United States,* 100 F.3d 1576, 1582 (Fed. Cir. 1996); *Wilson v. United States,* 135 F.2d 1005 (3rd Cir. 1943); B-217636, Mar. 4, 1985.

The information furnished must be "original" information, that is, the first information the Customs Service has concerning the particular fraud or violation. *Lacy v. United States,* 607 F.2d 951, 953 (Ct. Cl. 1979); *Cornman v. United States,* 409 F.2d 230, 234 (Ct. Cl. 1969), *cert. denied,* 396 U.S. 960 (1969); *Tyson v. United States,* 32 F. Supp. 135, 136 (Ct. Cl. 1940).

In cases where the furnishing of information leads to recoveries from multiple parties, the monetary ceiling on the reward "for any case" generally applies to the information furnished, not to the number of recoveries it produces. *White & Case LLP v. United States*, 89 Fed. Cl. 12 (Fed. Cl. 2009); s*ee also Cornman,* 409 F.2d

at 234 (discussing older version of statutory ceiling "in any case"), *citing and following* 24 Comp. Dec. 17 (1917).

Liquidated damages assessed under customs bonds are "recoveries" for purposes of 19 U.S.C. § 1619. 34 Comp. Gen. 70 (1954). So are recoveries under bail bonds. 19 U.S.C. § 1619(e). Moneys received by customs officers as bribes, however, are not recoveries for purposes of the reward. 11 Comp. Gen. 486 (1932).

The statute applies to recoveries under the "customs laws or the navigation laws." *See* 16 Comp. Gen. 1051 (1937). Recoveries under other laws generally do not qualify. Thus, a reward could not be paid where recovery was made under several laws and the amount attributable to the customs laws or navigation laws could not be ascertained. 32 Comp. Gen. 405 (1953). Similarly, a violation of the Anti-Dumping Act is not a violation of the customs laws for purposes of 19 U.S.C. § 1619. *Fraters Valve & Fitting Co. v. United States,* 347 F.2d 990 (Ct. Cl. 1965). Nor is a violation of the internal revenue laws. *Wilson,* 135 F.2d 1005. *But see Doe v. United States,* 47 Fed. Cl. 367 (2000) (finding that awards under 19 U.S.C. § 1619 and certain drug laws could be made for the same information).

The reward is authorized, based on appraised value, if the item forfeited is destroyed or "delivered to any governmental agency for official use" rather than sold. Under this provision, seized merchandise donated to state governmental agencies under General Services Administration (GSA) regulations qualifies for the reward since the statutory language is not limited to federal agencies. B-146223, Nov. 27, 1961. Similarly, where forfeited distilled spirits, wines, or beer, which are required by statute to be delivered to GSA for disposal, are subsequently given to "eleemosynary institutions" for medicinal purposes, the reward is payable because the initial delivery to GSA counts as delivery to a "governmental agency for official use" under 19 U.S.C. § 1619. B-146223, Feb. 2, 1962.

(3) Lost or missing government property

It has long been established that no payment may be made to one who finds lost government property unless a reward has been offered prior to the return of the property. 11 Comp. Dec. 741 (1905); 5 Comp. Dec. 37 (1898); A-23019, May 24, 1928; B-117297-O.M., Feb. 12, 1954. To offer a reward for the recovery of lost or missing property, an agency needs some statutory basis.

Some cases permit agencies to use a so-called "contingent expense" appropriation to pay rewards for the recovery of property.[120] The Army could offer a reward from its contingent expense appropriation for the recovery of stolen platinum. 6 Comp. Gen. 774 (1927). The Navy wanted to use a general appropriation to offer rewards for locating lost aircraft. B-33518, Apr. 23, 1943. The general appropriation could not be used since the reward was not essential to carrying out its purposes, but, relying on 6 Comp. Gen. 774, the Navy could use its contingent expense appropriation.

One case stated that the Coast Guard had no general authority beyond 14 U.S.C. § 643 to make reasonable payments to persons who found lost property. 41 Comp. Gen. 410 (1961). This case, in conjunction with the earlier cases involving the Navy and Army, seems to suggest that a general operating appropriation is not available to offer or pay rewards for the recovery of lost property.

The Civil Aeronautics Administration received an appropriation for the temporary relief of distressed persons. B-79173, Oct. 18, 1948. The question presented was whether the appropriation was available to pay a reward to someone who had found a lost airplane four months after it disappeared. The Comptroller General concluded that the appropriation was not available to pay a reward

[120] The modern successor to the "contingent expense" appropriation is the appropriation each military department receives for "emergencies and extraordinary expenses". *See*, *e.g.*, Department of Defense Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2333, 2335 (Dec. 18, 2015) (appropriation for "emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army".)

to someone who had found a lost airplane four months after it had disappeared because the passengers could all be presumed dead after four months. The opinion expressly declined, however, to decide whether the appropriation would have been available if the airplane had been found "with such promptness as to afford reasonable hope that survivors might be found and given relief." The reasoning is similar to that in the cases regarding rewards to informants: the reward might have been considered necessary to carrying out the relief appropriation if there was a reasonable chance of survivors, but after the passage of several months it would be at best helpful. As with the necessary expense rule in general, "necessary" relates not to the importance of the object itself but to carrying out the purposes of the particular appropriation.

Stolen property was also involved in a case in which the Air Force asked if it could pay a reward, pursuant to local custom, to two Thai police officers whose services had been instrumental in recovering a stolen road grader. 53 Comp. Gen. 707 (1974). Based on 6 Comp. Gen. 774, the Comptroller General held that the Air Force could pay the reward from its appropriation for emergencies and extraordinary expenses, successor to the old "contingent expense" appropriation.[121] However, apart from that particular appropriation, there was no authority for the reward. This part of the decision was based on 8 Comp. Gen. 613 (1929), once again implying that the rules in the rewards to informants cases would apply to missing property as well.

Some of the cases discussed above were issued prior to the enactment of statutes that provided some agencies with specific statutory authority to pay rewards for the recovery of property. Examples include the Department of Defense and the military departments (10 U.S.C. § 2252) and the Coast Guard (14 U.S.C. § 643).

[121] *See*, *e.g.*, Department of Defense Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2333, 2335 (Dec. 18, 2015) (appropriation for "emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army").

(4) Rewards to government employees

A reward may not be paid to a government employee for services rendered within the scope of his or her official duties.[122] For example, a Deputy United States Marshal claimed a reward for apprehending a military deserter. 4 Comp. Gen. 687 (1925). The reward could not be paid since the Marshal had been acting in his official capacity (*i.e.,* doing his job) rather than his personal capacity. *See also* 7 Comp. Gen. 307 (1927); A-35247, Apr. 1, 1931; A-17808, Mar. 30, 1927. Under the Defense Department's statutory authority to pay expenses plus a small reward, a federal employee may be reimbursed actual expenses incurred, but may not be paid the reward. 32 Comp. Gen. 219 (1952). In addition, some statutes, such as 19 U.S.C. § 1619, expressly exclude government employees from eligibility.

However, if an employee performs services beyond the scope of his official duties for which a reward has been offered, the reward may be paid since the employee was acting in his capacity as a private citizen. Thus, a reward was payable to a patrol inspector for the Immigration Service who had apprehended a military deserter since the action was outside the scope of his official duties. 5 Comp. Gen. 447 (1925); *see also* A-17066, Mar. 2, 1927.

The prohibition against employees receiving rewards for services performed in the course of their official duties applies as well to rewards offered by nongovernment sources. The principle is illustrated in a 1970 case in which an Air Force major, flying a low-level training mission in the Republic of Colombia, spotted a cargo plane unloading in a suspicious location. 49 Comp. Gen. 819 (1970). He notified the Colombian authorities, who seized what turned out to be a load of contraband. Under Colombian law, the informant was entitled to a reward of 25 percent of the total value of the contraband. However, any earnings of an employee in excess

[122] There is a distinction between rewards and awards; we discuss awards for government employees in section C. 6. c.

of his regular compensation, earned in the course of performing his official duties, belong to the government. Therefore, the major could not keep the reward but had to turn it in for deposit in the Treasury. Another reason the major could not keep the reward is the prohibition in the United States Constitution (art. I, § 9, cl. 8) against the acceptance by a government officer or employee of gifts or emoluments from a foreign government without the consent of Congress. Payments from nongovernment sources may also raise questions under 18 U.S.C. § 209, particularly where the employee rendered the same or similar services to both the government and a private person. *See, e.g., United States v. Project on Gov't Oversight*, 454 F.3d 306 (D.C. Cir. 2006). For a fuller discussion of this issue, see the discussion in section E.3.b. in Chapter 6, *Availability of Appropriations: Amount.*

(5) Military deserters

For many years, a provision in the annual Defense Department appropriation acts authorized payment of expenses of the apprehension and delivery of deserters, including a small reward. In 1984, the provision was made permanent and is now found at 10 U.S.C. § 956(1). The Coast Guard also has permanent authority to offer rewards for the apprehension of deserters. 14 U.S.C. § 644. Some decisions interpret the statutory language and implementing regulations. For example, the term "apprehension" was construed to permit payment of the reward where an Army deserter voluntarily surrendered to a local law enforcement officer. 6 Comp. Gen. 479 (1927).

The statute and implementing regulations limit the amount payable as expenses, but this limitation applies only to the period before the deserter is returned to military control. Expenses incurred after return to military control, such as continued civil detention at the request of military authorities, are not subject to the limitation and may be paid. B-179920, July 18, 1974; B-147496-O.M., Jan. 4, 1962. Three early decisions permitted payment of expenses incurred in apprehending a deserter in excess of the statutory limit where the deserter was also wanted for other criminal offenses

(such as forgery or embezzlement). 16 Comp. Dec. 132 (1909); 11 Comp. Dec. 124 (1904); B-3591, May 27, 1939.[123]

q. Traditional ceremonies

Expenditures that might otherwise be prohibited as personal may be permissible when they are incurred incident to certain traditional ceremonies. Groundbreaking ceremonies and dedication ceremonies for the laying of cornerstones in public buildings are the most common examples of such traditional ceremonies.

For example, the cost of flowers used as centerpieces at a dedication ceremony was held to be a proper expenditure. B-158831, June 8, 1966. Similarly, the cost of engraving and chrome-plating a ceremonial shovel used in a groundbreaking ceremony was viewed as a necessary expense of the ceremony. 53 Comp. Gen. 119 (1973). Expenses necessarily incident to a groundbreaking or cornerstone ceremony are chargeable to the appropriation for the construction of the building. B-158831, June 8, 1966; B-11884, Aug. 26, 1940 (cost of printing programs and invitations to cornerstone ceremony); A-88307, Aug. 21, 1937 (recording of presidential speech and group photograph at cornerstone ceremony); B-107165-O.M., Apr. 3, 1952 (cost of dedication ceremony).

Some expenses incident to Armed Forces change of command ceremonies are also permissible. For example, the Coast Guard could use its operating expenses appropriation for the cost of printing invitations to a change of command ceremony for one of its

[123] The excess payment in each of these cases was authorized from the Army's appropriation for "contingent expenses." While the "contingent expense" language is no longer used, the military departments receive similar appropriations for "emergencies and extraordinary expenses." *See* 53 Comp. Gen. 707 (1974). For an example of such an appropriation, see Department of Defense Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat 2242, 2333, 2335 (Dec. 18, 2015) (appropriation for "emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army".)

vessels. 56 Comp. Gen 81 (1976). In view of the traditional role of change of command ceremonies in the military, the invitations were not inherently personal. (The case was therefore distinguishable from the decisions previously discussed prohibiting the use of public funds for greeting cards.) In another case, the costs of a change of command reception were payable from official reception and representation funds because the reception met the prerequisites for an "official reception for an incoming commander." 69 Comp. Gen 242 (1990). (See section C.5.n above for a discussion of official reception and representation funds.)

The "traditional ceremony" concept has also been applied to a vessel "christening" ceremony at a Navy yard (A-74436, May 19, 1936), a Uniformed Services University of the Health Sciences annual graduation ceremony (B-211700, Mar. 16, 1984), and a Federal Law Enforcement Training Center's graduation ceremony (B-240365.2, Mar. 14, 1996). *But see* B-250450, May 3, 1993 (grand opening of a new cafeteria located inside an existing federal building does not constitute a "traditional ceremony." Costs of food and entertainment provided for this event are not payable from appropriations for operating expenses, but may be chargeable to reception and representation funds then available).

r. Training

Training of government employees is governed by the Government Employees Training Act, 5 U.S.C. chapter 41, aspects of which are discussed in several places in this chapter. The authority of the Government Employees Training Act is broad. *See*, *e.g.*, B-272280, May 29, 1997 (examination expenses that substitute for a college course are covered where the skipped course is part of an approved training program for which the agency would otherwise pay). An agency may pay, or reimburse an employee for, necessary expenses incident to an authorized training program. 5 U.S.C. § 4109. This applies whether the training is held through a nongovernment facility or by the federal government itself. 5 U.S.C. § 4105; B-258442, Apr. 19, 1995; B-244473, Jan. 13, 1992. The Act governs training implemented by both agencies and non-government entities, both of which are defined in the statute.

5 U.S.C. § 4101. The event, however, must comply with the Act's definition of "training" in 5 U.S.C. § 4101(4). 72 Comp. Gen. 178 (1993).

Training can also encompass preparation for professional examinations. For example, the Pension Benefit Guaranty Corporation (PBGC) asked whether it could use appropriated funds to pay, as training costs, fees for actuary accreditation. B-286026, June 12, 2001. PBGC employs a number of actuaries to calculate pension benefits. Although actuaries, at that time, did not need a professional license for employment, PBGC proposed to use training funds to send actuaries to the examination review courses and to provide on-the-job study time. PBGC determined that this course of study and testing would enhance the ability of the PBGC actuaries to carry out their assignments. PBGC has the discretion under the Government Employees Training Act to determine that the review courses constitute appropriate training for its actuaries. Accordingly, PBGC has authority, under 5 U.S.C. § 4109(a), to use appropriated funds for review courses and on-the-job study time.[124]

Although the Government Employees Training Act provides broad authority, it is not unlimited. For example, tryouts for the U.S. Olympic Shooting Team do not constitute training under the Act. 68 Comp. Gen. 721 (1989). Nor do routine meetings, however formally structured. 68 Comp. Gen. 606 (1989); 68 Comp. Gen. 604 (1989).

Training of nonfederal personnel, where necessary to the implementation of a federal program, is a straightforward "necessary expense" question under the relevant program appropriation. *E.g.,* 18 Comp. Gen. 842 (1939); *see also* B-148826, July 23, 1962 (Defense Department could pay $1 each to students participating in a civil defense training course as consideration for a

[124] The decision also concluded that PBGC had no authority to pay the cost for the accreditation examination itself. However, this decision preceded the enactment of 5 U.S.C. § 5757, which grants agencies authority to pay for professional accreditation. We discuss 5 U.S.C. § 5757 further in section C. 4. g.

release from liability; the students presumably were not federal employees).

A government entity that is not an "agency" as that word is defined for the purposes of the Training Act receive no authority under the Training Act. 5 U.S.C. § 4101 (defining "agency" for the purposes of the Training Act). For an entity not covered by the definition of "agency" in the Act, the authority to conduct training is limited. The particular training program must be (1) necessary to carry out the purpose for which the appropriation is made, (2) for a period of brief duration, and (3) special in nature. 36 Comp. Gen. 621 (1957) (including extensive citations to earlier decisions); *see also* 68 Comp. Gen. 127 (1988).

s. Travel

Reimbursement for travel expenses incurred on official travel is now authorized by statute. 5 U.S.C. § 5702. However, even before the legislation was enacted, expenses incurred on authorized, official travel were reimbursable as a necessary expense. 4 Comp. Dec. 475 (1898).

Of course, there are limits to the amount reimbursable. Expenses are reimbursable only to the extent authorized by statute and implementing regulations, such as those allowing for the reimbursement of necessary travel expenses. Thus, in an early case, expenses of a groom and valet incurred by an Army officer in Belgium could not be regarded as necessary travel expenses and therefore could not be reimbursed from Army appropriations. 21 Comp. Dec. 627 (1915).

Another limit to reimbursable travel expenses concerns the nature of the travel. Senior-level officials frequently travel for political purposes. As the Justice Department has pointed out, it is often impossible to neatly categorize travel as either purely business or purely political. To the extent it is possible to distinguish, however, appropriated funds should not be used for political travel. 6 Op. Off. Legal Counsel 214 (1982). GAO has conducted occasional reviews in this area, and has commented on the lack of legally binding

guidelines against which to evaluate particular expenditures. *E.g.,* GAO, *Review of White House and Executive Agency Expenditures for Selected Travel, Entertainment, and Personnel Costs,* AFMD-81-36 (Washington, D.C.: Mar. 6, 1981); *Review of the Propriety of White House and Executive Agency Expenditures for Selected Travel, Entertainment, and Personnel Costs,* FGMSD-81-13 (Washington, D.C.: Oct. 20, 1980).

Finally, there are situations in which expenses of congressional travel may be chargeable to the appropriations of other agencies. For example, under 31 U.S.C. § 1108(g) "[a]mounts available under law are available for field examinations of appropriation estimates. The use of the amounts is subject only to regulations prescribed by the appropriate standing committees of Congress."

Thus, travel expenses of congressional committee members and staff incident to "field examinations" of appropriation requests may be charged to the agency whose programs and budget are being examined. B-214611, Apr. 17, 1984; B-129650, Jan. 2, 1957. Before the above provision was enacted as permanent legislation, similar provisions had appeared for many years in various appropriation acts. *See* 6 Comp. Gen. 836 (1927); 23 Comp. Dec. 493 (1917). Travel expenses of congressional spouses (Members and staff), however, may not be paid from appropriated funds. B-204877, Nov. 27, 1981.

Federal employees may retain promotional travel benefits, including frequent flyer miles or upgrades, when the benefits are earned as a result of official travel and if the promotional item is obtained under the same terms as those offered the general public and at no additional cost to the government. Pub. L. No. 107-107, div. A, title XI, § 1116, 115 Stat. 1012, 1241 (Dec. 28, 2001).

D. Step 2: expenditure must not be prohibited

Determining that an expenditure is reasonably and logically related to the purpose of an appropriation does not end the inquiry. The

second test under the purpose analysis is that the expenditure must not be prohibited by law. As a general proposition, neither a necessary expense rationale nor the "necessary expense" language in an appropriation act can be used to overcome a statutory prohibition. *E.g.,* B-277905, Mar. 17, 1998 (expenditure for installation and maintenance of water pipelines to support a military base golf course not permissible because such expenditure is specifically prohibited by 10 U.S.C. § 2246, which prohibits the use of appropriated funds to "equip, operate, or maintain" a golf course); B-247348, June 22, 1992 (detail of Government Printing Office employee to Library of Congress not permissible because 44 U.S.C. § 316 prohibits details for "duties not pertaining to the work of public printing and binding"). In 38 Comp. Gen. 758 (1959) and 4 Comp. Gen. 1063 (1925), the Comptroller General held that the necessary expense language did not overcome the prohibition in 41 U.S.C. § 12 against contracting for public buildings or public improvements in excess of appropriations for the specific purpose. In large measure, this is little more than an application of the rule against repeal by implication discussed in Chapter 2, section D.8.a.

There are exceptions where applying the rule would make it impossible to carry out a specific appropriation. A very small group of cases stands for the proposition that, where a specific appropriation is made for a specific purpose, an expenditure which is "absolutely essential" to accomplishing the specific object may be incurred even though the expenditure would otherwise be prohibited. In order for this exception to apply, the expenditure must literally be absolutely essential in the sense that the object of the appropriation could not be accomplished without it. Also, the rule would not apply to the use of a more general appropriation.

For example, in 2 Comp. Gen. 133 (1922), *modifying* 2 Comp. Gen. 14 (1922), an appropriation to provide airmail service between New York, Chicago, and San Francisco was held available to construct hangars and related facilities at a landing field in Chicago notwithstanding the requirement for a specific appropriation in 41 U.S.C. § 12. The reason was that it would have been impossible to provide the service, and hence, to accomplish the purpose of the appropriation, without erecting the facilities. *See also* 17 Comp.

Gen. 636 (1938) and 22 Comp. Dec. 317 (1916). (The 1938 decision cites the rule but the decision itself is an ordinary necessary expense case.)

An 1899 case, 6 Comp. Dec. 75, provides another good illustration of the concept. The building housing the Department of Justice (Justice) had become unsafe and overcrowded. Congress enacted legislation to authorize and fund the construction of a new building. The statute specifically provided that the new building be constructed on the site of the old building, but did not address the question of how Justice would function during the construction period. The obvious solution was to rent another building until the new one was ready, but 40 U.S.C. § 34 prohibited the rental of space in the District of Columbia except under an appropriation specifically available for that purpose, and Justice had no such appropriation. On the grounds that any other result would be absurd, the Comptroller of the Treasury held that Justice could rent interim space notwithstanding the statutory prohibition. While the decision was not couched in terms of the expenditure being "absolutely essential," it said basically the same thing. Since Justice could not cease to function during the construction period, the appropriation for construction of the new building could not be fulfilled without the expenditure for interim space.

As the above examples show, many prohibitions (such as on the use of appropriations for golf courses or on details of Government Publishing Office employees) have narrow applicability, sometimes applying to particular activities or to a single agency. Some prohibitions appear in annual appropriations acts and apply only to a single agency for a single year. *See*, *e.g.*, B-328325, Sept. 12, 2016 (Congress barred the National Telecommunications and Information Administration from taking certain actions during fiscal year 2016). Therefore, it is important that agencies maintain awareness not only of permanent statutory prohibitions but also of temporary prohibitions that Congress may enact in annual appropriations acts.

Of course, agencies must heed all prohibitions, whether broad or narrow, permanent or temporary. However, this section will discuss

prohibitions that apply to many agencies across the government. These prohibitions generally have longstanding applicability, either because Congress has enacted them into permanent law or because they are temporary measures that Congress typically re-enacts annually. Most of expenditures we discuss here, such as for lobbying or for attorneys, are prohibited by statute. Another principle that bars many expenditures, sovereign immunity, is rooted in the constitutional supremacy of the federal government. We will also discuss the prohibition of the purchase of insurance, which is rooted in longstanding policy as well as in a series of Comptroller General decisions.

1. Agency communications with Congress and the public

Congress has enacted a number of statutory provisions concerning agency communications with it and with the public. Some of these provisions, such as one barring agencies from engaging in particular lobbying activities, are permanent. Other provisions, such as those barring agencies from engaging in publicity or propaganda, are not in permanent law but instead appear in annual appropriations statutes.

Provisions on agency communications fall into five categories, all of which we will discuss in this section:

1. Provisions that bar the use of appropriations to make appeals to members of the public suggesting that they, in turn, contact their elected representatives to indicate support of or opposition to pending legislation. Such activity is known as “grassroots lobbying.”

2. Prohibitions on the use of appropriations for publicity or propaganda. As we will discuss, the prohibition against publicity or propaganda bars three categories of communications: (1) self-aggrandizement, or communications tending to emphasize the importance of the agency, its officials, or the activity in question; (2) covert propaganda, which refers to

communications that fail to disclose the agency's role as the source of the information; and (3) purely partisan materials, which are those designed to aid a political party or candidate.

3. Prohibitions on the use of appropriated funds to pay the salary of any federal official who prohibits or prevents another federal employee from communicating with Congress.

4. A longstanding policy against the appearance of commercial advertising in government publications.

5. A statute barring the use of appropriations to pay publicity experts.

In this section we discuss expenditures that are prohibited by law or policy. We further discuss advertising specifically in section C.6.a above: agencies may use their appropriations to purchase advertising both if it is a necessary expense (Step 1 of the three-step purpose analysis) and if the expenditure is not prohibited (Step 2 of the purpose analysis).

a. Lobbying

Generally speaking, there are two types of lobbying. "Direct lobbying," as the term implies, means direct contact with the legislators, either in person or by various means of written or oral communication. "Indirect" or "grassroots" lobbying is different. There, the lobbyist contacts third parties, either members of special interest groups or the general public, and urges them to contact their legislators to support or oppose something. Of course, the term "lobbying" can also refer to attempts to influence decision makers other than legislators.

There is nothing inherently evil about lobbying. A House select committee investigating lobbying in 1950 put it this way:

> "Every democratic society worthy of the name must have some lawful means by which individuals and groups can lay their needs before government. One of

> the central purposes of government is that people should be able to reach it; the central purpose of what we call 'lobbying' is that they should be able to reach it with maximum impact and possibility of success. This is, fundamentally, what lobbying is about."[125]

Nevertheless, because of the obvious potential for abuse, there are legal restrictions on lobbying. This section will explore some of them. Because the focus of this publication is on the use of appropriated funds, coverage is limited for the most part to lobbying by government officials and does not include lobbying by private organizations. Restrictions on lobbying by government officials derive from two sources: penal statutes and provisions in appropriation acts.

(1) Grassroots lobbying

(a) The Anti-Lobbying Act: 18 U.S.C. § 1913

Originally enacted in 1919, 18 U.S.C. § 1913 provided for criminal sanctions. In late 2002, however, the statute was amended to omit the criminal sanctions and significantly expand the scope of the lobbying restriction.[126] The statute, commonly referred to as the Anti-Lobbying Act, now provides:

> "No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service,

[125] General Interim Report of the House Select Committee on Lobbying Activities, H.R. Rep. No. 81-3138, at 1 (1950).

[126] 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, div. A, title II, § 205(b), 116 Stat. 1758, 1778 (Nov. 2, 2002).

> advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy, or appropriations which they deem necessary for the efficient conduct of the public business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities. Violations of this section shall constitute violations of section 1352(a) of title 31."

Thus, section 1913 incorporates the penalties contained in another lobbying statute, 31 U.S.C. § 1352. That statute provides that any person who makes an improper expenditure shall be subject to a

civil penalty ranging from $10,000 to $100,000 for each improper expenditure.[127]

Prior to the 2002 amendment, 18 U.S.C. § 1913 only prohibited the use of appropriated funds for lobbying aimed at the most basic legislative activities of Congress. The amended statute expands the prohibition to a broader scope of legislative activities conducted at all levels of government, not just the federal level.

To date no case law has provided further insight on the expanded and decriminalized 18 U.S.C. § 1913. The following discussion of the statute, while based upon section 1913 before it was amended in 2002, nevertheless provides a solid foundation for interpreting the statute as the basic framework of the lobbying restriction was not altered.

The context in which the original section 1913 was enacted is reflected in the following passage from the floor debate on the 1919 legislation:

> "The bill also contains a provision which . . . will prohibit a practice that has been indulged in so often, without regard to what administration is in power[—]the practice of a bureau chief or the head of a department writing letters throughout the country, sending telegrams throughout the country, for this organization, for this man, for that company to write his Congressman, to wire his Congressman, in behalf of this or that legislation. (Applause.) The gentleman from Kentucky . . . during the closing days of the last Congress was greatly worried because he had on his

[127] A thorough discussion of 31 U.S.C. § 1352, also known as the Byrd Amendment, is in section D. 1. a. (4).

> desk thousands upon thousands of telegrams that had been started right here in Washington by some official wiring out for people to wire Congressman Sherley . . . Now, it was never the intention of Congress to appropriate money for this purpose, and [§ 1913] will absolutely put a stop to that sort of thing. (Applause.)"[128]

Since 18 U.S.C. § 1913 was a criminal statute, its enforcement was the responsibility of the Department of Justice and the courts. Although the statute no longer contains criminal sanctions, the Department of Justice continues to have enforcement responsibilities. The enforcement mechanism for 18 U.S.C. § 1913 is derived from 31 U.S.C. § 1352(c), which provides that violations are to be handled in accordance with the administrative process for adjudicating civil liability for false claims. Under this process, provided for under the Program Fraud Civil Remedies Act of 1986, Pub. L. No. 99-509, title VI, subtitle B, §§ 6101-04, 100 Stat. 1874, 1934-1948 (Oct. 21, 1986), codified at 31 U.S.C. §§ 3801–3812, no alleged violation is subject to adjudication unless approved by the Department of Justice. 31 U.S.C. § 3803(b). The Department of Justice is also responsible for the judicial enforcement of any civil penalty imposed. 31 U.S.C. § 3806.

Where GAO has determined that appropriated funds were used, GAO would refer those matters to the Department of Justice in appropriate cases. *E.g.,* B-192658, Sept. 1, 1978; B-164497(5), Mar. 10, 1977. Generally, GAO would refer matters to the Department of Justice if asked to do so by a Member of Congress or where available information provided reasonable cause to suspect that a violation may have occurred. B-145883, Apr. 27, 1962.

[128] 58 Cong. Rec. 403 (1919) (remarks of Representative Good), *quoted in National Treasury Employees' Union v. Campbell*, 654 F.2d 784, 791 (D.C. Cir. 1981).

The Department of Justice has construed section 1913 as applying to large-scale "grassroots" lobbying campaigns of telegrams, letters, and other forms of communication designed to generate citizen contacts with Congress on behalf of an Administration position with respect to pending legislation, but not to direct communications between executive branch officials and Congress. The Department of Justice later emphasized that section 1913 does not apply to (1) public speeches, appearances, or writings, so that officials are free to publicly advance Administration positions, even to the point of calling on the public to encourage Members of Congress to support such positions, or (2) the lobbying activities of the President, his aides and assistants within the Executive Office of the President, the Vice President, cabinet members, and other Senate-confirmed officials appointed by the President. *See* OLC, *Guidelines on 18 U.S.C. § 1913 (Apr. 14, 1995)*; 13 Op. Off. Legal Counsel 300 (1989).[129]

In evaluating particular fact situations to determine possible violations of section 1913, GAO has applied the Department of Justice's interpretation of that statute. Thus, GAO found that referral to Justice was not warranted in the following situations:

- Unsolicited letter to Members of Congress from agency head urging support for continuation of agency programs. B-145883, Oct. 10, 1967.

[129] However, when applying grassroots lobbying prohibitions enacted within appropriations measures, GAO has not recognized a similar blanket exemption for the lobbying activities of presidentially-appointed and Senate-confirmed officials. *See* B-325248, Sept. 9, 2014 (e-mail message sent by the Deputy Secretary of the Department of Housing and Urban Development violated section 716 of the Financial Services and General Government Appropriations Act, 2012, Pub. L. No. 112-74, div. C., title VII, § 716, 125 Stat. 786, 933 (Dec. 23, 2011), *as carried forward by* Pub. L. No. 113-6, div. F, title I, §§ 1101(a)(2), 1105, 127 Stat. 198, 412-413 (Mar. 26, 2013)). Further, although the Department of Justice exempts the activities of certain officials from application of section 1913, it cautioned against these officials engaging in the sort of grassroots lobbying campaigns the provision was intended to prevent. 13 Op. Off. Legal Counsel at 303 n.5.

- Various judicial branch activities including direct contacts with legislators by federal judges, legislative liaison activities by the Judicial Conference of the United States, and some grassroots lobbying which did not involve the use of federal funds. 63 Comp. Gen. 624 (1984).

- Providing to a private lobbying group a copy of congressional testimony by the Secretary of State supporting the Administration's Central American policies. 66 Comp. Gen. 707 (1987). The answer may have been different if the State Department had used appropriated funds to develop material for the lobbying group rather than simply providing existing and readily available material. *Id; see also* B-229069.2, Aug. 1, 1988.

- Contacts with congressional staff members and a briefing for the House Foreign Affairs Committee by State Department officials designed to generate opposition for a legislative measure perceived as inconsistent with administration nuclear nonproliferation policy. B-217896, July 25, 1985.

- Speeches and written materials by the Chairman of the Federal Trade Commission expressing opposition to the Postal Service's "monopoly" status for letter class mail. None of the materials exhorted members of the public to contact their legislators. B-229257, June 10, 1988.[130]

- Written materials prepared and disseminated by the Small Business Administration (SBA), none of which included grassroots lobbying, designed to support an administration proposal to transfer the SBA to the Commerce Department. B-223098, B-223098.2, Oct. 10, 1986.

[130] Although not noted in the decision, under the Department of Justice's interpretation of section 1913 noted above, the lobbying activities of the Chairman would not have been restricted in any case. *See, e.g.,* B-270875, July 5, 1996.

- Transmission of information by the Consumer Product Safety Commission to a private company advising of scheduled congressional hearings on legislation relevant to a problem the company was facing. B-229275-O.M., Nov. 17, 1987. The memorandum stated:

> "We believe it is within the statutory authority of a regulatory agency to advise a regulated company that a remedy it seeks can only be obtained through legislation and that such legislative remedy may be initiated by a particular Congressional Committee."

- Congressional briefings by Department of Energy officials designed to influence views on nuclear weapons testing legislation. A planned media campaign to further that objective would have been more questionable, but it was not carried out. GAO, *Nuclear Test Lobbying: DOE Regulations for Contractors Need Reevaluation,* GAO/RCED-88-25BR (Washington, D.C.: Oct. 9, 1987).

- Letter sent by Deputy Secretary of Energy to thousands of individuals and organizations addressing the administration's energy policies and legislative proposals was not grassroots lobbying as recipients were encouraged to contact the Deputy Secretary, not their elected representatives. B-270875, July 5, 1996.

- Environmental Protection Agency distribution of fact sheets to various organizations setting forth the adverse effects of pending legislation on the environment was not grassroots lobbying as none of the material contained direct appeals for people to contact Members of Congress. B-270875, July 5, 1996.

- Consumer Product Safety Commission e-mail to swimming pool industry representative encouraging the recipient to contact Members of Congress that supported a rule change involving

the interpretation of the phrase "unblockable drain" was not grassroots lobbying because the e-mail did not address pending legislation. B-322882, Nov. 8. 2012.

Numerous additional examples may be found in section D.1.b below.

GAO found the following situations sufficiently questionable to warrant referral to Justice:[131]

- An article written by a Commerce Department official and published in *Business America*, a Commerce Department publication, explicitly urging readers to contact their elected representatives in Congress to support certain amendments to the Export Administration Act.[132] B-212235(1), Nov. 17, 1983.

- Campaign by Air Force and Defense Department to use contractors' lobbyists and subcontractor network to lobby Congress in support of C-5B aircraft procurement. GAO, *Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft*, GAO/AFMD-82-123 (Washington, D.C.: Sept. 29, 1982).

As of early 1995, the Department of Justice reported that there had been no prosecutions under section 1913.[133] *See* OLC, *Guidelines on 18 U.S.C. § 1913* (Apr. 14, 1995). To our knowledge, Justice

[131] A few early cases will be found in which GAO held expenditures illegal under 18 U.S.C. § 1913. *E.g.*, B-139134-O.M., June 17, 1959 (Air Force paid registration fee for members to enter state rifle association shooting match; portion of fee set aside for fund to fight adverse gun legislation held to be an improper payment); B-76695, June 8, 1948.

[132] Under later Department of Justice interpretations of section 1913, a similar case may not warrant referral since Justice interprets section 1913 as permitting agency officials to publicly advance Administration positions in public speeches, appearances, and writings, including urging the public to contact elected officials.

[133] A conclusion by the Department of Justice that section 1913 was violated would not have automatically resulted in a prosecution. The Attorney General has what is known as "prosecutorial discretion;" a great many factors influence the decision whether to prosecute.

initiated no prosecutions between 1995 and 2002 when section 1913 was amended.

As noted earlier, no judicial activity under the amended version of 18 U.S.C. § 1913 has provided new insight into the provision. *See, e.g.*, AFGE, Local 3721 v. District of Columbia, 2005 U.S. Dist. LEXIS 8326, *33-34 (D.D.C. May 2, 2005) (reaffirming that section 1913 only applies to federal departments or agencies and their employees despite broad prohibitory language). Judicial activity addressing the pre-amendment version largely regarded the issue of whether the statute created a private right of action. The answer was no. *Grassley v. Legal Services Corp.,* 535 F. Supp. 818 (S.D. Iowa 1982); *National Treasury Employees' Union v. Campbell,* 482 F. Supp. 1122 (D.D.C. 1980), *aff'd,* 654 F.2d 784 (D.C. Cir. 1981), *overruling National Association for Community Development v. Hodgson,* 356 F. Supp. 1399 (D.D.C. 1973); *American Trucking Ass'ns, Inc. v. Department of Transportation,* 492 F. Supp. 566 (D.D.C. 1980).

One other statute with penal sanctions deserves brief mention—the Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (Dec. 19, 1995), as amended, classified largely at 2 U.S.C. §§ 1601–1612. This statute does not apply to the legislative activities of government agencies, but rather to organizations that lobby certain federal officials in the legislative and executive branches. These organizations are required to register with the Secretary of the Senate and the Clerk of the House of Representatives and to semiannually report expenditures and certain other information related to their lobbying efforts.[134] 2 U.S.C. §§ 1603(a), 1604. This statute repealed the Federal Regulation of Lobbying Act of 1946, which GAO criticized for resulting in comparatively few lobbyists registering with Congress. *See* GAO, *Federal Lobbying: Comments on the Adequacy of Federal*

[134] *See* GAO, *Federal Lobbying: Differences in Lobbying Definitions and Their Impact*, GAO/GGD-99-38 (Washington, D.C.: Apr. 15, 1999).

Lobbying Laws, GAO/T-GGD-93-49 (Washington, D.C.: Sept. 30, 1993).

(b) Appropriations act provisions: publicity or propaganda designed to influence pending legislation

The version of the appropriations act restriction that the Comptroller General has had the most frequent occasion to apply is the version prohibiting publicity or propaganda designed to influence pending legislation.[135]

For over 30 years, from the early 1950s to fiscal year 1984, the following provision was enacted every year:

> "No part of any appropriation contained in this or any other Act . . . shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."[136]

As long as this version was in effect, it applied, by virtue of the "this or any other act" language, to all government agencies regardless of which appropriation act provided their funds. For fiscal year 1984, the "this or any other act" provision fell victim to a point of order and was dropped. *See* 64 Comp. Gen. 281 (1985). For some time after that, no government-wide provision existed. However,

[135] The lobbying restriction on activities designed to influence pending legislation differs, of course, from the prohibition on the use of appropriated funds for publicity or propaganda—self-aggrandizement, covert propaganda, and purely partisan materials—which will be discussed in depth in section D. 1. b.

[136] *E.g.,* Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, § 607(a), 93 Stat. 559, 575 (Sept. 29, 1979).

another change in course occurred and since fiscal year 1997,[137] the following government-wide "pending legislation" provision has been in place:

> "No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself."[138]

Although the government-wide provision currently in place is more detailed than the prior government-wide restriction, we have concluded that the language currently used has the same legal effect. *See* B-270875, July 5, 1996.

During the time when there was no government-wide restriction, restrictions aimed at curtailing the influencing of pending legislation appeared in individual appropriation acts in various forms. Many of these continue to appear in individual appropriation acts along with

[137] In fiscal year 1996, GAO investigated whether or not the activities of five agencies violated any anti-lobbying provisions and concluded that there were no violations, in part, because only one of the five agencies was covered by a restriction on influencing pending legislation. B-270875, July 5, 1996. A government-wide restriction reappeared the next fiscal year.

[138] *E.g.* Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, title VI, § 631, 110 Stat. 3009-314, 3009-362 (Sept. 30, 1996).

the government-wide restriction.[139] A sampling of fiscal year 2016 appropriation acts provisions provided below reveals a variety of versions, many of which do not include the terms publicity or propaganda:

- "None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress."[140]

- "None of the Federal funds provided in this Act shall be used for publicity or propaganda purposes or implementation of any policy including boycott designed to support or defeat legislation pending before Congress or any State legislature."[141]

- "None of the funds appropriated by this Act may be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. [§] 1913."[142]

- "No part of any appropriation contained in this Act . . . shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet,

[139] While it is understandable that individual agency situations may require unique language, in some instances the restrictions included in the individual appropriation acts are mere repetition. For example, in 2003 a restriction identical to the government-wide restriction was also contained in the Veterans Affairs appropriations act. *See* Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations, 2003, Pub. L. No. 108-7, div. K, title IV, § 414, 117 Stat. 11, 524-25 (Feb. 20, 2003).

[140] Department of Defense Appropriations Act, 2016, Pub. L. No. 114-113, div. C, title VIII, § 8013, 129 Stat. 2242, 2353 (Dec. 18, 2015).

[141] Financial Services and General Government Appropriations Act, 2016, Pub. L. No. 114-113, div. E, title VIII, § 802, 129 Stat. 2242, 2487 (Dec. 18, 2015).

[142] Energy and Water Development and Related Agencies Appropriations Act, 2016, Pub. L. No. 114-113, div. D, title V, § 501, 129 Stat. 2242, 2422 (Dec. 18, 2015).

> booklet, publication, electronic communication, radio, television, or video presentation designed to support or defeat the enactment of legislation before the Congress or any State or local legislature or legislative body, except in presentation to the Congress or any State or local legislature itself, or designed to support or defeat any proposed or pending regulation, administrative action, or order issued by the executive branch of any State or local government, except in presentation to the executive branch of any State or local government itself."[143]

The Comptroller General has construed the "pending legislation" provisions as applying primarily to indirect or "grassroots" lobbying and not to direct contact with Members of Congress.[144] In other words, the statute prohibits appeals to members of the public suggesting that they in turn contact their elected representatives to indicate support of or opposition to pending legislation, thereby expressly or implicitly urging the legislators to vote in a particular manner. GAO and the Department of Justice have interpreted the traditional prohibition ("publicity or propaganda purposes designed to support or defeat pending legislation") to require an overt appeal to the public.[145] B-270875, July 5, 1996.

If a given policy or activity is affected by pending or proposed legislation, any discussion of that policy or activity by officials will

[143] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2016, Pub. L. No. 114-113, div. H, title V, § 503(a), 129 Stat. 2242, 2648 (Dec. 18, 2015).

[144] Therefore, where an e-mail encouraging the recipient to contact Members of Congress regarding an interpretive rule change of the Consumer Product Safety Commission did not concern pending legislation, the subject e-mail did not constitute grassroots lobbying as prohibited by an appropriations restriction. B-322882, Nov. 8, 2012.

[145] Some early interpretations of "pending legislation" provisions were couched in terms of whether the expenditure was extraordinary in nature or presented circumstances leaving no doubt as to the prohibited nature of the expenditure. *See, e.g.*, B-147578, Nov. 8, 1962 (White House Regional Conferences); B-150038, Nov. 2, 1962 (Department of Agriculture press release); B-148206, Mar. 20, 1962 (radio and television announcements by Commerce Department supporting foreign trade legislation).

necessarily refer to such legislation, either explicitly or by implication, and will presumably be either in support of or in opposition to it. Thus, an interpretation of a "pending legislation" statute that strictly prohibited expenditures of public funds for dissemination of views on pending legislation would preclude virtually any comment by officials on agency or administration policy or activities. Absent a compelling indication of congressional intent, GAO has been unwilling to adopt this approach. *See, e.g.,* B-270875, July 5, 1996.

GAO concluded in a 1984 study that further statutory restraints on executive branch lobbying did not appear necessary. GAO did recommend, however, that the restriction on "grassroots" lobbying be enacted into permanent law. GAO, *No Strong Indication That Restrictions on Executive Branch Lobbying Should Be Expanded,* GAO/GGD-84-46 (Washington, D.C.: Mar. 20, 1984). *See also* B-206391, B-217896, Oct. 30, 1985; B-206391, July 2, 1982; GAO, *H.R. 3078, The Federal Agency Anti-Lobbying Act,* GAO/T-OGC-96-18 (Washington, D.C.: May 15, 1996). (Each of these documents comments on proposed legislation that was not enacted.)

Before proceeding to the specific cases, certain threshold concerns should be noted. The discussion that follows interprets the "pending legislation" provisions in existence at that time. The particular agencies involved may or may not still be subject to the same restriction. Or a different version of the restriction may apply that could produce different results. As we have noted, government-wide restrictions have gone in and out of congressional favor. Therefore it is critical to check the current appropriations acts to determine what restrictions are applicable.

The appropriation act restrictions, unless specified to the contrary, require pending legislation. Of course, this would include appropriation bills and the President's budget submission. B-178648, Sept. 21, 1973.

Finally, unless a particular provision specifically includes lobbying at the state level, the legislation must be pending before the U.S.

Congress, not a state legislature. *E.g.,* B-193545, Mar. 13, 1979; B-193545, Jan. 25, 1979.

(c) Cases involving violations of appropriations act provisions barring grassroots lobbying

As discussed, a violation of the grassroots lobbying or "pending legislation" appropriations provisions requires a clear appeal by an agency to the public to contact Congress in support of, or in opposition to, pending legislation.

A bill was introduced in the 86th Congress to prohibit the Post Office Department from transporting first class mail by aircraft on a space-available basis. The Post Office Department opposed the bill and embarked on a campaign to defeat it. Among the tactics used were letters to postal patrons and "canned" editorials asking the public to contact Members of Congress to urge opposition to the bill. GAO found that this activity violated the anti-lobbying statute. B-116331, May 29, 1961.

Another violation resulted from the use of a kit entitled "Battle of the Budget 1973." The White House at the time was opposed to 15 bills then pending in Congress that it felt would exceed the Administration's 1974 budget. White House staff writers assembled a package of materials that were distributed to executive branch officials in an effort to defeat the bills. The kit included statements that people should be urged to write their representatives in Congress to support the administration's opposition to the 15 bills. This, the Comptroller General held, violated the grassroots lobbying provision. B-178448, Apr. 30, 1973.

Administration budget battles with Congress produced another violation in B-178648, Sept. 21, 1973. This case involved prerecorded news releases provided to radio stations by executive branch agencies. GAO reviewed over 1,000 of these releases and while most were proper, GAO found several that violated the law. Examples of the violations are as follows:

- "If the President's position of resisting higher taxes resulting from big spending is to be upheld, the people need to be heard.

The voice of America can reach Capitol Hill and can be a positive persuader."

- "If we are going to have economic stability and fiscal responsibility, we must all support the President's budget program—and let Congress know we support it."

The next two examples illustrate important points:

> "If we don't slow down Federal spending . . . we face a 15-percent increase in income taxes and more inflation. I don't think any American wants this. But, in the final analysis the responsibility rests with the voters and the taxpayers. They must let the Congress know how they feel on this critical issue."

Here, the listener is urged merely to make his or her "views" known to Congress. This is nevertheless a violation if the context makes it clear, as in the example, what those "views" are supposed to be:

> "All those unneeded new bills headed for the President's desk from Congress—all the unworthy Federal programs and projects—are guns pointed at the heads of American taxpayers. . . . Right now, Congress is getting all kinds of letters from special interest groups. Those groups are pleading their own selfish causes. I think Congress should hear from all Americans on what the President is trying to do whatever their views may be. And I say that regardless of whether those who contact their Congressmen happen to be in agreement with me."

The purported disclaimer in the last sentence does not cure the obvious violation.

But see B-239856, Apr. 29, 1991, discussed further below, involving a National Endowment for the Arts regional representative's presentation at a conference. During a question-and-answer segment, where attendees asked how they may support the NEA, the representative responded that they may contact their elected officials. However, the speaker provided a disclaimer statement that factored into our finding that the statements made did not constitute prohibited lobbying. Despite the fact that the official's statement on its face was an exhortation for her audience to contact Members of Congress, we concluded that her comment was a good faith response to the audience member's question and was more of a "civics lesson." Furthermore, audience members recalled that the official made explicit "disclaimers" to the effect that she could not advise audience members to take particular actions in support of her agency.

Another violation occurred in B-128938, July 12, 1976. The Environmental Protection Agency, as part of an authorized public information program, contracted with a nonprofit organization to publish a newsletter in California entitled "Water Quality Awareness." One of the articles discussed a pending bill that environmentalists opposed. The article went on to name the California representatives on the House committee that was considering the bill and exhorted readers to "[c]ontact your representatives and make sure they are aware of your feelings concerning this important legislation." As with some of the violations involving prerecorded news releases provided to radio stations by federal agencies in B-178648, the context of the article left no doubt what those "feelings" were supposed to be. The fact that EPA did not publish the article directly did not matter since EPA contracted for its publication and an agency has a duty to ensure that its appropriations are not used to violate a statutory prohibition. *See*

also B-202975(1), Nov. 3, 1981;[146] GAO, *Alleged Lobbying Activities: Office for Substance Abuse Prevention,* GAO/HRD-93-100 (Washington, D.C.: May 4, 1993) (grantee violated statutory restriction concerning the use of appropriations for the salary or expenses of grant recipients by using grant funds to encourage grassroots lobbying).[147]

As technology develops and agencies adjust their communication strategies, the opportunity to violate the grassroots lobbying restriction also increases. This increased opportunity adds a new layer of significance to an agency's responsibility to ensure its appropriations are only used for authorized purposes. In B-326944, Dec. 14, 2015, the Environmental Protection Agency (EPA)'s inclusion of hyperlinks to the websites of environmental action groups within an agency blog post constituted a clear appeal to the public to contact Congress in opposition to pending legislation, in violation of the grassroots lobbying restriction. EPA's blog post, entitled "Tell Us Why #CleanWaterRules," initiated a social media campaign designed to support finalization of EPA's rule defining "Waters of the United States" under the Clean Water Act. In the blog post, EPA's Communications Director included hyperlinks to a Surfrider Foundation blog post and a Natural Resources Defense Council webpage. Each page led to action prompts that appealed to readers to contact Congress in support of the rule and in opposition to measures that would undermine the rule, while

[146] In this opinion, discussed further in section D. 1. a. (4) , we found that the Urban Mass Transportation Administration violated the government-wide appropriations act restriction against grassroots lobbying when a grant fund recipient published a newsletter urging readers to contact Congress in support of continued funding for a project. We emphasized that agencies are responsible for ensuring that federal funds made available to grantees are not used in violation of the grassroots lobbying prohibition, and also cited certain grant regulations in effect at the time for the proposition that grantee expenditures prohibited by federal laws are not allowable program costs. Since this opinion was issued, the Office of Management and Budget has developed the "common rule" system for grant regulations, and Congress has enacted the Byrd Amendment, which applies specifically to lobbying by recipients of federal grant funds. Given these developments, it is not certain that we would apply the reasoning employed in B-202975(1) to a similar situation today.

[147] For a detailed discussion of the prohibition against the use of grant funds for lobbying activities, see section D. 1. a. (4) .

several bills that would explicitly prevent its implementation were pending.

The fact that the content of the linked webpages did not belong to EPA did not excuse the agency from responsibility for its own message, which included the message conveyed by the expressive act of facilitating access to these webpages using an agency blog post. EPA's message was entirely within EPA's control. EPA chose to link to external websites belonging to environmental action groups to support statements made in its blog post, and in doing so, associated itself with the content reached by clicking those hyperlinks.[148] As with B-128938 and B-178648, context was important in assessing EPA's actions. Every hyperlink by an agency, of course, does not constitute an endorsement of the linked webpage. However, here, the timing and purpose of the blog post paired with the content of the external websites precluded a good faith characterization of the hyperlinks as mere citations.

Developments such as the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002), and the 2009 Open Government Initiative emphasize the utility and necessity of leveraging technology to serve and engage the public. But, as always, agencies must balance efforts to enhance public participation with the bright line rule against grassroots lobbying, when such a restriction is in effect, rather than throw caution to the wind. In a November 2016 memorandum, the Office of Management and Budget (OMB) directed executive agencies to ensure that links on their websites to external information "provide a suitable level of information quality *as implied by the agency linking to or referencing it in their official website*." (Emphasis added.) The memo stated that websites must "clearly state that the content of

[148] The concept that including a hyperlink forms an expressive act and conveys a message that may be informed by the linked content finds support in a line of federal court cases under the government speech doctrine. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 473, 476 (2009); *Sutliffe v. Epping School Dist.*, 584 F. 3d 314, 331-33 (1st Cir. 2009); *Page v. Lexington County School Dist. One*, 531 F.3d 275, 278 (4th Cir. 2008).

external links to non-Federal agency websites is not endorsed by the Federal government." [149] OMB Memorandum, *Policies for Federal Agency Public Websites and Digital* Services, M-17-06 (Nov. 18, 2016).

In B-285298, May 22, 2000, the White House engaged in extensive outreach efforts to business, labor, environmental, and other groups in order to achieve enactment of legislation establishing permanent normal trade relations for China. After reviewing hundreds of documents, we identified one e-mail communication that constituted grassroots lobbying. The e-mail, sent by an Agriculture employee serving on the interagency working group established by the White House, went to two major farmers' organizations. The e-mail forwarded an attached message from a Commerce employee (also serving on the working group) reporting that a certain Member of the House of Representatives had not heard from any of the farmers in his district on the issue of trade with China. The forwarding e-mail stated: "We need to work on this ASAP. [The Member] needs to hear from the farmers in his district." The fact that the House Member was already planning on supporting the legislation did not impact our conclusion that the

[149] In OMB's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies," the term "information" is defined to specifically exclude "hyperlinks to information that others disseminate" and "opinions, where the agency's presentation makes it clear that what is being offered is someone's opinion rather than fact or the agency's views." 67 Fed. Reg. 36, 8460 (Feb. 22, 2002). Noting this exclusion, OMB stated in its memorandum, *Policies for Federal Agency Websites*, M-04-05 (Dec. 17, 2004), that it "does not remove agency responsibility to exercise due diligence when determining whether to link externally," and further, that "Agency links to commercial organizations or interest groups present special challenges with respect to agency objectivity and thus must be used judiciously." OMB rescinded and replaced M-05-04 on November 8, 2016, with M-17-06.

e-mail on its face directly appealed to large farm organizations to contact a Member of Congress to support the legislation.[150]

Two other cases in which violations were found are B-212235, Nov. 17, 1983, and GAO, *Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft,* GAO/AFMD-82-123 (Washington, D.C.: Sept. 29, 1982), both of which are summarized in our previous discussion of 18 U.S.C. § 1913.

It is not necessary for a statement to explicitly refer to the particular piece of pending legislation. *See* B-326944 (while specific legislation was not mentioned in EPA's blog post or the hyperlinked webpages, several measures that would explicitly prevent implementation of the rule were pending, and a Member of Congress contacted via the action forms reached through the hyperlinked webpages could fairly perceive the contact as encouragement to vote against such pending legislation). In another decision, a lobbying campaign using appropriated funds urged the public to write to Members of Congress to support a strong merchant marine at a time when cargo preference legislation was pending violated the law. B-192746-O.M., Mar. 7, 1979. The fact that an article did not refer to specific pending legislation was, however, a factor in our determination that the agency did not engage in prohibited grass roots lobbying in GAO/HRD-93-100.

(d) Cases with no violation of appropriations act provisions barring grassroots lobbying

As indicated above, GAO has consistently taken the position that the "pending legislation" statute does not prohibit direct communication, solicited or unsolicited, between agency officials

[150] *See also* B-325248, Sept. 9, 2014 (e-mail encouraging over 1000 recipients to contact 17 named senators to urge them to take specific actions in support of the then-pending, Senate version of the Transportation, Housing, and related agencies appropriations bill constituted a direct appeal to the public in clear violation of the grassroots lobbying prohibition).

and Members of Congress. This is true even where the contact is an obvious attempt to influence legislation. Thus, GAO concluded that the "pending legislation" statute was not violated in the following cases:

- Contacts with Members of Congress by federal judges and legislative liaison activities by the Judicial Conference of the United States. 63 Comp. Gen. 624 (1984).
- Visits to Members of Congress by National War College students as part of a seminar on the legislative process. B-209584, Jan. 11, 1983.
- Director of the Office of Management and Budget's letter to all Members of the House of Representatives urging opposition to a disapproval resolution on a plan concerning reorganization of the Civil Service. B-192658, Sept. 1, 1978.

See also B-200250, Nov. 18, 1980 (agency sent position paper to Members of Congress opposing particular piece of pending legislation); B-164497(5), Mar. 10, 1977 (entertainment in form of dinners for Members of Congress); B-114823, Dec. 23, 1974 (personal visits to Capitol Hill by agency officials during floor debate on authorizing legislation, at request of congressional proponents of the legislation); B-164786, Nov. 4, 1969 (cruises with Members of Congress on presidential yacht, paid for from entertainment appropriation); B-93353, Sept. 28, 1962 (telegram sent by agency head to all Members of the House of Representatives).

A government contractor lobbying with its own corporate (*i.e.,* nonfederal) funds would generally not violate the appropriation act restriction. However, applicable contract cost principles may restrict or prohibit reimbursement. *See, e.g.,* Federal Acquisition Regulation, 48 C.F.R. § 31.205-22; B-218952, Aug. 21, 1985; GAO, *Nuclear Test Lobbying: DOE Regulations for Contractors Need Reevaluation,* GAO/RCED-88-25BR (Washington, D.C.: Oct. 9,

1987). In addition, there may be legislation applicable to contractor lobbying.[151]

Also as indicated above, an agency will not violate the pending legislation statute by disseminating material to the public that is essentially expository in nature. Even if the material is promotional, there is no violation, at least of the pending legislation statute, as long as it is not a clear appeal to members of the public to contact their elected representatives.[152] Again, several cases will illustrate.

For example, the Department of Transportation (Transportation) set up displays on U.S. Capitol grounds of passenger cars equipped with passive restraint systems (airbags). Transportation employees at the displays distributed brochures, explained the devices, and answered questions from Members of Congress and the public. All this was done while legislation was pending to prohibit implementation and enforcement of the airbag standards. While, considering the timing and location of the displays, one would have to be pretty naive not to see this as an obvious lobbying ploy, that did not make it illegal since there was no evidence that Transportation urged members of the public to contact their elected representatives. Thus, since it was not illegal for Transportation to advocate the use of airbags or to communicate with Congress directly, there was no violation. B-139052, Apr. 29, 1980. The

[151] One of the previously cited "pending legislation" statutes—the Labor-Health & Human Services provision (n. 143)—has an additional subsection, not included in our quotation, barring the use of appropriated funds to pay the salary or expenses of any grant or contract recipient, or agent of such recipient, related to any activity designed to influence pending legislation. In addition, 31 U.S.C. § 1352, enacted in October 1989 and summarized later in our discussion of lobbying with grant funds, includes government-wide restrictions on certain lobbying activities by contractors.

[152] The fact patterns of some of the examples that follow may have yielded violations of another restriction on legislative lobbying, had the provision applied. The next section will discuss this restriction, typically included in the Department of Interior appropriations act, which prohibits activity that falls short of an overt appeal to the public to contact Members of Congress.

apparent intent alone is not enough; it must be translated into action.

The Office for Substance Abuse Prevention (OSAP) published "Prevention Pipeline" as part of its statutory duties to act as a clearinghouse for drug and alcohol abuse material and to educate the public. OSAP included in the publication items submitted to it with the following disclaimer: "Publication of information and products does not imply endorsement by OSAP or the Federal Government." One item that was submitted to and published by OSAP informed readers of an "activist's guide" for communities developed by an organization that lobbied for legislation requiring warning labels on alcoholic beverages. While the item went on to describe the guide as helping people with writing to U.S. Senators to urge support of legislation, it did not make any reference to the specific legislation that was pending before Congress at the time, nor did it expressly endorse the idea of writing to Members of Congress in support of legislation. GAO, *Alleged Lobbying Activities: Office for Substance Abuse Prevention,* GAO/HRD-93-100 (Washington, D.C.: May 4, 1993).

In another case, the Social Security Administration (SSA), in its annual mailing of employment benefit reports to American workers, included material concerning the Social Security system's potential financial problems and legislative initiatives to reform the Social Security program. Since none of the material called on the public to contact Congress and urge it to support SSA's position on this or any other matter, GAO determined that there was no violation of the grassroots lobbying prohibition. GAO rejected the suggestion that the standard ought to be an assessment of the agency's intent and whether the agency's message would be likely to influence the public to contact Congress. The standard requiring evidence of a clear appeal by the agency to the public to contact congressional members to urge them to support the agency's position is based upon the language and legislative history of the grassroots lobbying provisions. Moreover, the standard is consistent with a proper respect for the right and responsibility of federal agencies to communicate with the public and Congress regarding policies and activities. GAO stated:

> "We have no reason to think that Congress meant to preclude government officials from saying anything that might possibly cause the public to think about or take positions on the issues of the day and, as a result, contact their elected representatives. To the contrary, we see the free and open exchange of ideas and views as central to our political system and, accordingly, remain reluctant to construe these laws in such a way that would unnecessarily or excessively constrain agency communications with the public or Congress."

B-304715, Apr. 27, 2005. *See also* B-319075, Apr. 23, 2010 (GAO's review of the Department of Health and Human Service's *HealthReform.gov* Web site, *State Your Support* Web page, and materials regarding subsequent contacts with Web users found no explicit or direct appeal to the public to contact Members of Congress in support of pending legislation). *Compare* B-326944, Dec. 14, 2015 (EPA hyperlinks constitute clear appeal).

Similarly, the statute was not violated by the following actions:

- Speech by the Secretary of the Air Force urging defense contractors to direct their advertising towards convincing the public of the need for a strong defense rather than promoting particular weapon systems manufactured by their companies. Speech did not refer to legislation nor urge anyone to contact Congress. B-216239, Jan. 22, 1985.

- Bumper stickers purchased by Department of Transportation and affixed to government vehicles urging compliance with 55 mph speed limit. B-212252, July 15, 1983.

- Various trips by the District of Columbia Police Chief during which he made speeches supporting the administration's law enforcement policy. B-118638, Aug. 2, 1974.

- Statements by cabinet members, distributed to news media, which discussed pending legislation but were limited to an exposition of the administration's views. B-178648, Dec. 27, 1973.

- Mailings by the National Credit Union Administration to federally chartered credit unions consisting of reprints from the Congressional Record giving only one side of a controversial legislative issue. B-139458, Jan. 26, 1972.

- Statements by Deputy Assistant Secretary for the Mining Safety and Health Administration (MSHA) before mining industry executives concerning agency's opposition to legislative proposal to merge MSHA with OSHA did not include urging anyone to contact Members of Congress. GAO, *MSHA Lobbying,* GAO/HEHS-96-9R (Washington, D.C.: Oct. 19, 1995).

- Remarks made by Secretary of Education in meetings with members of education organizations and presidents of education associations included factual presentation of budget proposals relating to education but not requests for lobbying assistance. GAO, *Department Of Education: Compliance With the Federal Advisory Committee Act and Lobbying Restrictions,* GAO/GGD/OGC-00-18 (Washington, D.C.: Dec. 30, 1999).

- Housing and Urban Development report and the letter transmitting report to agency constituencies criticized proposed budget cuts as having "devastating impact on families and communities nationwide" but did not contain any express appeals that members of the public contact their congressional representatives. B-284226.2, Aug. 17, 2000.

See also B-270875, July 5, 1996 (Labor Department publications entitled "America's Job Fax," supporting President's employment legislation);

(2) Provision of assistance to private lobbying groups

Another type of "lobbying" activity GAO has found improper is the use of appropriated funds to provide assistance to private lobbying groups. This is largely an outgrowth of the concept that an agency should not be able to do indirectly that which it cannot do directly.

In 1977, the Office of the Special Assistant to the President for Consumer Affairs and the Office of Consumer Affairs within the then Department of Health, Education and Welfare (HEW) mounted an active campaign to obtain passage of legislation to establish a Consumer Protection Agency. As part of the campaign, the Special Assistant had instructed the Office of Consumer Affairs to informally clear its efforts with certain "public interest lobby members." In addition, two of the consumer lobby groups asked HEW to provide material illustrating situations where a Consumer Protection Agency could have had an impact had it been in existence. Before implementing the campaign, however, the Office of Consumer Affairs sought advice from the HEW General Counsel, who advised against certain elements of the plan, including the two items mentioned.

Pursuant to the HEW General Counsel's advice, the more egregious elements of the plan were not carried out, and the Comptroller General concluded that the activities ultimately carried out violated no laws. However, the Comptroller General pointed out that the grassroots lobbying statute would prohibit the use of appropriated funds to develop propaganda material to be given to private lobbying organizations to be used in their efforts to lobby Congress. An important distinction must be made. There would be nothing wrong with servicing requests for information from outside groups, lobbyists included, by providing such items as stock education materials or position papers from agency files, since this material would presumably be available in any event under the Freedom of Information Act. The improper use of appropriated funds arises when an agency assigns personnel or otherwise provides administrative support to prepare material not otherwise in existence to be given to a private lobbying organization. B-129874,

Sept. 11, 1978. *See also* 66 Comp. Gen. 707 (1987), drawing the same distinction in the context of 18 U.S.C. § 1913.

In another example, the Maritime Administration ("MarAd") had become intimately involved with the National Maritime Council, a trade association of ship operators and builders. MarAd staff performed the administrative functions of the Council at MarAd headquarters and regional offices. In 1977, at a time when cargo preference legislation was pending in Congress, the Council, with MarAd's active assistance, undertook an extensive advertising campaign in national magazines and on television advocating a strong U.S. merchant marine. Some of the advertisements encouraged members of the public to contact their elected representatives to urge them to support a strong merchant fleet. Reviewing the situation, GAO concluded that MarAd had violated the grassroots lobbying statute by expending appropriated funds to provide administrative support to the Council in the form of staff time, supplies, and facilities, when it knew the Council was attempting to influence legislation pending before Congress. *See* B-192746-O.M., Mar. 7, 1979; GAO, *The Maritime Administration And The National Maritime Council—Was Their Relationship Appropriate?* CED-79-91 (Washington, D.C.: May 18, 1979).

In B-133332, Mar. 28, 1977, the Smithsonian Institution had prepared an exhibit entitled "The Tallgrass Prairie: An American Landscape" and displayed it at a premiere showing for the benefit of the Tallgrass Prairie Foundation, a nonprofit organization. While appropriated funds were used to prepare the exhibit, none were used for the premiere showing itself since, under the Smithsonian's traveling exhibit program, administrative costs are paid by the host organization. The problem arose because the Tallgrass Prairie Foundation shared a large part of its membership with a lobbying organization known as "Save the Tallgrass Prairie, Inc." In addition, a leading member of both organizations had actually created the exhibit under contract with the Smithsonian. However, the exhibit itself was noncontroversial and the Foundation had an independent legal existence. Thus, since no lobbying took place at the premiere showing, and since any lobbying by "Save the Tallgrass" or by the exhibit's creator could not be imputed to the Foundation or to the

Smithsonian, GAO concluded that the Smithsonian had not used its appropriations for any improper indirect lobbying.[153]

(3) Promotion of legislative proposals: Interior appropriations act restriction

Since 1977, the following restriction has been included in every Interior Department appropriations act:

> "No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which Congressional action is not complete other than to communicate to Members of Congress as described in 18 U.S.C. 1913."[154]

This prohibition applies only to appropriations funded under the Interior, Environment, and Related Agencies appropriations act, which includes appropriations for various agencies including the Department of the Interior and the Environmental Protection Agency. The committee report accompanying what ultimately became the Interior restriction explained the Committee's concern over "certain public information activities being promoted by [some agencies] that tend to promote pending legislative proposals to set aside certain areas in Alaska for national parks, wildlife refuges,

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[153] *See also GAO, Department Of Education: Compliance With the Federal Advisory Committee Act and Lobbying Restrictions,* GAO/GGD/OGC-00-18 (Washington, D.C.: Dec. 30, 1999), for a discussion of another instance in which GAO found no evidence that an agency was involved in providing improper assistance to lobbying groups.

[154] Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. G, title IV, § 401, ___ Stat. ___ (May 5, 2017). In various iterations of the appropriations language where reference to section 1913 was eliminated, GAO concluded that its deletion had no effect on the interpretation of the restriction. B-262234, Dec. 21, 1995.

national forest and other withdrawals." The Committee referred to the colorful brochures printed and actively distributed by these agencies, extolling the benefits of such proposals, which as a result tended to promote certain legislative goals of these agencies. The Committee considered these activities to be, at a minimum, violations of the intent of 18 U.S.C. § 1913. At the same time the Committee cautioned that the language "should not be construed as an impediment on the agencies' ability to respond to public information inquiries."[155]

The Interior restriction has been interpreted to prohibit both grassroots lobbying activity, proscribed by both 18 U.S.C. § 1913 and the pending legislation restriction, and activity that falls short of such activity. In describing the prohibited activity as that which "in any way *tends to promote* public support or opposition" (emphasis added) to legislation, the restriction is designed to cover particularly egregious examples of lobbying even though the material or activity stops short of explicitly soliciting a member of the public to contact his or her member of Congress in support or opposition of pending legislation. *See* 59 Comp. Gen. 115 (1979); B-284226.2, Aug. 17, 2000.

We have found a number of instances where agencies covered by the Interior provision avoided grassroots lobbying but went beyond appropriate information dissemination and violated the Interior restriction:

- A mass mailing by the National Endowment for the Arts (NEA) of an information package supporting the Livable Cities Program implicitly advocated support of the appropriation for that NEA program. Although the literature did not directly exhort readers to lobby Congress, its tenor was clearly designed to promote public support for the program and the mailing was timed to reach the public just before House reconsideration of a prior refusal to fund the program. 59 Comp. Gen. 115 (1979).

[155] S. Rep. No. 95-276, at 4–5 (1977).

- Remarks made by a Fish and Wildlife Service employee at a press conference called to generate opposition to a pending amendment to the Clean Water Act and timed to coincide with the congressional committee's active consideration, tended to promote public opposition to the legislative proposal. While the official did not urge members of the public to contact their Members of Congress, he stated, "we cannot afford to roll back protection" for wetlands, which he believed the legislation would do. B-262234, Dec. 21, 1995.

- Forest Service officials waged an aggressive campaign to promote public support for a budget proposal seeking to change the way certain Forest Service payments to states are calculated. Briefing packages, used by officials in talking to local public officials likely to be concerned about funding, were highly supportive of the proposal, emphasizing the benefits of re-forming Forest Service payments to states. Based on the response of some local officials, who indicated they would contact their congressional representatives, the briefing efforts were clearly successful at promoting support for the payment proposal. B-281637, May 14, 1999.[156]

In analyzing whether a violation has occurred, a variety of factors must be considered, including the timing, setting, audience, content, and the reasonably anticipated effect of the questioned activity. *See* GAO, *H.R. 3078, The Federal Agency Anti-Lobbying Act,* GAO/T-OGC-96-18 (May 15, 1996).[157]

In this restriction, unlike others, intent can also be an important factor to consider when presented with a particularly close case. As we have noted, "there is a very thin line between the provision of legitimate information in response to public inquiries and the

[156] *See also* GAO, Alleged Unauthorized Use of Appropriated Moneys by Interior Employees, CED-80-128 (Washington, D.C.: Aug. 13, 1980).

[157] This testimony concerned proposed government-wide legislation modeled on the Interior restriction. The proposed legislation did not pass.

provision of information in response to the same requests which 'tends to promote public support or opposition' to pending legislative proposals." 59 Comp. Gen. 115 (1979). Navigating this thin line may be difficult for agencies, which cannot always prevent or even anticipate public response.

In B-239856, Apr. 29, 1991, GAO relied on the demonstrated intent of the National Endowment for the Arts (NEA) officials engaging in the questioned activities, in concluding that the agency had not violated the Interior restriction. One aspect of this decision involved an NEA official's remarks at an arts conference. In response to a question from the audience concerning what the audience could do to support NEA, the official responded that they could contact their congressional representatives. GAO's investigation concluded that there was no intent to promote. The official's response was incidental to her presentation and not part of any plan to generate action on the part of her audience. The official's answer was viewed as more of a civics lesson, informational in nature, rather than an exhortation to contact Congress.

(4) Lobbying with grant funds: the Byrd Amendment

The use of grant funds by a federal grantee for lobbying presents somewhat more complicated issues. On the one hand, there is the principle, noted in various contexts throughout this publication, that an agency should not be able to do indirectly what it cannot do directly. Thus, if an agency cannot make a direct expenditure of appropriated funds for certain types of lobbying, it should not be able to circumvent this restriction by the simple device of passing the funds through to a grantee. Yet on the other hand, there is the seemingly countervailing rule that where a grant is made for an authorized grant purpose, grant funds in the hands of the grantee largely lose their identity as federal funds and are no longer subject to many of the restrictions on the direct expenditure of appropriations. *See* B-289801, Dec. 30, 2002 (holding that when the Department of Education makes grant awards during the period of availability of the funds to be used, Education's grant awards are in compliance with the *bona fide* needs rule even when

appropriations available for only one fiscal year are used to fund multiyear grants).

In some instances, Congress has dealt with the problem by legislation. For example, legislation, commonly known as the Byrd Amendment and codified at 31 U.S.C. § 1352, imposes limited government-wide restrictions. Section 1352(a)(1) provides:

> "None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any Federal action described in paragraph (2) of this subsection."

The actions identified in paragraph (2) are the awarding of any federal contract; the making of any federal grant or loan; the entering into of any cooperative agreement; and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement. The law includes detailed disclosure requirements and civil penalties. Section 1352(d)(1)(c) stresses that section 1352 should not be construed as permitting any expenditure prohibited by any other provision of law. Thus, section 1352 supplements other anti-lobbying statutes; it does not supersede them.

Section 1352(b)(6) directs the Office of Management and Budget (OMB) to issue guidance for agency implementation. OMB published interim and final guidance entitled "Governmentwide Guidance for New Restrictions on Lobbying" on December 20, 1989 (54 Fed. Reg. 52306), supplemented on June 15, 1990 (55 Fed. Reg. 24540), and amended on January 15, 1992 (57 Fed. Reg. 1772) and January 19, 1996 (61 Fed. Reg. 1412). OMB

maintains a list of agency implementing regulations. OMB, *Federal Agency Rule on Lobbying*, *available at* www.whitehouse.gov/omb/grants_chart (last visited Aug. 11, 2017). For contracts, see subpart 3.8 of the Federal Acquisition Regulations.

GAO has most often addressed the application of the Byrd Amendment to federal contractors in the context of bid protests. *See* 71 Comp. Gen. 281 (1992) (communication between bidder's "regularly employed" employee and government engineer was not an attempt to influence procuring agency in connection with a federal contract and therefore did not violate the Byrd Amendment); 71 Comp. Gen. 81 (1991) (Byrd Amendment does not require disclosure of the expenditure of other than appropriated funds to pay reasonable compensation to regularly employed employees); 69 Comp. Gen. 604 (1990) (contractor lobbying activity was not directed at award of current contract and therefore was not required to be disclosed under the Byrd Amendment); B-246304.8, B-246304.9, May 4, 1993 (bidder's lobbying to have legislation changed, regardless of how funded, did not violate the Byrd Amendment).

GAO has had one occasion to consider the Byrd Amendment's application to federal grant recipients in a case involving the Denali Commission. B-317821, June 30, 2009. Some Denali Commissioners are also officials of organizations who receive federal grants from the agency or whose members receive federal grants. GAO determined that the Byrd Amendment prohibits Commissioners and their personal staff, when acting in their role as grantees, from using grant funds to lobby Members of Congress and their staff in connection with the making of a grant.[158] *Id.*

[158] The decision in B-317821 notes, however, that the Byrd Amendment does not apply when Commissioners are acting in their role as commissioners. In that instance, anti-lobbying restrictions may apply. For discussion of the anti-lobbying restrictions, see section D. 1. a. (1) (a).

More recently, the Lobbying Disclosure Act of 1995,[159] as amended, 2 U.S.C. §§ 1601–1614, provides that organizations described in section 501(c)(4) of the Internal Revenue Code[160] which engage in lobbying activities are not eligible to receive federal grants. 2 U.S.C. § 1611. The Act, at 2 U.S.C. § 1602(7), defines "lobbying activities" to mean:

> "[L]obbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others."

The Act, at 2 U.S.C. § 1602(8), further defines "lobbying contact" to mean certain communications with covered federal officials. As such, the Act does not prevent "grassroots" lobbying activities by federal grants recipients as that term is discussed in section D.1.a(1) above.[161]

Another example is the legislation governing the Legal Services Corporation. Under the Legal Services Corporation Act, recipients of funds, both contractors and grantees, may not use the funds directly or indirectly to attempt to influence the passage or defeat of legislation. The prohibition covers legislation at the state and local level as well as federal legislation. The statute permits three

[159] Pub. L. No. 104-65, 109 Stat. 691 (Dec. 19, 1995). For a discussion of the constitutionality of the Byrd Amendment in the grant context after passage of Public Law 104-65, *see United States v. National Training & Information Center*, 532 F. Supp. 2d 946 (N.D. Ill. 2007).

[160] This includes certain civic leagues, social welfare organizations, and local associations of employees. 26 U.S.C. § 501(c)(4).

[161] *See also* GAO, *Federal Lobbying: Differences in Lobbying Definitions and Their Impact*, GAO/GGD-99-38 (Washington, D.C.: Apr. 15, 1999) for further discussion of the Act.

exceptions: (1) recipients may testify before and otherwise communicate with legislative bodies upon request, (2) they may initiate contact with legislative bodies to express the views of the Corporation on legislation directly affecting the Corporation, and (3) they may engage in certain otherwise prohibited lobbying activities when necessary to the proper representation of an eligible client. 42 U.S.C. § 2996f(a)(5).[162] For a general discussion of these provisions, see B-129874-O.M., Oct. 30, 1978. *See also Regional Management Corp. v. Legal Services Corp.,* 186 F.3d 457 (4th Cir. 1999) (generally discussing 42 U.S.C. § 2996f(a)(5) as part of finding that there is no private right of action to challenge the Legal Services Corporation's decision that its grantee did not violate anti-lobbying provision); B-202569, Apr. 27, 1981.

Three 1981 cases illustrate the application of the Legal Services Corporation statute. In one case, the Board of Aldermen for the City of Nashua, New Hampshire, was considering a resolution to authorize a "food stamp workfare" demonstration project. An attorney employed by the New Hampshire Legal Assistance group, a Legal Services Corporation grantee, wrote to members of the Board urging them to reject the resolution. Since the letter was not related to the representation of any specific client or group of clients but rather had been self-initiated by the attorney, the use of federal funds to prepare and distribute the letter was illegal. B-201928, Mar. 5, 1981.

In the second case, 60 Comp. Gen. 423 (1981), the Corporation and its grantees conducted a lobbying campaign to drum up support for the Corporation's reauthorization and appropriation legislation. The Corporation argued that the actions were permissible under the exception authorizing contact with legislative bodies on legislation directly affecting the Corporation. While recognizing that the statute permitted direct self-initiated contact in

[162] Similar provisions, found in 42 U.S.C. § 2996e(c), apply to the Corporation itself. An illustrative case is B-231210, June 7, 1988, *aff'd upon reconsideration*, B-231210, June 4, 1990, holding that the Corporation is not authorized to retain a private law firm to lobby Congress on its behalf.

these circumstances, GAO reviewed the legislative history and concluded that the exception did not permit grassroots lobbying either by the Corporation itself or by its grantees.

In the third case, the Managing Attorney of a Legal Services Corporation (LSC) grantee made a mass mailing of a form letter to local attorneys. The letter solicited their support for continuation of the LSC program and urged them to contact a local Congressman opposed to reauthorization of the LSC to try to persuade him to change his vote. This too constituted impermissible grassroots lobbying. B-202787, Dec. 29, 1981.

GAO also found the statute was violated when a grantee used LSC grant funds to oppose the confirmation of Judge Robert Bork to the United States Supreme Court. The finding was based largely on LSC regulations that broadly define "legislation" to include action on appointments. B-230743, June 29, 1990.

Another provision in the LSC enabling legislation prohibits both the Corporation and its grantees from contributing or making available "corporate funds or program personnel or equipment for use in advocating or opposing any ballot measures, initiatives, or referendums." 42 U.S.C. § 2996e(d)(4). The Corporation and one of its grantees violated this one by providing funds and personnel for a campaign to defeat a ballot measure in California. 62 Comp. Gen. 654 (1983).

In addition to the LSC's enabling legislation, appropriation acts providing funds for the Corporation also include restrictions. Beginning in 1978, the Corporation's appropriations contained a restriction that prohibited the use of Corporation funds for publicity or propaganda designed to support or defeat legislation pending before Congress or any state legislature. While serving largely to reemphasize the prohibitions contained in the Corporation's enabling legislation, the restriction made it clear that the exception for the proper representation of eligible clients did not extend to grass roots lobbying. *See* 60 Comp. Gen. 423 (1981); B-163762, Nov. 24, 1980.

Since 1996 the LSC's appropriations have gone beyond restricting grantee use of federal funds for lobbying activities to a broader prohibition of the Corporation's providing funds to any grantee "that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body."[163]

In 2001, the Supreme Court struck down a restriction contained in the Corporation's 1996 appropriation on the use of the Corporation's funds for lobbying purposes. *Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001). The Court found that provisions, which sought to restrict efforts toward welfare reform, were unconstitutional. See also *Legal Aid Society of Hawaii v. Legal Services Corp.,* 145 F.3d 1017 (9th Cir.), *cert. denied,* 525 U.S. 1015 (1998) for additional background on appropriation act restrictions.

Still another example of legislation expressly applicable to grantees is discussed in B-202787(1), May 1, 1981. The appropriation act providing funds for the Community Services Administration (CSA) contained a provision which prohibited the use of funds "to pay the salary or expenses of any grant or contract recipient . . . to engage in any activity designed to influence legislation or appropriations pending before the Congress." GAO found this provision violated when a local community action agency used grant funds for a mass mailing of a letter to members of the public urging them to write to their Congressmen to oppose abolition of the agency. In addition, CSA had issued a regulation purporting to exempt CSA grantees from the appropriation act restriction. Finding that CSA had

[163] Ascertaining applicable lobbying restrictions often requires a certain level of patience. The Corporation's 2016 appropriation refers back to the restriction contained in its 1996 appropriation by prohibiting the use of funds "for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119 . . ." Pub. L. No. 114-113, 129 Stat. 2242, 2322 (Dec. 18, 2015); Pub. L. No. 105-119, 111 Stat. 2440, 2510 (Nov. 26, 1997). Public Law 105-119 contains the Corporation's 1998 appropriation, which itself refers back to the Corporation's 1996 appropriation, contained in the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(4), 110 Stat. 1321, 1321-53 (Apr. 26, 1996).

exceeded its authority, the Comptroller General recommended that CSA rescind its ruling. The Department of Justice also found the CSA regulations invalid, construing the statute as constituting "an unqualified prohibition against lobbying by federal grantees" and not merely a restriction on grassroots lobbying. 5 Op. Off. Legal Counsel 180 (1981).

The provision discussed in the preceding paragraph was also violated when a university, using grant funds received from the Department of Education, encouraged students to write to Members of Congress to urge their opposition to proposed cuts in student financial aid programs. GAO, *Improper Use of Federal Student Aid Funds for Lobbying Activities,* GAO/HRD-82-108 (Washington, D.C.: Aug. 13, 1982).

An almost identical, subsequent provision was violated when a grantee of the Office of Substance Abuse Prevention used grant funds to host a conference used as a forum for grassroots lobbying. Another grantee did not violate the provision, however, because its lobbying efforts related to a state legislature matter. GAO, *Alleged Lobbying Activities: Office for Substance Abuse Prevention,* GAO/HRD-93-100 (Washington, D.C.: May 4, 1993). The fiscal year 2016 Labor, Health and Human Services, and Education, and Related Agencies appropriation act contains a version of this restriction, which has been expanded to prohibit such lobbying activities at the state level. Pub. L. No. 114-113, div. H, title V, § 503(b), 129 Stat. 2242, 2648 (Dec. 18, 2015).

The question of lobbying with grant funds becomes more difficult when the situation is not covered by statute and applicable appropriation act restrictions do not expressly cover grantees. Until late in 1981, the question of whether appropriation act restrictions, silent as to grantees, applied to grantee expenditures had not been definitively addressed in a decision of the Comptroller General. An early case held that telegrams to Members of Congress by state agencies funded by Labor Department grants constituted an improper use of federal funds where they were clearly designed to influence pending legislation. B-76695, June 8, 1948. This case pre-dated appropriation act restrictions and was decided under

18 U.S.C. § 1913.[164] The concept of applying the prohibition to grantee expenditures would arguably be the same under the appropriation act restrictions. In a 1977 letter, GAO noted the principle that funds in the hands of a grantee largely lose their identity as federal funds and said that the applicability of the publicity or propaganda statute was therefore "questionable." B-158371, Nov. 11, 1977 (nondecision letter). A 1978 letter to a Member of the Senate said that the issue should be addressed on a case-by-case basis. B-129874, Aug. 15, 1978.

In B-128938, July 12, 1976, GAO said that an agency has a responsibility to ensure that its appropriations are not used to violate the anti-lobbying statute. While the case involved expenditures by a contractor, the principle would seemingly apply as well to a grantee.

Finally, in B-202975(1), Nov. 3, 1981, the Comptroller General seemingly resolved the uncertainty, applied the concept of B-128938, and concluded that: "Federal agencies and departments are responsible for insuring that Federal funds made available to grantees are not used contrary to [the publicity or propaganda] restriction." The case involved the Los Angeles Downtown People Mover Authority, a grantee of the Urban Mass Transportation Administration (UMTA), Department of Transportation. Fearing that its funding was in jeopardy, the Authority prepared and distributed a newsletter urging readers to write to their elected representatives in Congress to support continued funding for the People Mover project. The Comptroller General found that this newsletter, to the extent it involved UMTA grant funds, violated the anti-lobbying statute. Nevertheless, this decision predates the Byrd Amendment and the establishment of the common rule system of grant

[164] While 18 U.S.C. § 1913 has been regarded as applicable only to officers and employees of the federal government and not to contractors or grant recipients, this interpretation has not been challenged since the statute was amended in 2002 by Pub. L. No. 107-273, § 205(b), 116 Stat. 1758, 1778 (Nov. 2, 2002). *See* B-214455, Oct. 24, 1984 (citing a May 24, 1983, letter to GAO from the Justice Department's Criminal Division).

regulations. It is possible that our reasoning would differ if we were to evaluate a similar situation today.

In 1996, GAO determined that the state of Nevada improperly used grant funds in violation of a broad provision found in the annual Energy and Water Development appropriations acts prohibiting the use of federal funds to influence legislation and other lobbying activities.[165] *See* GAO, *Nuclear Waste: Nevada's Use of Nuclear Waste Grant Funds,* GAO/RCED-96-72 (Washington, D.C.: Mar. 20, 1996.) Emphasizing the prohibition of the "indirect use" of federal funds to influence pending legislation, GAO concluded that the production of a videotape advancing the state's opposition to a nuclear waste repository at Yucca Mountain constituted such an attempt to influence a matter pending before Congress.[166]

In our preceding discussion of lobbying by government agencies, we noted that appropriation act restrictions may be limited to lobbying the United States Congress or may also apply to lobbying at the state and local level where expressly provided. The same principle applies with respect to lobbying with grant funds. B-214455, Oct. 24, 1984; B-206466, Sept. 13, 1982.

b. Publicity or propaganda

While lobbying restrictions are found in penal statutes and appropriations acts, restrictions on publicity or propaganda are found only in appropriations acts. In 1949, a House Resolution created a Select Committee on Lobbying Activities to review the operation of the Federal Regulation of Lobbying Act and to

[165] "[N]one of the funds herein appropriated may be used directly or indirectly to influence legislative action on any matter pending before Congress or a State legislature or for any lobbying activity as provided in section 1913 of title 18, United States Code." Energy and Water Development Appropriations Act, 1995, Pub. L. No. 103-316, 108 Stat. 1707, 1716 (Aug. 26, 1994).

[166] Note the language of the prohibition differed from the typical grassroots lobbying restriction, which prohibits the use of appropriations for "publicity or propaganda purposes" designed to support or defeat pending legislation.

investigate all lobbying activities both by the private sector and by federal agencies. The Committee held extensive hearings and issued several reports. In its final report, the Committee had this to say about lobbying by government agencies:

> "The existing law in this field, unlike the law governing lobbying by private interests, is not directed toward obtaining information of such activities, but is prohibitory in concept and character. It forbids the use of appropriated funds for certain types of lobbying activities and is specifically a part of the Criminal Code. Enacted in 1919, it is not a recent or in any sense a novel piece of legislation. Its validity has never been challenged and we consider it sound law. . . .
>
> "It is our conclusion that the long-established criminal statute referred to above should be retained intact and that Congress, through the proper exercise of its powers to appropriate funds and to investigate conditions and practices of the executive branch, as well as through its financial watch dog, the General Accounting Office, can and should remain vigilant against any improper use of appropriated funds and any invasion of the legislative prerogatives and responsibilities of the Congress."[167]

[167] House Select Committee on Lobbying Activities, *Report and Recommendations on Federal Lobbying Act*, H.R. Rep. No. 81-3239, at 36 (1951).

When the Select Committee referred to the "proper exercise" of the congressional power to appropriate funds, it of course had in mind the use of that power to restrict the use of funds for activities considered undesirable. While the use of appropriation act restrictions to control lobbying had some earlier precedent, the practice began in earnest shortly after the issuance of the Select Committee's final report with some fiscal year 1952 appropriations, and has continued ever since.

The publicity or propaganda prohibition made its first appearance in 1951. Members of Congress expressed concern over a speaking campaign promoting a national healthcare plan undertaken in the early 1950s by Oscar R. Ewing, the Administrator of the Federal Security Agency, a predecessor to the Department of Health and Human Services and the Social Security Administration. In reaction to this activity, Representative Lawrence R. Smith introduced the following provision, which was enacted in the Labor-Federal Security appropriation for 1952, Pub. L. No. 134, ch. 373, § 702, 65 Stat. 209, 223 (Aug. 31, 1951): "No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not heretofore authorized by the Congress." It prohibited expenditures for all unauthorized publicity or propaganda. Later versions of this provision prohibited activity throughout the government:

> "No part of any appropriation contained in this *or any other Act* shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofore authorized by the Congress."[168]

[168] *See, e.g.,* Financial Services and General Government Appropriations Act, 2016, Pub. L. No. 114-113, div. E, title VII, § 718, 129 Stat. 2242, 2477 (Dec. 18, 2015) (emphasis added).

Unfortunately, as with most of the publicity or propaganda statutes over the years, there is no definition of either term. Thus, the statutes have been applied through administrative interpretation.

In construing and applying a publicity or propaganda provision, it is necessary to achieve a delicate balance between competing interests. On the one hand, every agency has a legitimate interest in communicating with the public and with the Congress regarding its functions, policies, and activities. The Select Committee recognized this, quoting in its Interim Report from the report of the Hoover Commission:

> "Apart from his responsibility as spokesman, the department head has another obligation in a democracy: to keep the public informed about the activities of his agency. How far to go and what media to use in this effort present touchy issues of personal and administrative integrity. But of the basic obligation there can be little doubt."[169]

In addition, the courts have indicated that it is not illegal for government agencies to spend money to advocate their positions, even on controversial issues. *See Joyner v. Whiting,* 477 F.2d 456, 461 (4th Cir. 1973); *Donaggio v. Arlington County, Virginia,* 880 F. Supp. 446, 454–56 (E.D. Va 1995); *Arrington v. Taylor,* 380 F. Supp. 1348, 1364 (M.D. N.C. 1974).[170]

Yet on the other hand, the statute has to mean something. As the court said in *National Association for Community Development v. Hodgson,* 356 F. Supp. 1399 (D.D.C. 1973) in reference to

[169] H.R. Rep. No. 81-3138, at 53 (1950).

[170] Further useful discussion may be found in cases dealing with different but conceptually related issues such as *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), citing *United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989).

18 U.S.C. § 1913, "[o]bviously, Congress intended to remedy some problem or further some cause, otherwise they would not have bothered enacting the statute." *Id.* at 1403. As long as the law exists, there has to be a point beyond which government action violates it. Testifying before the Select Committee on March 30, 1950, former Assistant Comptroller General Frank Weitzel made the following remarks:

> "[I]f you set up an organization in the executive branch for the benefit of the three blind mice they would come up here with a budget program and prospectus which would convince any Member of Congress that that was one of the most important organizations in the executive branch. . . .
>
> "And no doubt by that time there would also be some private organizations with branches which would parallel your Federal agency, which would be devoted to the propagation and dissemination of information about the three blind mice . . . ."[171]

As noted, although the publicity or propaganda prohibition has appeared in some form in the annual appropriations acts since 1951, the prohibitions themselves provide little definitional guidance as to what specific activities are publicity or propaganda. Thus, and in light of the delicate balance described, GAO has identified three activities that are prohibited by the publicity or propaganda prohibition—self-aggrandizement, covert propaganda, and purely partisan materials.

[171] *The Role of Lobbying in Representative Self-Government: Hearings before the House Select Committee on Lobbying Activities*, 81st Cong., pt. 1, at 158 (1950).

In evaluating whether a given action violates a publicity or propaganda provision, GAO will ask for the agency's administrative justification. GAO will not accept the agency's justification where it is clear that the action falls into one of these categories. Before discussing these categories, two threshold issues must be noted.

First, it must be determined whether the agency in question is subject to a publicity or propaganda restriction. The existence and precise terms of the restriction can change over time. Therefore, it is always necessary to check the relevant appropriation acts for the year in which the questioned obligation or expenditure was made in order to determine what, if any, agency-specific or government-wide restrictions exist.

Second, a violation must be predicated on the use of public funds (either direct appropriations or funds which, although not direct appropriations, are treated as appropriated funds). If appropriated funds are not involved, there is no violation no matter how blatant the conduct may be. 56 Comp. Gen. 889 (1977) (involving a newsletter concerning the Clinch River Breeder Reactor Project containing material which would have been illegal had it been financed in any way with appropriated funds).

As noted above, the broadest form of the publicity or propaganda restriction prohibits the use of appropriated funds "for publicity or propaganda purposes not authorized by the Congress." Recent government-wide provisions have limited the restriction to activities "within the United States."[172]

(1) Self-aggrandizement

The Comptroller General first had occasion to construe this provision in 31 Comp. Gen. 311 (1952). The National Labor

[172] *See, e.g.,* Pub. L. No. 114-113, div. E, title VII, § 718, 129 Stat. 2242, 2477 (Dec. 18, 2015); Pub. L. 113-235, div. E, title VII, § 718, 128 Stat. 2130, 2383 (Dec. 16, 2014); Pub. L. No. 113-76, div. E, title VII, § 718, 128 Stat. 5, 234 (Jan. 17, 2014).

Relations Board asked whether the activities of its Division of Information amounted to a violation. Reviewing the statute's scant legislative history, the Comptroller General concluded that it was intended "to prevent publicity of a nature tending to emphasize the importance of the agency or activity in question." *Id*. at 313. Therefore, the prohibition would not apply to the "dissemination to the general public, or to particular inquirers, of information reasonably necessary to the proper administration of the laws" for which an agency is responsible. *Id*. at 314. Based on this interpretation, GAO concluded that the activities of the Board's Division of Information were not improper. The only thing GAO found that might be questionable, the decision noted, were certain press releases reporting speeches of members of the Board.

Thus, 31 Comp. Gen. 311 established the important proposition that the statute does not prohibit an agency's legitimate informational activities. *See also* B-319075, Apr. 23, 2010; B-302992, Sept. 10, 2004; B-302504, Mar. 10, 2004; B-284226.2, Aug. 17, 2000; B-223098.2, Oct. 10, 1986. It also established that the publicity or propaganda restriction prohibits "publicity of a nature tending to emphasize the importance of the agency or activity in question." 31 Comp. Gen at 313. *See also* B-302504, Mar. 10, 2004; B-212069, Oct. 6, 1983. Such activity has become known as "self-aggrandizement."

In B-302504, Mar. 10, 2004, GAO considered a flyer and television and print advertisements that the Department of Health and Human Services (HHS) produced and distributed to inform Medicare beneficiaries of recently enacted changes to the Medicare program. While the materials had notable factual omissions and other weaknesses, GAO concluded that the materials were not self-aggrandizement because they did not attribute the enactment of new Medicare benefits to HHS or any of its agencies or officials.

There was also no violation found in B-303495, Jan. 4, 2005, which was affirmed in B-303495.2, Feb. 15, 2005. In this case, the Office of National Drug Control Policy used the term "Drug Czar" to describe its director in video news releases it issued under the Drug-Free Media Campaign Act of 1998. The term had common,

widespread, and long-standing usage by the media and Members of Congress, and was not being used by the agency to persuade the public of the importance of the director. Rather, it was used as "nothing more than a sobriquet." B-303495, at 15.

In B-326944, Dec. 14, 2015, we considered whether the Environmental Protection Agency (EPA) engaged in self-aggrandizement by posting various messages on its social media accounts emphasizing the importance of the agency's new clean water rule, using the hashtag #CleanWaterRules. The posts described perceived benefits that would be attributed to the new rule. While the social media posts certainly touted the significance of the *rule*, engendering praise for the *agency* was not the goal; therefore, we did not find EPA's posts to be self-aggrandizing.

In a 1973 case, the Republican National Committee financed a mass mailing of copies of editorials from British newspapers in praise of the President. The editorials were transmitted with a letter prepared by a member of the White House staff, on State Department letterhead stationery, and signed by the Ambassador to Great Britain. B-178528, July 27, 1973. GAO again noted the extreme difficulty in distinguishing between disseminating information to explain or defend administration policies, which is permissible, and similar activities designed for purely political or partisan purposes. *See also* B-194776, June 4, 1979. In addition, a legitimate function of a foreign legation is to communicate information on press reaction in the host country to policies of the United States. Thus, GAO was unable to conclude that there was any violation of the publicity or propaganda law.

Other cases, in which GAO specifically found no self-aggrandizement, are B-320482, Oct. 19, 2010 (Department of Health and Human Services' (HHS) contracts for technical assistance and production and airing of a television advertisement); B-319834, Sept. 9, 2010 (HHS's preparation and distribution of a brochure informing Medicare recipients about changes in Medicare); B-319075, Apr. 23, 2010 (HHS's creation and operation of its HealthReform.gov Web site and the State Your Support Web page); B-284226.2, Aug. 17, 2000 (Department of Housing and

Urban Development report and accompanying letter providing information to agency constituents about the impact of program reductions being proposed in Congress); B-212069, Oct. 6, 1983 (press release by Director of Office of Personnel Management excoriating certain Members of Congress who wanted to delay a civil service measure the administration supported); and B-161686, June 30, 1967 (State Department publications on Vietnam War). In none of these cases were the materials designed to glorify the issuing agency or official.

Similarly, GAO concluded that the Census Bureau did not violate this restriction when its employees participated in a symposium. The symposium was to attract thousands of African-Americans, a population the Bureau characterized as "hard-to-count" and therefore targeted in its outreach activities. The Bureau's participation in the symposium was limited to responding to questions about the census and giving away promotional items and was therefore legitimate informational activity, not puffery or self-aggrandizement. *See* GAO, *Census Bureau Participation in Los Angeles Symposium, August 2000*, GAO-01-124R (Washington, D.C.: Oct. 24, 2000).

Some agencies have authority to disseminate material that is promotional rather than purely informational. For example, the Commerce Department is charged with promoting commerce. In so doing, it entered into a contract with the Advertising Council to undertake a national multimedia campaign to enhance public understanding of the American economic system. Finding that this was a reasonable means of implementing its function and that the campaign did not "aggrandize" the Commerce Department, GAO found nothing illegal. B-184648, Dec. 3, 1975.

If an agency does not have promotional authority, the scope of its permissible activities is correspondingly more restricted. For example, GAO found the publicity or propaganda law violated when a presidential advisory committee, whose sole function was to advise the President and which had no promotional role, set up and implemented a public affairs program which included the hiring of a "publicity expert." B-222758, June 25, 1986. See section D.1.e

below for further discussion of agency promotional authorities and the employment of publicity experts.

(2) Covert propaganda

Another type of activity that GAO has construed as prohibited by the publicity or propaganda statute is "covert propaganda." Covert propaganda refers to communications that fail to disclose the agency's role as the source of information, or that are misleading as to their origin. B-326944, Dec. 14, 2015; B-304716, Sept. 30, 2005. *See also* B-229257, June 10, 1988 (describing covert propaganda as "materials such as editorials or other articles prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency"). A critical element of the violation is concealment of, or failure to disclose to the target audience, the agency's role in sponsoring the material. B-326944; B-305368, Sept. 30, 2005; B-304228, Sept. 30, 2005; B-303495, Jan. 4, 2005; B-302710, May 19, 2004; B-306349, Sept. 30, 2005 (nondecision letter); B-229257.

In a 1986 case, the Small Business Administration (SBA) prepared "suggested editorials" and distributed them to newspapers. The editorials urged support of an administration proposal to merge the SBA with the Department of Commerce. Clearly, SBA had prepared and disseminated the "suggested editorials" to promote a particular viewpoint; in this sense, one may have considered them to be "propaganda" in the common sense of the word.[173] This, however, was not enough to violate the law. The problem was that the editorials were misleading as to their origin. The plan presumably was for a newspaper to print the editorial as its own without identifying it as an SBA document. This, the Comptroller General concluded, went beyond the range of acceptable public information

[173] *See American Heritage Dictionary of the English Language* 1404 (4th Ed. 2009) (propaganda is "[m]aterial disseminated by the advocates or opponents of a doctrine or cause").

activities and therefore violated the publicity or propaganda law. B-223098, B-223098.2, Oct. 10, 1986. *See also* B-129874, Sept. 11, 1978 ("canned editorials" and sample letters to the editor in support of Consumer Protection Agency legislation, had they been prepared, would have violated the law).[174]

Prepackaged news stories, ordinarily contained in video news releases, or "VNRs," have become a popular tool in the public relations industry, and for a period of time agencies' use of this tool was a focal point of GAO case law regarding covert propaganda. The prepackaged news stories may be accompanied by a suggested script, video clips known as "B-roll" film which news organizations can use either to augment their presentation of the prepackaged news story or to develop their own news reports in place of the prepackaged story, and various other promotional materials. These materials are produced in the same manner in which television news organizations produce materials for their own news segments, so they can be reproduced and presented as part of a newscast by the news organizations.

In B-302710, May 19, 2004, GAO found that the Department of Health and Human Services (HHS) violated the publicity or propaganda prohibition when it produced and distributed prepackaged video news stories that did not identify the agency as the source of the news stories. The HHS news stories were part of a media campaign to inform Medicare recipients about new benefits available under the recently enacted Medicare Prescription Drug, Improvement, and Modernization Act of 2003. HHS designed its prepackaged video news stories to be indistinguishable from video segments produced by private news broadcasters, allowing broadcasters to incorporate them into their broadcasts without alteration. The suggested anchor lead-in scripts included in the package facilitated the unaltered use of the prepackaged news stories, announcing the package as a news story by fictional news

[174] Note this opinion applied the appropriations provision prohibiting grassroots lobbying, rather than the publicity or propaganda prohibition.

reporters. HHS, however, did not include any statement in the news stories to advise the television viewing audience, the target of the purported news stories, that the agency wrote and produced the prepackaged news stories, and the television viewing audiences did not know that the stories they watched on television news programs about the government were, in fact, prepared by the government. *See also* B-304228, Sept. 30, 2005 (prepackaged news story produced by consultant hired by the Department of Education did not reveal to the target audience the Department's role so it was covert propaganda in violation of the prohibition); B-303495, Jan. 4, 2005 (prepackaged news stories produced by the Office of National Drug Control Policy were covert propaganda in violation of the prohibition).

In reaction to the growing use of prepackaged news stories within the government, GAO issued a circular letter to the heads of departments, agencies, and others concerned entitled Prepackaged News Stories, B-304272, Feb. 17, 2005. The letter fully explains the limitations imposed by the publicity or propaganda prohibition on the use of prepackaged news stories. It also explains when agencies are allowed to use prepackaged news stories, noting in particular that such use is valid so long as there is clear disclosure to the viewing audience that the material presented was prepared by or in cooperation with a government agency.

In May 2005, Congress enacted section 6076 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 110 Stat. 231, 301 (May 11, 2005). Section 6076 provided that no appropriations "may be used by an executive branch agency to produce any prepackaged news story intended for broadcast or distribution unless the story includes a clear notification within the text or audio of the prepackaged news story that the prepackaged news story was prepared or funded by that executive branch agency." *Id.* In the conference report submitted to both houses of Congress the conferees specifically adopted GAO's analysis of covert propaganda and stated that section 6076 "confirms the opinion of the Government Accountability Office dated February 17, 2005 (B-304272)." H.R. Conf. Rep. No. 109-72, at 158–59 (2005)

(emphasis added). The opinion to which the report was referring was the Comptroller General's circular letter which clearly stated that the critical element in determining whether prepackaged news stories constitute covert propaganda is whether the intended audience is informed of the source of the materials. B-304272, Feb. 17, 2005. Section 6076 did not create new law or impose a new requirement: "Congress enacted section 6076 to emphasize that the publicity or propaganda prohibition always restricted the use of appropriations to disseminate information without proper source attribution." B-307917, July 6, 2006, at 2 (concerning newspaper article without source attribution that agency contracted for before passage of section 6076). Therefore, transactions entered into before the date of enactment of section 6076 are held to the same requirement for source attribution. *Id.*

In 66 Comp. Gen 707 (1987), involving newspaper articles and editorials in support of Central American policy, we found an analogous violation. Here, materials were prepared by paid consultants at government request, and published as the work of nongovernmental parties. The decision also found that media visits by Nicaraguan opposition leaders, arranged by government officials but with that fact concealed, constituted another form of "covert propaganda." *See also* B-305368, Sept. 30, 2005 (Department of Education contract with radio and television personality to comment regularly on the No Child Left Behind Act without assuring that the Department's role was disclosed to the targeted audiences violated the publicity or propaganda prohibition); B-306349, Sept. 30, 2005 (Department of Education urged to review newspaper article written by a Department of Education contractor which did not disclose the agency's involvement in its writing for possible publicity or propaganda violations).

However, where an economist, on contract with HHS for technical assistance, acted on his own behalf in writing opinion pieces, testifying, or otherwise speaking on health reform, HHS did not violate the publicity or propaganda provision. B-320482, Oct. 19, 2010. Unlike the situations described above, HHS did not contract for, or have any involvement with, these activities. Similarly, in B-316443, July 21, 2009, Department of Defense (DOD) outreach

to retired military officers (RMOs) who served as media analysts did not violate the prohibition. DOD sought to influence public opinion of its war policies by providing the RMOs with talking points and information and by organizing meetings and travel, but DOD did not engage the RMOs, by contract or otherwise, to have them deliver to the public, analysis created by DOD, or particular commentary. *See also* B-304716, Sept. 30, 2005 (articles praising the President's Healthy Marriage Initiative, prepared by expert consultant hired by the Department of Health and Human Services, Administration for Children and Families (ACF), did not violate the publicity or propaganda prohibition, as ACF did not contract with the consultant for the publication of favorable articles, but rather she performed those activities on her own).

The publicity or propaganda provision applies to actions carried out by or at the behest of a government entity, using appropriated funds. Again, a violation of the provision based on covert propaganda will stem from the agency's failure to disclose its role to the target audience of its communication. B-326944, Dec. 14, 2015. As demonstrated in the opinions and decisions discussed above, an agency's transparency to the distributors of its messages—for example, the person delivering positive commentary pursuant to a contract with the agency, or the television station airing a prepacked news story with knowledge of the source from which it received the material, or the newspaper entreated to publish a canned editorial, with awareness of its government author—are not the communications at issue, as these distributors are not the target audiences of the messages they will deliver. *See, e.g.*, B-305368, Sept. 30, 2005; B-302710, May 19, 2004; B-223098, B-223098.2, Oct. 10, 1986. Nor are the actions of non-government actors taken on their own behalf, independent of solicitation by a government entity or official, the communications to which the covert propaganda restriction applies. *See, e.g.*, B-320482, Oct. 19, 2010, B-304716, Sept. 30, 2005. These precepts persist regardless of the medium through which the government message is being disseminated.

In B-326944, Dec. 14, 2015, we considered whether the Environmental Protection Agency (EPA) engaged in covert

propaganda through its use of two social media platforms: Thunderclap and Twitter. We found a violation of the publicity or propaganda provision as to the agency's use of Thunderclap, because the Thunderclap message that EPA created did not identify EPA as the author to the intended viewers.

Thunderclap describes itself a "crowdspeaking platform" that allows a single message to be shared across multiple Facebook, Twitter, and Tumblr accounts at the same time. To this end, the website allows "campaign organizers" to create campaign pages describing the organizer's cause or issue, including a short message that will be shared if enough people sign up to support the organizer's Thunderclap campaign. Thunderclap shares this short message on the date and at the time chosen by the campaign organizer, using the social media accounts of the supporters. EPA created a Thunderclap campaign, called "I Choose Clean Water," during the public comment period of its proposed rule to define the term "Waters of the United States" under the Clean Water Act. While the campaign page clearly identified EPA as the creator, the Thunderclap message to be shared using supporter social media accounts did not. Instead, EPA's Thunderclap message was written in the first person, as though coming from the individual supporter, declared support of EPA's efforts, and provided a link to the agency's website on the proposed rule. As with the prepacked news stories and canned editorials discussed above, EPA's message was able to be shared without alteration, and that message, as created by EPA, did not provide indication of EPA's role to the intended audience of the communication.

As highlighted in the opinion, there are arguably two target audiences of a Thunderclap campaign—the campaign requires supporters to share its message, and those supporters are one audience. But, as the chief purpose of a Thunderclap campaign is to gain enough support so as to maximize the reach of your particular message, the target audience of the short statement created to be shared extends beyond this supporter group to the friends and followers of the supporters' social media accounts. The adoption or belief in the message held by supporters who signed up to allow Thunderclap to share EPA's message via their accounts

did not alter the fact that EPA constructed a message to be shared by others to reach a broader group, and in that message did not identify its role. *See* B-326944.

Separately, EPA engaged in a Twitter effort, titled #DitchtheMyth, to dispel certain "myths" being circulated about its proposed rule. As part of this effort, EPA created a webpage displaying various "myths" followed by the corresponding "truth." Readers could share the truth by clicking a hyperlink labeled "Tweet the truth," which would generate a prewritten tweet. The prewritten tweets included EPA's twitter handle, @EPAWater, at the end, which EPA described as its byline. Here, we agreed that EPA created a message identifying the agency's involvement to the intended audience. We did not find EPA's #DitchtheMyth campaign to violate the publicity or propaganda provision. B-326944.

In B-302992, Sept. 10, 2004, the Forest Service produced video and print materials to explain and defend its controversial land and resource management plan for the Sierra Nevada Forest. Because the video and print materials clearly identified the Forest Service and the Department of Agriculture as the source of the materials, GAO concluded that they did not constitute covert propaganda. *See also* B-301022, Mar. 10, 2004 (the Office of National Drug Control Policy was clearly identified as the source of materials sent to members of the National District Attorneys Association concerning the debate over the legalization of marijuana); B-229257, June 10, 1988 (Federal Trade Commission's (FTC) preparation of a variety of materials critical of the Postal Service's "monopoly" on letter class mail, for distribution at a National Press Club breakfast that the Postmaster General was to attend, while unquestionably propaganda, did not violate the law because materials identified FTC as the source).

(3) Purely partisan materials

A third category of materials identified in GAO case law as violating the publicity or propaganda prohibition is purely partisan materials. To be characterized as purely partisan in nature, the offending materials must be found to have been "designed to aid a political

party or candidate." B-147578, Nov. 8, 1962. It is axiomatic that funds appropriated to carry out a particular program would not be available for political purposes. *See* B-147578, Nov. 8, 1962.

It is often difficult to determine whether materials are political or not because "the lines separating the nonpolitical from the political cannot be precisely drawn." *Id.*; B-144323, Nov. 4, 1960. *See also* B-130961, Oct. 26, 1972. An agency has a legitimate right to explain and defend its policies and respond to attacks on that policy. B-319834, Sept. 9, 2010; B-319075, Apr. 23, 2010; B-302504, Mar. 10, 2004. A standard GAO applies is that the use of appropriated funds is improper only if the activity is "completely devoid of any connection with official functions." B-322882, Nov. 8, 2012. B-147578, Nov. 8, 1962. As stated in B-144323, Nov. 4, 1960:

> "[The question is] whether in any particular case a speech or a release by a cabinet officer can be said to be so completely devoid of any connection with official functions or so political in nature that it is not in furtherance of the purpose for which Government funds were appropriated, thereby making the use of such funds . . . unauthorized. This is extremely difficult to determine in most cases as the lines separating the nonpolitical from the political cannot be precisely drawn.
>
> ". . . As a practical matter, even if we were to conclude that the use of appropriated funds for any given speech or its release was unauthorized, the amount involved would be small, and difficult to ascertain; and the results of any corrective action might well be more technical than real."

While GAO has reviewed materials to determine whether they are partisan in nature, to date there are no opinions or decisions of the Comptroller General concluding that an agency's informational materials constituted impermissible publicity or propaganda by virtue of any purely partisan material contained therein. For example, in B-304228, Sept. 30, 2005, GAO determined that appropriations were not available for the Department of Education to conduct a media analysis to gather information regarding public perception of the Republican Party's commitment to education, as such use was purely partisan. Ultimately, GAO concluded that there was no publicity or propaganda violation, given that other content of the analysis was acceptable, and thus there was minimal additional expense incurred by including the improper element. However, GAO cautioned the Department to be more diligent in its efforts to keep any future analyses free from explicit partisan content.

In 2000, GAO concluded that an information campaign by the Department of Housing and Urban Development (HUD) using a widely disseminated publication, entitled *Losing Ground: The Impact of Proposed HUD Budget Cuts on America's Communities*, had not violated the prohibition. B-284226.2, Aug. 17, 2000. In the publication, HUD criticized what it called "deep cuts" in appropriations that were proposed by the House Appropriations Committee for particular HUD programs. The publications stated that, if enacted, the "cuts would have a devastating impact on families and communities nationwide." GAO found that this publication was a legitimate exercise of HUD's duty to inform the public of government policies and that HUD had a right to justify its policies to the public and rebut attacks against those policies.

In B-302504, Mar. 10, 2004, GAO examined a flyer and print and television advertisements about changes to Medicare enacted by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (Dec. 8, 2003). The flyer contained information about new prescription drug benefits and price discount cards. GAO noted that while the materials contained opinion and notable factual omissions, the materials did not constitute impermissible publicity or propaganda. GAO explained:

> "To restrict all materials that have some political content or express support of an Administration's policies would significantly curtail the recognized and legitimate exercise of the Administration's authority to inform the public of its policies, to justify its policies and to rebut attacks on its policies. It is important for the public to understand the philosophical underpinnings of the policies advanced by elected officials and their staff in order for the public to evaluate and form opinions on those policies."

B-302504, at 10. *See also* B-320482, Oct. 19, 2010 (Department of Health and Human Services' (HHS) television advertisement describing changes to Medicare are not purely partisan despite some overstatement of the benefits); B-319834, Sept. 9, 2010 (although an HHS brochure contained instances in which HHS presented abbreviated information and a positive view of recent changes to Medicare that are not universally shared, nothing in the brochure constituted communication that is purely partisan); B-319075, Apr. 23, 2010 (while HHS's *HealthReform.gov* Web site and *State Your Support* Web page contained statements that may be characterized as having political content, GAO found no statements that are purely partisan).

In B-302992, Sept. 10, 2004, GAO upheld the Forest Service's right to produce and distribute a brochure and video materials regarding its controversial policy on managing wildfire in the Sierra Nevada Forest. Because the materials sought to explain hundreds of pages of scientific data, official opinions, and documents of the Forest Service, they were not comprehensive and did not explain all the positive and negative aspects of the thinning policies adopted in its regional forest plan. GAO concluded that the Forest Service had the authority to disseminate information about its programs and policies and to defend those policies.

In B-322882, Nov. 8, 2012, GAO reviewed an e-mail written by a Consumer Product Safety Commission staff member to a swimming pool industry representative. The e-mail encouraged the recipient to contact nine Members of Congress belonging to the same political party who supported a change in a Commission interpretive rule. The staffer explained that hearing from the industry representative may provide the Members of Congress "some insight into the safety of the current [before the revised rule] system." GAO acknowledged that encouraging a person to contact Members of Congress of a single political party "may imbue the [e-mail] with a subtle political tone." However, the publicity or propaganda prohibition "does not bar materials that may have some political content or express support for a particular view." Moreover, an e-mail is not purely partisan solely because it fails to present a balanced view of the consequences of agency action. Because the e-mail purported to facilitate an exchange of information regarding pool safety, the staff member's e-mail was not completely devoid of official functions and therefore did not violate the prohibition.

Apart from considerations of whether any particular law has been violated, GAO has taken the position in two audit reports that the government should not disseminate misleading information. In 1976, the former Energy Research and Development Administration (ERDA) published a pamphlet entitled *Shedding Light On Facts About Nuclear Energy*. Ostensibly created as part of an employee motivational program, ERDA printed copies of the pamphlet far in excess of any legitimate program needs, and inundated the state of California with them in the months preceding a nuclear safeguards initiative vote in that state. While the pamphlet had a strong pro-nuclear bias and urged the reader to "Let your voice be heard," the pamphlet did not violate any anti-lobbying statute because applicable restrictions did not extend to lobbying at the state level. B-130961-O.M., Sept. 10, 1976. However, GAO's review of the pamphlet found it to be oversimplified and misleading. GAO characterized it as propaganda not suitable for distribution to anyone, employees or otherwise, and recommended that ERDA cease further distribution and recover and destroy any undistributed copies. *See* GAO, *Evaluation Of the Publication and Distribution Of*

"Shedding Light On Facts About Nuclear Energy," EMD-76-12 (Washington, D.C.: Sept. 30, 1976).

In a later report, GAO reviewed a number of publications related to the Clinch River Breeder Reactor Project, a cooperative government/industry demonstration project, and found several of them to be oversimplified and distorted propaganda, and as such questionable for distribution to the public. However, the publications were produced by the private sector components of the Project and paid for with utility industry contributions and not with federal funds. GAO recommended that the Department of Energy work with the private sector components in an effort to eliminate this kind of material, or at the very least ensure that such publications include a prominently displayed disclaimer statement making it clear that the material was not government approved. GAO, *Problems With Publications Related To The Clinch River Breeder Reactor Project*, EMD-77-74 (Washington, D.C.: Jan. 6, 1978).

c. Employee communications with Congress

Since 1998, annual appropriations acts each year have contained a government-wide prohibition on the use of appropriated funds to pay the salary of any federal official who prohibits or prevents another federal employee from communicating with Congress. *See* Pub. L. No. 105-61, § 640, 111 Stat. 1272, 1318 (Oct. 10, 1997). Specifically, this provision states:

> "No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of

> the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee . . . ."

Pub. L. No. 114-113, div. E, title VII, § 713, 129 Stat. 2242, 2475-2476 (Dec. 18, 2015); *see also* Pub. L. No. 113-235, div. E, title VII, § 713, 128 Stat. 2130, 2382 (Dec. 16, 2014). This provision has its antecedents in several older pieces of legislation, including section 6 of the Lloyd-La Follette Act of 1912, Pub. L. No. 336, ch. 389, 66 Stat. 539, 540 (Aug. 24, 1912), which stated: "The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."

Congress enacted section 6 in response to concern over executive orders by Presidents Theodore Roosevelt and Howard Taft that prohibited federal employees from contacting Congress except through the head of their agency. The legislative history of this provision indicates that Congress intended to advance two goals: to preserve the First Amendment rights of federal employees regarding their working conditions and to ensure that Congress had access to programmatic information from frontline federal employees. *See* H.R. Rep. No. 62-388, at 7 (1912); 48 Cong. Rec. 5634, 10673 (1912).

In B-302911, Sept. 7, 2004, GAO concluded that the Department of Health and Human Services violated this provision by paying the salary of the Director of the Centers for Medicare & Medicaid Services (CMS) who prohibited the CMS Chief Actuary from

providing certain cost estimates of Medicare legislation to Congress. The Director specifically instructed the Chief Actuary not to respond to any requests for information and advised that there would be adverse consequences if he released any information to Congress. GAO recognized that certain applications of the provision could raise constitutional separation of powers concerns; however, there was no controlling judicial opinion declaring the provision unconstitutional. GAO found that the provision, as applied to the facts in this case, precluded the payment of the CMS Director's salary because he specifically prevented another employee from communicating with Congress, particularly in light of the narrow, technical nature of the information requested by Congress and Congress's need for the information in carrying out its constitutional legislative duties. *See also* B-325124.2, Apr. 5, 2016 (the Department of Housing and Urban Development's (HUD) General Deputy Assistant Secretary for Congressional and Intergovernmental Relations and its Associate General Counsel prevented HUD's Regional Director from appearing before a congressional committee for a transcribed interview, in violation of the provision).

d. Advertising in government publications

Suppose you opened this publication and found on the inside front cover a full-page advertisement for somebody's soap or underwear or aluminum siding or the local pool parlor. We assume most readers would find this offensive. There is, in fact, a long-standing policy against involving the government in commercial advertising. In the case of government publications, the policy is codified in section 13 of the Government Printing and Binding Regulations issued by the Joint Committee on Printing (1990 reprint):

> "No Government publication or other Government printed matter, prepared or produced with either appropriated or nonappropriated funds or identified with an activity of the Government, shall contain any advertisement inserted by or for any private individual, firm, or

> corporation; or contain material which implies in any manner that the Government endorses or favors any specific commercial product, commodity, or service."

S. Pub. No. 101-9, at 13 (1990). The provision does not restrict the use of appropriated funds, but rather is a prohibition on agency activity. An explanatory paragraph included in the regulations summarizes many of the reasons for this prohibition. Advertising would be unfair to competitors in that it would, regardless of intent, unavoidably create the impression of government endorsement. It would also be unfair to nongovernment publications that compete for advertising dollars and need those dollars to stay in business. Acceptance of advertising could also pose ethical, if not legal, problems. (Imagine, for example, lobbyists scrambling to purchase advertising space in the Congressional Record.)

A different situation was presented in 67 Comp. Gen. 90 (1987). The United States Information Agency (USIA) was authorized to accept donations of radio programs from private syndicators for broadcast over the Voice of America. Some donations were conditioned on the inclusion of commercial advertising. GAO noted that, in the case of public broadcasting stations (which are supported by the Corporation for Public Broadcasting), commercial advertising is expressly prohibited by 47 U.S.C. § 399b(b). However, there was no comparable statute applicable to USIA. Therefore, the conditional donations were not subject to any legal prohibition. In view of the traditional policy against commercial advertising, GAO suggested that USIA first consult the appropriate congressional committees.

e. Publicity experts

A statute originally enacted in 1913, now found at 5 U.S.C. § 3107, provides: "Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose." This provision applies to all appropriated funds. GAO has consistently noted certain difficulties in enforcing the statute. In GAO's first

substantive discussion of 5 U.S.C. § 3107, the Comptroller General states "[i]n its present form, the statute is ineffective." A-61553, May 10, 1935. The early cases[175] identified three problem areas, summarized in B-181254(2), Feb. 28, 1975.

First, the prohibition is against compensating any "publicity expert," but the statute does not define the term "publicity expert" nor does it provide criteria for determining who is one. Traditionally, persons employed for or engaged in so-called publicity work have not been appointed as "publicity experts" but under some other designation, and often have other duties as well. Everyone who prepares a press release is not a publicity expert. Testifying before the House Select Committee on Lobbying Activities in 1950, Assistant Comptroller General Weitzel said:

> "I might mention one of the great difficulties in enforcing that language is it is very, very rare, if ever, the case that a man is on the pay roll as publicity experts [sic]. He can be called almost anything else, and usually and frequently will have other duties, so that that in itself, is a very difficult statute to enforce."[176]

Second, employees engaged in so-called publicity work are normally assigned to their duties by their supervisors. It would be harsh, in the absence of much more definitive legislative or judicial guidance, to withhold the compensation of an employee who is merely doing his or her assigned job. Some thought was given in the 1930s and early 1940s to amending the statute to cure this

[175] There is no mention of the 1913 statute before the 1930s. A small group of cases then arose. In addition to A-61553, cited in the text, *see* A-57297, Sept. 11, 1934; A-82332, Dec. 15, 1936; A-93988, Apr. 19, 1938; and B-26689, May 4, 1943. Another stretch of silence followed and the statute did not rise again until B-181254(2), Feb. 28, 1975.

[176] The Role of Lobbying in Representative Self-Government, Hearings before the House Select Committee on Lobbying Activities, 81st Cong., pt. 1, at 156 (1950).

problem, but the legislation was not enacted. *See* B-181254(2), Feb. 28, 1975; B-26689, May 4, 1943; A-82332, Dec. 15, 1936.

Third, the effective implementation of the duties of some agencies requires the acquisition and dissemination of information, although agencies normally do not receive specific appropriations for the required personnel.

The legislative history of section 3107 provides some illumination. While it is not clear what was meant by "publicity expert," there are indications that the provision would prohibit the use of press agents "to extol or to advertise" the agency or individuals within the agency. *See, e.g.*, 50 Cong. Rec. 4410 (1913) (comments of Representative Fitzgerald, chairman of the committee that reported the bill). There are also indications that the provision should not interfere with legitimate information dissemination regarding agency work or services. When some members expressed concern that the provision may affect the hiring of experts to "mak[e] our farm bulletins more readable to the public and more practical in their make-up," supporters indicated that such activities would not be restricted by passage of the provision. *Id.* at 4410 (colloquy between Representatives Lever and Fitzgerald).

Based on these considerations, GAO does not view 5 U.S.C. § 3107 as prohibiting an agency's legitimate informational functions or legitimate promotional functions where authorized by law. The apparent intent of the statute is to prohibit publicity activity "for the purpose of reflecting credit upon an activity, or upon the officials charged with its administration, rather than for the purpose of furthering the work which the law has imposed upon it." A-82332, Dec. 15, 1936. *See also* B-181254(2), Feb. 28, 1975. In this sense, 5 U.S.C. § 3107 is closely related to the prohibition on self-aggrandizement previously discussed, although the focus is different in that, to violate 5 U.S.C. § 3107, the activity must be performed by a "publicity expert."

GAO considered a mass media campaign by the Federal Energy Administration (FEA), now part of the Department of Energy, to educate the American public on the need for and means of energy

conservation. Based on the considerations discussed above and on the FEA's statutory authority to disseminate information and to promote energy conservation, GAO found no basis on which to assess a violation of 5 U.S.C. § 3107. B-181254(2), Feb. 28, 1975; B-139965, Apr. 16, 1979. In both cases, GAO stressed its view that the statute is not intended to interfere with the dissemination of information that an agency is required or authorized by statute to disseminate, or with promotional activities authorized by law.

In B-222758, June 25, 1986, the Chemical Warfare Review Commission, a presidential advisory committee, hired a public affairs consultant. The Commission's functions were solely advisory; it had no authority to engage in promotional activities or to maintain a public affairs program. In view of the consultant's duties, job title, and reputation, GAO found that he was a "publicity expert." As such, and given the nature of the Commission's functions and its lack of statutory authority, the hiring was held to violate 5 U.S.C. § 3107.

GAO revisited the statute in B-302992, Sept. 10, 2004. The Forest Service had hired a public relations firm to help produce and distribute materials regarding its controversial land and resource management plan in the Sierra Nevada Forest, a plan consisting of hundreds of pages of scientific data and opinions. The Forest Service had hired the public relations firm to help make the plan's scientific content more understandable to the public and media. GAO concluded that the Forest Service had not violated section 3107. GAO said that section 3107 was not intended to impede legitimate informational functions of agencies and does not prohibit agencies from paying press agents and public affairs officers to facilitate and manage dissemination of agency information. GAO stated: "Instead, what Congress intended to prohibit with section 3107 is paying an individual 'to extol or to advertise' the agency, an activity quite different from disseminating information to the citizenry about the agency, its policies, practices, and products." B-302992, Sept. 10, 2004.

In 2005, GAO considered whether the Social Security Administration's (SSA) use of the Gallup Organization to poll the

public on Social Security program issues violated 5 U.S.C. § 3107. Citing to the discussion of the legislative history of section 3107 in B-302992, Sept. 10, 2004, GAO determined that SSA did not hire Gallup to—nor did Gallup in fact—extol or advertise SSA or individuals within SSA. Rather, SSA hired Gallup to engage in the legitimate agency activity of collecting information that the agency needed in order to carry out its Social Security program. SSA's authority to survey the general public on its knowledge of the Social Security program and programs financing is inherent in the agency's authority to administer that program, 42 U.S.C. § 901(b). Since Gallup was assisting SSA in this endeavor, Gallup was not a "publicity expert" within the meaning of section 3107. B-305349, Dec. 20, 2005.

2. Compensation restrictions

> "If an officer is not satisfied with what the law gives him for his services, he may resign."

Embry v. United States, 100 U.S. 680, 685 (1879).

As a general proposition, restrictions on the compensation of federal employees are regarded as matters of personnel law that are now under the jurisdiction of the Office of Personnel Management.[177] However, compensation restrictions may also be viewed as limits on the "purpose availability" of appropriations. We specifically treat three compensation-related topics in this chapter—

[177] The 104th Congress enacted two laws, the Legislative Branch Appropriations Act of 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (Nov. 19, 1995), and the General Accounting Office Act of 1996, Pub. L. No. 104-316, 110 Stat. 3826 (Oct. 19, 1996), that transferred GAO's authority over the settlement of claims and related decisions, waivers, and other functions (including judgment fund payments and transportation carriers appeals) to the Executive Branch. Federal employees' claims for compensation and leave, and settlement of deceased employees' accounts were assigned to Office of Personnel Management, (OPM) Office of General Counsel, Claims Adjudication Unit. In April 2000, this function was transferred to OPM's Office of Merit Systems Oversight and Effectiveness.

the restrictions on dual compensation, the restrictions on employing aliens, and the statutes concerning forfeiture of retirement annuities and retired pay—as illustrations of the different ways in which Congress may exercise its constitutional role of controlling the public purse by prescribing the purposes for which appropriated funds may be used. The provision on aliens is a restriction appearing in annual appropriation acts. The dual compensation and forfeiture statutes are permanent provisions found in the United States Code; while not phrased in terms of appropriation restrictions, the effect is the same.

a. Dual compensation

Section 5536 of title 5 of the United States Code prohibits a civilian employee or member of the uniformed services whose pay is fixed by statute or regulation from receiving additional pay from public money for any other service or duty, unless authorized by law.[178] This is a purpose restriction on how an agency may spend its appropriation. For instance, GAO found that paying the actual cost of personal cell phone use for government business is permitted, but not at a flat rate because an established fee per day is equivalent to an allowance in addition to salary, and, therefore, is prohibited by 5 U.S.C. § 5536. B-287524, Oct. 22, 2001. GAO has also held in several cases that the provision of free food while on duty violates the prohibition against dual compensation. *See, e.g., United States Dep't of the Navy v. Fed. Labor Relations. Authority*., 665 F.3d 1339, 1351 (D.C. Cir. 2012); 42 Comp. Gen. 149, 151 (1962); B-272985, Dec. 30, 1996.

[178] We note in passing that there are other laws limiting the salaries paid to federal employees. *E.g.*, 18 U.S.C. § 209 (salary of government employees payable only by United States). However, this discussion is limited to laws that constitute purpose restrictions on an agency's use of appropriations to pay salaries.

b. Employment of aliens

For many years, with variations from year to year, appropriation acts have included provisions restricting the compensation of aliens, in certain circumstances. The typical prohibition, with exceptions to be noted below, bars the use of appropriated funds to pay compensation to any officer or employee of the United States whose post of duty is in the continental United States, unless that person is a United States citizen. In more recent years, the recurring prohibition has appeared as a general provision in the Financial Services and General Government appropriation acts, applicable to funds contained "in this or any other act."[179] For a more general restriction concerning the employment of aliens, *see* 8 U.S.C. § 1324a.

The recurring prohibition generally applies to all appropriated funds, unless expressly provided otherwise.[180] For example, a recurring general provision in the Defense Department appropriation act exempts Defense Department personnel from the alien restriction.[181] Given the prohibition's broad applicability, versions of this prohibition have been found to apply to the special deposit accounts established by statute for the Senate and House restaurants, since these accounts amount to permanent indefinite appropriations. 50 Comp. Gen. 323 (1970). Similarly, this recurring

[179] For example, the 2017 provision is found in Pub. L. 115-31, div. E, title VII, §§ 704, __ Stat. __ (May 5, 2017).

[180] Since appropriation act restrictions and exceptions vary from year to year, it is important to scrutinize the relevant appropriation act for any given year. For an illustration of the complexities that may arise when the provisions vary from year to year, see 57 Comp. Gen. 172 (1977).

[181] Pub. L. 115–31, div. C, title VIII, § 8002, __ Stat. __ (May 5, 2017) (*codified at* 10 U.S.C. § 1584) ("During the current fiscal year, provisions of law prohibiting the payment of compensation to, or employment of, any person not a citizen of the United States shall not apply to personnel of the Department of Defense.").

restriction has been found to apply to working capital funds. B-161976, Aug. 10, 1967.[182]

In addition to any agency-specific exemptions, the recurring restriction concerning alien compensation, itself, contains a number of categorical exclusions.[183] For example, the current prohibition does not apply to persons lawfully admitted for permanent residence and seeking citizenship, or persons admitted as a refugee or granted asylum who have filed a declaration of intention to become a lawful permanent resident (and then a citizen when eligible).[184] The employee must have filed the declaration prior to the date of enactment and a subsequent filing will not cure the disqualification. 17 Comp. Gen. 1104 (1938). A declaration timely filed but which had become void by operation of law due to lapse of time has also been held insufficient. B-138854, Apr. 1, 1959.

The current version of the prohibition does not apply to a person who "owes allegiance to the United States." This has been interpreted to mean an "absolute and permanent allegiance" as distinguished from "qualified and temporary allegiance." 17 Comp. Gen. 1047 (1938); B-119760, Apr. 27, 1954. The exemption was apparently prompted by a concern for non-citizen inhabitants of U.S. territorial possessions, for example, "Filipinos in the service of

[182] The cited decision refers to the Naval Industrial Fund established under 10 U.S.C. § 2208. The decision makes no mention of the statutory exemption for the Defense Department, which was in effect in 1967. For purposes of this discussion, whether B-161976 could have been disposed of more simply based on the Department's exemption is irrelevant. The decision is cited here merely for the proposition noted in the text.

[183] Though no longer included in the current version, the restriction has historically included specific country exceptions. *See* B-194929, June 20, 1979 (examining the relationship of dual citizenship with this exception). Similarly, the allied-country exception, which provided that the prohibition does not apply to nationals of "countries allied with the United States in the current defense effort," is no longer included. *See generally* 73 Comp. Gen. 319 (1994); B-188852, July 19, 1977; B-151064, Mar. 25, 1963; B-146142, June 22, 1961; B-139667, June 22, 1959; B-133877, Oct. 16, 1957; 35 Comp. Gen. 216 (1955); B-113780, Mar. 4, 1953; B-107288, Feb. 14, 1952; B-107579, Feb. 14, 1952.

[184] Pub. L. 115-31, div. E, title VII, §§ 704, __ Stat. __ (May 5, 2017).

the United States." 17 Comp. Gen. at 1048. Accordingly, this clause applies only to non-citizen inhabitants of U.S. territorial possessions, not to resident aliens. For example, a permanent resident alien who was not an inhabitant of a U.S. territorial possession was ineligible for federal employment. *Yuen v. Internal Revenue Service,* 497 F. Supp. 1023 (S.D.N.Y. 1980), *aff'd,* 649 F.2d 163 (2nd Cir. 1981) (including, in the lower court opinion, an exhaustive review of the relevant legislative history). Under the provision, a signed affidavit will be regarded as *prima facie* evidence of allegiance.

The prohibition also does not apply to "temporary employment in the field service . . . as a result of emergencies." The term "emergency" in this context means "flood, fire, or other catastrophe." B-146142, June 22, 1961. *See also* 73 Comp. Gen. 319 (1994). An alien appointed in contravention of the statutory prohibition may not retain compensation already paid. 35 Comp. Gen. 216 (1955); 18 Comp. Gen. 815 (1939). (The statute expressly gives the United States the right to recover.)

As a final note, the Supreme Court in 1976 invalidated a Civil Service Commission regulation requiring citizenship as a prerequisite to federal employment. *Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976). The Court did not, however, invalidate the appropriation act restrictions. *See* B-188507, Dec. 16, 1977. The *Yuen* litigation cited earlier specifically upheld the restriction against a charge of violation of the Equal Protection clause.

c. Forfeiture of annuities and retired pay

Under 5 U.S.C. § 8312 (the so-called "Hiss Act"), a civilian employee of the United States or a member of the uniformed services who is convicted of certain criminal offenses relating to the national security will forfeit his or her retirement annuity or retired pay. Further, the annuity or retired pay may not be paid to the convicted employee's survivors or beneficiaries. The offenses which will result in forfeiture are specified in the statute. Examples include: gathering or delivering defense information to aid a foreign government; gathering, transmitting, or losing defense information;

disclosure of classified information; espionage; sabotage; treason; rebellion or insurrection; seditious conspiracy; advocating the overthrow of the government; enlistment to serve in an armed force against the United States; and certain violations of the Atomic Energy Act. In addition, perjury by falsely denying the commission of one of the specified offenses is itself an offense for purposes of forfeiture.

An employee, for purposes of 5 U.S.C. § 8312, includes a Member of Congress and an individual employed by the government of the District of Columbia. 5 U.S.C. § 8311(1). The specific types of retirement annuities and retired pay subject to forfeiture are enumerated in 5 U.S.C. §§ 8311(2) and (3).

Since 5 U.S.C. § 8312 imposes a forfeiture, it is penal in nature. Therefore, it must be strictly construed. GAO will not construe the statute as applicable to situations that are not expressly covered by its terms. 35 Comp. Gen. 302 (1955).

In the absence of an authoritative judicial decision to the contrary, the effective date of a conviction for stoppage of retired pay should be determined in a manner which will result in the least expenditure of public funds. Thus, the date a guilty verdict is returned should be considered the date of conviction rather than a later date when the judgment is ordered executed, and retired pay should be stopped the following day. 39 Comp. Gen. 741 (1960). Using the cited decision to illustrate: the jury returned a guilty verdict on December 2, 1959; judgment was entered on January 29, 1960; the date of conviction is December 2, 1959, and retired pay should be stopped effective December 3.

In the absence of an authoritative judicial decision to the contrary, a plea of "*nolo contendere*" should be regarded as a conviction for purposes of 5 U.S.C. § 8312. 41 Comp. Gen. 62 (1961).

(1) The Alger Hiss case

The event that, more than any other single incident, gave rise to the original enactment of 5 U.S.C. § 8312, was the case of Alger Hiss.

A former State Department employee, Hiss was convicted in 1950 of perjury stemming from testimony before a grand jury investigating alleged espionage violations. *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951). When Hiss was released from prison after serving his sentence, considerable public and congressional attention was directed at the fact that he was still entitled to receive his government pension. Given the political climate of the times, the result was the enactment of 5 U.S.C. § 8312 in 1954 (Pub. L. No. 769, ch. 1214, 68 Stat. 1142 (Sept. 1, 1954)).

Hiss applied for his pension in 1967 and the then Civil Service Commission denied the application based on 5 U.S.C. § 8312. He subsequently sued for restoration of his forfeited pension. In *Hiss v. Hampton,* 338 F. Supp. 1141 (D.D.C. 1972), the court, finding that the statute had been aimed more at punishing Alger Hiss than regulating the federal service, held 5 U.S.C. § 8312 to be an *ex post facto* law and therefore unconstitutional as it had been applied to Hiss for conduct which occurred prior to the date of its enactment. Therefore, the court ordered the Civil Service Commission to pay Hiss his annuity retroactively with interest.

The *Hiss* case gave rise to two GAO decisions—52 Comp. Gen. 175 (1972), *aff'd,* B-115505, Dec. 21, 1972—holding that the interest payable to Hiss, as with the annuity itself, must be paid from the Civil Service Retirement Fund rather than the permanent judgment appropriation, 31 U.S.C. § 1304. The court case and decisions are summarized in B-115505, May 15, 1973.

(2) Types of offenses covered

Under the original version of 5 U.S.C. § 8312, forfeiture was not strictly limited to national security offenses. An employee could lose his or her retirement annuity or retired pay simply by committing a felony "in the exercise of his authority, influence, power, or privileges as an officer or employee of the Government." There

were numerous examples of forfeitures for such infractions as falsifying a travel voucher or using a government-owned vehicle for personal purposes.[185]

Recognizing that in many cases the punishment was too severe for the offense, especially in cases where the offense occurred after many years of government service, Congress amended the statute in 1961 (Pub. L. No. 87-299, 75 Stat. 640 (Sept. 26, 1961)) to limit it to offenses relating to national security and to "retroactively remove therefrom those provisions of the statute which prohibited payment of annuities and retired pay to persons who commit offenses, acts or omissions which do not involve the security of the United States." 41 Comp. Gen. 399, 400 (1961). Thus, numerous offenses which would have caused forfeiture before 1961 no longer do. *See, e.g.,* B-155823, Sept. 15, 1965 (conspiracy to embezzle government funds); B-155558, Nov. 25, 1964 (false statement). Of course, to the extent that the pre-1961 decisions establish principles apart from the specific offenses involved, such as the general principles noted above, they remain valid.

The original 1954 enactment of 5 U.S.C. § 8312 did not expressly cover offenses under the Uniform Code of Military Justice (UCMJ), and this omission generated many GAO decisions prior to the 1961 amendment. *E.g.,* 40 Comp. Gen. 601 (1961); 38 Comp. Gen. 310 (1958); 35 Comp. Gen. 302 (1955). The UCMJ decisions came to an abrupt halt with the enactment of the 1961 amendment. The current version of 5 U.S.C. § 8312 expressly covers UCMJ offenses, again limited to national security violations. Now, a conviction under the UCMJ will produce a forfeiture if the offense involves certain UCMJ articles specified in the statute, or if it involves any other article of the UCMJ where the charges and specifications describe a violation of certain of the United States Code offenses, and if the "executed sentence" includes death, dishonorable discharge, or dismissal from the service.

[185] *See, e.g.*, 41 Comp. Gen. 114 (1961); 40 Comp. Gen. 364 (1960); 40 Comp. Gen. 176 (1960).

(3) Related statutory provisions

When a forfeiture is invoked under 5 U.S.C. § 8312, the individual is entitled to a refund of his contribution toward the annuity less any amounts already paid out or refunded. 5 U.S.C. § 8316.

Forfeiture may not be invoked where an individual is convicted of an offense "as a result of proper compliance with orders issued, in a confidential relationship, by an agency or other authority" of the United States government or the District of Columbia government. 5 U.S.C. § 8320.

If a payment of annuity or retired pay is made in violation of 5 U.S.C. § 8312 "in due course and without fraud, collusion, or gross negligence," the relevant accountable officer will not be held responsible. 5 U.S.C. § 8321.

In addition to 5 U.S.C. § 8312, retirement annuities or retired pay may be forfeited for willful absence from the United States to avoid prosecution for a section 8312 offense (5 U.S.C. § 8313); refusal to testify in national security matters (5 U.S.C. § 8314);[186] or knowingly falsifying certain national security-related aspects of a federal or District of Columbia employment application (5 U.S.C. § 8315).

3. Guard services: Anti-Pinkerton Act

a. Evolution of the law prior to 1978

On July 6, 1892, in Homestead, Pennsylvania, a riot occurred between striking employees of the Carnegie, Phipps & Company steel mill and approximately 200 Pinkerton guards. The company had brought in the Pinkerton force ostensibly to protect company property. As the Pinkertons were being transported down the

[186] Construed by the Justice Department as applicable to proceedings involving the individual's own loyalty or knowledge of activities or plans that pose a serious threat to national security. 1 Op. Off. Legal Counsel 252 (1977).

Monongahela River, the strikers sighted them and began firing on them. The strikers were heavily armed, and even had a cannon on the riverbank. The violence escalated to the point where the strikers spread oil on the water and ignited it. Several of the Pinkerton men were killed and several of the strikers were indicted for murder. The riot received national attention.

The then-common practice of employing armed Pinkerton guards as strikebreakers in labor disputes became an emotionally charged issue. The Homestead riot, together with other similar although less dramatic incidents made it clear that the use of these guards provoked violence. Although Congress was reluctant to legislate against their use in the private sector, some congressional action became inevitable. The result was the law that came to be known as the Anti-Pinkerton Act. Originally enacted as part of the Sundry Civil Appropriation Act of August 5, 1892, 27 Stat. 368, it was made permanent the following year by the Act of March 3, 1893, ch. 208, 27 Stat. 591. Now found at 5 U.S.C. § 3108, the Act provides:

> "An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the Government of the District of Columbia."

As we will see, the statute has little impact today. Nevertheless, it remains on the books and could become relevant, albeit only in unusual circumstances. Therefore, it may be useful to briefly recount the administrative interpretations of the law.

Although the Anti-Pinkerton Act was never the subject of any judicial decisions until the late 1970s, it was the subject of numerous decisions of the Comptroller General and the Comptroller of the Treasury. Several principles evolved through the decisions.

- The Act applies to contracts with "detective agencies" as firms or corporations as well as to contracts with or appointments of

individual employees of such agencies. 8 Comp. Gen. 89 (1928); A-12194, Feb. 23, 1926.

- The Act prohibits the employment of a detective agency or its employees, regardless of the character of the services to be performed. The fact that such services are not to be of a "detective" nature is immaterial. Thus, detectives or detective agencies within the scope of the Act may not be employed in *any* capacity. 51 Comp. Gen. 494 (1972); 26 Comp. Gen. 303 (1946).

- The statutory prohibition applies only to direct employment. It does not extend to subcontracts entered into with independent contractors of the United States. 26 Comp. Gen. 303. The legislative history of the original 1892 statute made it clear that Congress did not intend to reach subcontracts. However, the Act does apply to a contract under the Small Business Administration (SBA) set-aside program since the contract is a prime contract *vis-à-vis* SBA even though it may be a subcontract *vis-à-vis* the actual employing agency. 55 Comp. Gen. 1472 (1976).

- Although the Comptroller General never defined "detective agency" for purposes of the Anti-Pinkerton Act, the decisions drew a distinction between detective agencies and protective agencies and held that the Act did not forbid contracts with the latter. 38 Comp. Gen. 881 (1959); 26 Comp. Gen. 303 (1946); B-32894, Mar. 29, 1943. Thus, the government could employ a protective agency, but could not employ a detective agency to do protective work. An important test became whether the organization was empowered to do general investigative work.

- In determining whether a given firm is within the statutory prohibition, GAO considers the nature of the functions it may perform as well as the functions it in fact performs. Two factors are relevant here: the firm's authority under its corporate charter and its powers under licensing arrangements in the states in which it does business. If a firm is chartered as a detective agency and licensed as a detective agency, then the fact that it

does not actually engage in detective work will not permit it to escape the statutory prohibition. Since virtually every corporation inserts in its charter an "omnibus" clause ("engage in any lawful act or activity for which corporations may be organized in this state" or similar language), an omnibus clause alone will not make a company a detective agency. Rather, specific charter authorization is needed. 41 Comp. Gen. 819 (1962); B-146293, July 14, 1961.

- The government may employ a wholly owned subsidiary of a detective agency if the subsidiary itself is not a detective agency, even if the subsidiary was organized primarily or solely to avoid the Anti-Pinkerton Act. As long as there is *prima facie* separation of corporate affairs, the Act does not compel the government to "pierce the corporate veil." 44 Comp. Gen. 564 (1965); 41 Comp. Gen. 819 (1962); B-167723, Sept. 12, 1969.

- A telephone listing alone is not sufficient evidence that a given firm is a "detective agency" for purposes of 5 U.S.C. § 3108, although the fact of such a listing should prompt further inquiry by the procuring agency. 55 Comp. Gen. 1472 (1976); B-181684, Mar. 17, 1975; B-176307(1), Mar. 21, 1973; B-177137, Feb. 12, 1973.

- Corrections to charters and licenses may be made prior to contract award to avoid Anti-Pinkerton Act violations. Post-award corrections, while perhaps relevant to future procurements, do not, absent compelling circumstances, retroactively expunge ineligibility existing at the time of the award. 56 Comp. Gen. 225 (1977); B-172587, June 21, 1971; B-161770, Nov. 21, 1967; B-160538, Nov. 15, 1967; B-156424, July 22, 1965.

These principles were discussed and applied in many decisions over the years. For example, a contract for guard services was found to violate the Act where the contractor was expressly chartered and licensed as a detective agency. 55 Comp. Gen. 1472, *aff'd upon reconsideration,* 56 Comp. Gen. 225. Similarly, a contract with a sole proprietorship was invalid where the

owner was also the president of a corporation chartered and licensed as a detective agency. B-186347, B-185495, Oct. 14, 1976, *aff'd upon reconsideration,* B-186347, B-185495, Mar. 7, 1977.

By the 1970s, the Anti-Pinkerton Act had become a hindrance to the government's guard service contracting activities. The federal government is a major consumer of guard services, and it was the rare solicitation that did not generate a squabble over who was or was not subject to the Act. Many companies, including Pinkerton itself, were forced to form subsidiaries in order to compete for government business.

b. The present state of the law

The first reported judicial decision dealing with the Anti-Pinkerton Act was *United States ex rel. Weinberger v. Equifax,* 557 F.2d 456 (5th Cir. 1977), *cert. denied,* 434 U.S. 1035 (1978). The issue in that case was whether the Act applied to a credit reporting company. The Comptroller General, in B-139965, Jan. 10, 1975, had already held that it did not. The court reached the same result, although on different reasoning. Relying heavily on the Act's legislative history, the court held:

> "In light of the purpose of the Act and its legislative history, we conclude that an organization is not 'similar' to the (quondam) Pinkerton Detective Agency unless it offers quasi-military armed forces for hire."

Equifax, 557 F.2d at 463.

In a June 1978 circular letter to department and agency heads, published at 57 Comp. Gen. 524 (1978), the Comptroller General announced that GAO would follow the *Equifax* interpretation in the future. Therefore, the statutory prohibition will now be applied only if an organization can be said to offer quasi-military armed forces for hire. The Comptroller General declined, as did the Fifth Circuit, to

attempt a definition of a quasi-military armed force but noted that, whatever it might mean, "it seems clear that a company which provides guard or protective services does not thereby become a 'quasi-military armed force,' even if the individual guards are armed." 57 Comp. Gen. at 525. It follows that whether that company also provides investigative or detective services is no longer relevant. The first decision applying this new standard was 57 Comp. Gen. 480 (1978).

Prior to the *Equifax* decision, GAO had gone on record as favoring repeal of the Anti-Pinkerton Act. *See, e.g.,* 56 Comp. Gen. 225, 230 (1977). In light of the *Equifax* case and 57 Comp. Gen. 524, the case for repeal is considerably lessened. The statute is no longer a major impediment to legitimate guard service contracting, and certainly most would agree that the government should not deal with an organization that offers quasi-military armed forces for hire.

With the issuance of 57 Comp. Gen. 524 and 57 Comp. Gen. 480, GAO reviewed the prior decisions under the Anti-Pinkerton Act and designated them as either overruled or modified. If the result in the earlier case would have remained the same under the new standard, the decision was only "modified." If the new standard would have produced a different result, the earlier decision was "overruled." This is important because 57 Comp. Gen. 524 did not simply throw out all of the old rules. What it did is eliminate the "protective *versus* investigative" distinction and adopt the *Equifax* standard as the definition of a proscribed entity. Thus, an organization will no longer violate the Act by providing general investigative services; it will violate the Act only if it "offers quasi-military armed forces for hire." 57 Comp. Gen. at 525. If a given organization were found to offer quasi-military armed forces for hire—an event which is viewed as unlikely although not impossible—the rules in the earlier decisions would still be applicable even though the decisions themselves have been technically overruled or modified. Thus, the pre-1978 principles set forth previously in this discussion remain applicable, but the focal point is now whether the organization in question offers quasi-military armed forces for hire, not merely whether it provides general detective or investigative services. For purposes of guard

service contracting, the burden of proof rests with the party alleging the violation. *E.g.,* B-216534, Jan. 22, 1985.

4. Insurance

a. The self-insurance rule

One frequently hears that the government is a self-insurer. This is not completely true; there are many situations in which the government buys or pays for insurance. Among the more well-known examples are the Federal Employees' Health Benefits Program and Federal Employees' Group Life Insurance. As another example, the federal government is required by statute to pay half of the costs incurred by "qualified employees" for professional liability insurance. *See* Pub. L. No. 106-58, title VI, § 642(a), 113 Stat. 430, 477 (Sept. 29, 1999; B-300866, May 30, 2003. Also, the government frequently pays for insurance indirectly through contracts, grants, and leases. *E.g.,* B-72120, Jan. 14, 1948 (lease).[187]

However, the government *is* essentially a self-insurer in certain important areas, primarily with respect to loss or damage to government property, and the liability of government employees, insofar as the government is legally responsible or would ultimately bear the loss. The rule to be discussed in this section may be stated thusly: In the absence of express statutory authority to the contrary, appropriated funds are not available for the purchase of insurance to cover loss or damage to government property or the liability of government employees.

The rationale for the rule is aptly summarized in the following two passages from two early Comptroller decisions:

[187] *See* GAO, *Extending the Government's Policy of Self-Insurance in Certain Instances Could Result in Great Savings,* PSAD-75-105 (Washington, D.C.: Aug. 26, 1975); GAO, *Survey of the Application of the Government's Policy on Self-Insurance,* B-168106 (Washington, D.C.: June 14, 1972).

> "The basic principle of fire, tornado, or other similar insurance is the lessening of the burden of individual losses by wider distribution thereof, and it is difficult to conceive of a person, corporation, or legal entity better prepared to carry insurance or sustain a loss than the United States Government."

19 Comp. Gen. 798, 800 (1940).

> "The magnitude of [the government's] resources obviously makes it more advantageous for the Government to carry its own risks than to shift them to private insurers at rates sufficient to cover all losses, to pay their operating expenses, including agency or broker's commissions, and to leave such insurers a profit."

19 Comp. Gen. 211, 214 (1939). The rule and its evolution are also summarized in B-158766, Feb. 3, 1977.

The "self-insurance rule" dates back to the nineteenth century and has been stated and applied in numerous decisions of the Comptroller General and the Comptroller of the Treasury. In one early decision, 13 Comp. Dec. 779 (1907), the question was whether an appropriation for the education of natives in Alaska could be used to buy insurance to cover desks en route to Alaska, which had been purchased from that appropriation. The Comptroller of the Treasury held that the insurance could not be considered a necessary expense incident to accomplishing the purpose of the appropriation unless it somehow operated either to preserve and maintain the property for use, or to preserve the appropriation that was used to buy it. It did not do the first because insurance does not provide any added means to actually protect the property (life insurance does not keep you alive), but merely

transfers the risk of loss. Neither could it "preserve the appropriation" because any recoveries would have to be deposited into the general fund (miscellaneous receipts) of the Treasury. Therefore the appropriation was not available to purchase the insurance.

The following year, the Comptroller held that appropriations for the construction and maintenance of target ranges for the National Guard (then called "organized militias") could not be used to insure buildings acquired for use in target practice. 14 Comp. Dec. 836 (1908). The decision closely followed the reasoning of 13 Comp. Dec. 779 in that the insurance would not actually protect the property from loss, nor would it preserve the appropriation because any proceeds could not be retained by the agency but would have to be paid into the Treasury. Thus, the object of the appropriation "can be as readily accomplished without insurance as with it." 14 Comp. Dec. at 840.

Citing these and several other decisions, the Comptroller held similarly in 23 Comp. Dec. 269 (1916) that an appropriation for the construction and operation of a railroad in Alaska was not available to pay premiums for insurance on buildings constructed as part of the project.

A slightly different situation was presented in 24 Comp. Dec. 569 (1918). The Lincoln Farm Association had donated to the United States a memorial hall enclosing the log cabin in which Abraham Lincoln was born, together with a $50,000 endowment fund to preserve and maintain the property. The question was whether the fund could be used to buy fire insurance on the property. The Comptroller noted that the funds were not appropriated funds in the strict sense, but were nevertheless "government funds" in that legal title was in the United States. Therefore, the self-insurance rule applied. Recalling the reasoning of the earlier decisions, the Comptroller apparently could not resist commenting "[i]t should be remembered that fire insurance does not tend to protect or preserve a building from fire." *Id.* at 570.

The Comptroller General continued to apply the rule. In a 1927 case, a contracting officer attempted to agree to indemnify a contractor against loss or damage by casualty on buildings under construction. Since the appropriation would not have been available to insure the buildings directly, the contracting officer could not agree to do so by contract. The stipulation to indemnify was held to exceed the contracting officer's authority and therefore imposed no legal liability against the appropriation. 7 Comp. Gen. 105 (1927). Boiler inspection insurance was found improper in 11 Comp. Gen. 59 (1931).

A more recent decision applying the self-insurance rule is 55 Comp. Gen. 1196 (1976). There, the National Aeronautics and Space Administration (NASA) loaned certain property associated with the Apollo Moon Mission to the Air Force for exhibition. As a condition of the loan, NASA required the Air Force to purchase commercial insurance against loss or damage to its property. The Comptroller General found that the self-insurance rule applied to the loan of property from one federal agency to another, and that commercial coverage should not have been procured. Since the insurance had already been purchased and had apparently been procured and issued in good faith, the voucher could be paid. However, the decision cautioned against similar purchases in the future. *See also* B-237654, Feb. 21, 1991.

As noted at the outset, the self-insurance rule applies to tort liability as well as property damage. This was established in a 1940 decision to the Federal Housing Administration, 19 Comp. Gen. 798. In holding that insurance could not be procured against possible tort liability, the Comptroller General noted that the self-insurance rule "relates to the risk and not to the nature of the risk." *Id.* at 800. Since the 1946 enactment of the Federal Tort Claims Act, now codified at 28 U.S.C. §§ 2671 *et seq.,* the issue has become largely moot. However, questions still arise concerning the operation of motor vehicles, and these are discussed later in this section. Conceptually related is 65 Comp. Gen. 790 (1986), holding that an agency may not use its appropriations to insure against loss or damage to employee-owned hand tools. If the agency wishes to afford a measure of protection to employees who use their own

tools, it may consider loss or damage claims under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721. (This provision was amended in 1994 to permit agencies to pay for losses sustained by government personnel forced to evacuate a foreign country. Pub. L. No. 103-236, § 172, 108 Stat. 382 (Apr. 30, 1994).)

Another type of insurance which may not be paid for from appropriated funds is flight insurance. If a federal employee traveling by air on official business wishes to buy flight insurance, it is considered a personal expense and not reimbursable. B-309715, Sept. 25, 2007; 47 Comp. Gen. 319 (1967); 40 Comp. Gen. 11 (1960). Similarly nonreimbursable is trip cancellation insurance. 58 Comp. Gen. 710 (1979).

Insurance on household goods placed in storage incident to a permanent change of duty station may not be reimbursed to the employee unless the insurance is required by the storage company as a condition of accepting the goods for storage or is otherwise required by law. 28 Comp. Gen. 679 (1949).

Many of the decisions in this area include a statement to the effect that the government's practice of self-insurance "is one of policy and not of positive law." *E.g.,* 21 Comp. Gen. 928, 931 (1942). While the statement is true, as it has been carried from decision to decision the word "positive" has occasionally been omitted and this has caused some confusion. All the statement means is that the rule is not mandated by statute, but has evolved administratively from the policy considerations summarized above. *See also* 71 Comp. Gen. 4 (1991) (policy against using appropriated funds to make permanent improvements to private property).

b. Exceptions to the rule

(1) Departments and agencies generally

Exceptions to the self-insurance rule may, of course, be authorized by statute. The absence of an express prohibition on insurance is not enough to authorize it; rather, specific statutory authority is

required. 19 Comp. Gen. 798, 800 (1940); 14 Comp. Dec. 836, 839 (1908). Although legislation in this area has been minimal, Congress has occasionally authorized the procurement of insurance in some instances and prohibited it in others. By this pattern, congressional recognition of the rule may be inferred.

Also, the existence of statutory authority to buy insurance does not necessarily mean it has to be exercised. In one case, the Comptroller General recommended against the purchase of insurance although recognizing that it was statutorily authorized in that instance. 19 Comp. Gen. 211 (1939).

Moreover, because the rule is not mandated by statute but rather has evolved administratively from policy considerations, there are nonstatutory exceptions in the limited number of cases where the underlying policy considerations do not apply. The standards for exception were summarized in B-151876, Apr. 24, 1964, as follows:

- where the economy sought by self-insurance would be defeated;
- where sound business practice indicates that a savings can be effected; or
- where services or benefits not otherwise available can be obtained by purchasing insurance.

See also B-290162, Oct. 22, 2002; B-244473.2, May 13, 1993.

Two World War II-era cases provide early illustrations of this approach. In B-35379, July 17, 1943, the procurement of airplane hull insurance by the Civil Aeronautics Administration was approved. It was determined that the Administration did not have in its employ, and was unable at the time to recruit, the number of qualified personnel that would be required to appraise damage and arrange for and supervise immediate repairs in connection with the War Training Service and that commercial insurance coverage could provide such services. Also, in B-59941, Oct. 8, 1946, the purchase of pressure vessel insurance including essential inspection services from commercial sources was permissible

because of the necessity and economy brought on by wartime conditions.

In 37 Comp. Gen. 511 (1958), GAO considered a provision in a shipbuilding contract which required the contractor to procure builder's risk insurance, including war risk insurance that was obtainable mainly from the government. Under the contract, title vested in the United States to the extent work was completed, but the risk of loss remained in the shipbuilder until the completed vessel was delivered to and accepted by the government. The government would end up paying part of the premiums because their cost was included in the bid price. GAO approved the arrangement, finding that it did not improperly transfer the contractor's risk to the government.

A more recent example is provided in B-290162, Oct. 22, 2002. The Architect of the Capitol asked whether appropriated funds could be used for the purchase of "wrap-up" insurance for the construction of the Capitol Visitor Center. Wrap-up insurance would cover both the government's risk and the risks of contractors, designers, and consultants in constructing the Visitor Center. GAO held that wrap-up insurance could be purchased if it were shown that purchasing wrap-up insurance (1) is reasonably necessary or incident to the construction of the Visitor Center, and (2) would otherwise satisfy the standards for exception (discussed above), that is, the use of wrap-up insurance would result in a savings or that a benefit, not otherwise obtainable, would be gained through the use of wrap-up insurance.

Exceptions may be based on the funding arrangement of a particular agency or program. For example, the rule prohibiting the purchase of insurance did not apply to the Panama Canal Commission because the Commission operated on a self-sustaining basis, deriving its operating funds from outside sources. The vast resources available to the government, upon which the self-insurance rule is founded, were not intended to be available to the Commission. B-217769, July 6, 1987 (holding that the Commission could purchase "full scope" catastrophic insurance coverage if administratively determined to be necessary). Similarly,

GAO held in B-287209, June 3, 2002, that the rule prohibiting the purchase of insurance to cover loss of property or tort claims does not apply to the District of Columbia, since the United States' resources are not available to cover such loss sustained by the District. The fact that an agency's initial appropriation was placed in an interest-earning trust fund was found not sufficient to warrant an exception where the government's resources were nevertheless available to it. B-236022, Jan. 29, 1991 (John C. Stennis Center for Public Service Training and Development).

The Comptroller General has held that the self-insurance rule does not apply to privately owned property temporarily entrusted to the government. 17 Comp. Gen. 55 (1937) (historical items loaned to the government for exhibition purposes); 8 Comp. Gen. 19 (1928) (corporate books and records produced by subpoena for a federal grand jury); B-126535-O.M., Feb. 1, 1956 (airplane models loaned by manufacturer). *Compare* 25 Comp. Dec. 358 (1918), disallowing a claim for insurance premiums by West Publishing Company for law books loaned to a federal employee, where correspondence from the claimant made it clear that it was loaning the books to the employee personally and not to the government.

However, insurance may be purchased on loaned private property only where the owner requires insurance coverage as part of the transaction. If the owner does not require insurance, private insurance is not a necessary expense and the government should self-insure. 63 Comp. Gen. 110 (1983) (works of art temporarily loaned by the Corcoran Gallery to the President's Commission on Executive Exchange); 42 Comp. Gen. 392 (1963) (school classrooms used for civil service examinations).

Foreign art treasures are frequently loaned to the United States for exhibition purposes. While insurance may be purchased by virtue of 17 Comp. Gen. 55, its extremely high cost has been a disincentive. To remedy this situation, Congress in 1975 passed the Arts and Artifacts Indemnity Act, 20 U.S.C. §§ 971–977. This statute authorizes the Federal Council on the Arts and Humanities to enter into agreements to indemnify against loss or damage to works of art and other materials while on exhibition under specified

circumstances and within specified limits. Claims under the Act require specific appropriations for payment, but the agreements are backed by the full faith and credit of the United States. The Act constitutes authority to incur obligations in advance of appropriations and the agreements would therefore not violate the Antideficiency Act. *See* B-115398.01, Apr. 19, 1977.

Since nonappropriated fund activities are, by definition, not financed from public funds, they are not governed by the self-insurance rule. Whether the rule should or should not be followed would generally be within the discretion of the activity or its parent agency. Thus, it is within the discretion of the Department of Defense to establish the rule by regulation for its nonappropriated fund activities. B-137896, Dec. 4, 1958.

Finally, it is important to keep in mind that the self-insurance rule is aimed at insurance whose purpose is to protect the United States from risk of financial loss. Applying the rule from this perspective, GAO found that it would not preclude the Federal Bureau of Investigation (FBI) from purchasing insurance in connection with certain of its undercover operations. The objective in these instances was not to protect the government against risk of loss, but to maintain the security of the operation itself, for example, by creating the appearance of normality for FBI-run undercover proprietary corporations. Thus, the FBI could treat the expenditure purely as a "necessary expense" question. B-204486, Jan. 19, 1982. For additional exceptions, see 59 Comp. Gen. 369 (1980) and B-197583, Jan. 19, 1981.

(2) Government corporations

In an early case, the Comptroller of the Treasury indicated that the self-insurance rule would not apply to a wholly-owned government corporation, and suggested that it would generally take an act of Congress to apply the prohibition to a corporation's funds. 23 Comp. Dec. 297 (1916).

The Comptroller General followed this approach in 21 Comp. Gen. 928 (1942), noting that the rule "has not been observed

strictly in cases involving insurance of property of government corporations." *Id.* at 931. The decision held that, while the funds of the Virgin Islands Company were subject to various statutory restrictions on the use of public funds, they could be used to insure the Company's property.

The Federal Housing Administration is treated as a corporation for many purposes, although it is not chartered as one. *See* 53 Comp. Gen. 337 (1973). In 16 Comp. Gen. 453 (1936), the Comptroller General held that the Administration could purchase hazard insurance on acquired property based on a determination of necessity, but in 19 Comp. Gen. 798 (1940), declined to extend that ruling to cover insurance against possible tort liability. *See also* 55 Comp. Gen. 1321 (1976) (former Federal Home Loan Bank Board, although technically not a corporation, could nevertheless insure its new office building since Board's authority to cover losses by assessments against member banks made rationale of self-insurance rule inapplicable).

c. Specific areas of concern

(1) Property owned by government contractors

The cases previously discussed in which insurance was prohibited involved property to which the government held legal title. Questions also arise concerning property to which the government holds less than legal title, and property owned by government contractors.

A contractor will normally procure a variety of insurance as a matter of sound business practice. This may include hazard insurance on its property, liability insurance, and workers' compensation insurance. The premiums are part of the contractor's overhead and will be reflected in its bid price. When this is done, the government is paying at least a part of the insurance cost indirectly. Since the risks covered are not the risks of the government, there is no objection to this "indirect payment" nor, if administratively determined to be necessary, to the inclusion of an insurance

stipulation in the contract. 39 Comp. Gen. 793 (1960); 18 Comp. Gen. 285, 298 (1938).

Similarly differentiating between the government's risk and the contractor's risk, the Comptroller General has applied the self-insurance rule where the government holds "equitable title" under a lease-purchase agreement. 35 Comp. Gen. 393 (1956); 35 Comp. Gen. 391 (1956). In both decisions, the Comptroller General held that, although the government could reimburse the lessor for the cost of insuring against its own (the lessor's) risk, it could not require the lessor to carry insurance for the benefit of the government.

(2) Use of motor vehicles

As noted previously, the self-insurance rule applies to tort liability as well as property damage. 19 Comp. Gen. 798 (1940). At present, the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.,* provides the exclusive remedy for claims against the United States resulting from the negligent operation of motor vehicles by government employees within the scope of their employment. Thus, insurance questions have become largely moot. Nevertheless, the self-insurance rule has been involved in several situations involving the operation of motor vehicles.

A 1966 decision, 45 Comp. Gen. 542, involved Internal Revenue Service (IRS) employees classified as "high mileage drivers." They were assigned government-owned cars for official use and, when warranted, could drive the cars home at the close of the workday so that they could proceed directly to an assignment from home the next morning. The Treasury Department asked whether IRS appropriations were available to reimburse the employees for having their commercial liability insurance extended to cover the government vehicles. Applying the self-insurance rule, and noting further that the travel would most likely be considered within the scope of employment for purposes of the Federal Tort Claims Act, the Comptroller General concluded that the funds could not be so used. GAO similarly denied the claims of six Navy members for reimbursement of extra collision insurance they purchased on

rented trucks. They were authorized to rent trucks to perform their official duties and were even directed to obtain extra collision insurance. Nonetheless, GAO denied reimbursement because the insurance had been purchased in violation of the then in force Joint Federal Travel Regulation, vol. I, ¶ U3415-C2a, which prohibited the purchase of optional extra collision insurance. B-256669, Aug. 31, 1994. *See also* B-261141, Nov. 9, 1995.

In B-127343, Dec. 15, 1976, the Comptroller General concluded that the Federal Tort Claims Act applied to Senate employees operating Senate-owned vehicles within the scope of their employment. Therefore, the purchase of commercial insurance would be neither necessary nor desirable.

In 1972, the Veterans Administration (VA) asked whether it could use its appropriations to provide liability insurance coverage for disabled veteran patients being given VA-conducted driver training. Since the trainees were not government employees, they would not be covered by the Federal Tort Claims Act. Since the risk was not that of the government, the self-insurance rule was not applicable. Therefore, VA could procure the liability insurance upon administrative determinations that (1) the driver training was a necessary part of a given patient's medical rehabilitation, and (2) that the insurance coverage was necessary to its success. B-175086, May 16, 1972.

The Federal Tort Claims Act does not apply to claims arising in foreign countries and the rules are a bit different for driving overseas. Originally, notwithstanding the non-availability of the Federal Tort Claims Act, the Comptroller General had prohibited the purchase of insurance for government-owned vehicles operated in foreign countries. 39 Comp. Gen. 145 (1959). Instances of specific statutory authority for the State Department and the Foreign Agricultural Service were viewed as precluding insurance in other situations without similar legislative sanction.

However, GAO reviewed and revised its position in 1976. In 55 Comp. Gen. 1343 (1976), the Comptroller General held that the General Services Administration (GSA) could provide by regulation

for the purchase of liability insurance on government-owned vehicles operated regularly or intermittently in foreign countries, where required by local law or necessitated by legal procedures which could pose extreme difficulties in case of an accident (such as arrest of the driver and/or impoundment of the vehicle). The decision also concluded that GSA could amend its regulations to permit reimbursement of federal employees for the cost of "trip insurance" on both government-owned and privately owned vehicles in foreign countries where liability insurance is a legal or practical necessity. The decision was extended in 55 Comp. Gen. 1397 (1976) to cover the cost of required insurance on vehicles leased commercially in foreign countries on a long-term basis.

Some confusion may result from the statement in 55 Comp. Gen. 1343, 1347, that "39 Comp. Gen. 145 (1959), 19 Comp. Gen. 798 (1940), and similar decisions" are overruled "to the extent that they are inconsistent with this decision." Since 39 Comp. Gen. 145 prohibited insurance on government-owned vehicles *in foreign countries*, it is properly viewed as overruled by 55 Comp. Gen. 1343. However, 19 Comp. Gen. 798 and "similar decisions" remain valid insofar as they assert the general applicability of the self-insurance rule to tort liability and to motor vehicle usage in the United States. They should be viewed as modified to the extent that they no longer preclude purchase of insurance in the foreign country situations dealt with in 55 Comp. Gen. 1343 and 55 Comp. Gen. 1397.

(3) Losses in shipment

Early decisions had applied the self-insurance rule to the risk of damage or loss of valuable government property while in shipment. Thus, marine insurance could not be purchased for shipment of a box of silverware. 4 Comp. Gen. 690 (1925). Nor could it be purchased to cover shipment of $5,000 in silver dollars from San Francisco to Samoa. 22 Comp. Dec. 674 (1916), *aff'd upon reconsideration,* 23 Comp. Dec. 297 (1916).

In 1937, Congress enacted the Government Losses in Shipment Act, 40 U.S.C. §§ 721–729. The Act provides a fund for the payment of claims resulting from the loss or damage in shipment of government owned "valuables" as defined in the Act. The Act also prohibits the purchase of insurance except as specifically authorized by the Secretary of the Treasury. The Secretary may give such an authorization when he finds the risk of loss in shipment cannot adequately be guarded against by the facilities of the United States or adequate replacement cannot be provided for. *See* S. Rep. No. 75-738, at 5 (1937). If a given risk is beyond the scope of the Act, for example, if the items in question are not within the definition of "valuables" or if the particular movement does not qualify as "shipment," then the self-insurance rule and its exceptions would still apply. *See*, *e.g.,* 17 Comp. Gen. 419 (1937); B-244473.2, May 13, 1993.

(4) Bonding of government personnel

Prior to 1972, the federal government frequently required the surety bonding of officers and employees who handled money or other valuables. In 1972, Congress enacted legislation, now found at 31 U.S.C. § 9302, to expressly prohibit the government from requiring or obtaining surety bonds for its civilian employees or military personnel in connection with the performance of their official duties. The reasons for this legislation parallel the policy considerations behind the self-insurance rule. Indeed, the objective of the legislation was to substitute the principle of self-insurance for the practice of obtaining surety bonds on federal employees where the risk insured against is a loss of government funds or property.[188] 56 Comp. Gen. 788, 790 (1977). Although 31 U.S.C. § 9302 does not define "officer" or "employee," the definitions in title 5 of the United States Code are available for guidance. B-236022, Jan. 29, 1991.

[188] GAO had recommended the legislation. *See* GAO, *Review of Bonding Program for Employees of the Federal Government*, B-8201 (Washington, D.C.: Mar. 29, 1962); B-8201, B-59149, Jan. 18, 1972 (bill comments).

Under the former system, the surety bonds were for the protection of the government, not the bonded employee. If a loss occurred and the government collected on the bond, the surety could attempt to recover against the individual employee. Thus, the elimination of bonding in no way affects the personal liability of federal employees and 31 U.S.C. § 9302 specifies this.[189] This principle has been noted several times in connection with the liability of accountable officers and the cases are cited in Chapter 9.

In 56 Comp. Gen. 788 (1977), the Comptroller General held that, by virtue of 31 U.S.C. § 9302, the United States became a self-insurer of restitution, reparation, and support moneys collected by probation officers under court order. The decision noted that the same result applied to litigation funds paid into the registry of the court (funds paid into the registry by a litigant pending distribution by the court to the successful party).

However, if an agency requires an employee to serve as a notary public and state law requires bonding of notaries, the employee's expense in obtaining the surety bond may be reimbursed notwithstanding 31 U.S.C. § 9302. The bond in such a situation is neither required by nor obtained by the federal government. It is required by the state and obtained by the employee. Also, the risk involved is not one in which the United States is the insured. B-185909, June 16, 1976.

Similarly, if a federal court designates a state court employee to perform certain functions in connection with the arrest and detention of federal offenders, 31 U.S.C. § 9302 does not preclude the Administrative Office of the United States Courts from requiring that the state employee be bonded since the statute applies only to federal employees. 52 Comp. Gen. 549 (1973).

[189] As discussed earlier in this chapter, a federal employee may purchase professional liability insurance. The federal government is required to pay half the costs incurred by "qualified employees" for such insurance. Pub. L. No. 106-58, title VI, § 642(a), 113 Stat. 430, 477 (Sept. 29, 1999).

5. Meetings and conventions

It seems there are meetings on just about everything. Quite often they can be very useful. They can also, at times, be expensive. Various questions arise when considering whether appropriations are available to pay for meeting-related expenses. First, an agency must use Step 1 of the necessary expense analysis to determine whether the meeting bears a logical relationship to the purpose of the appropriation. Next, the agency must use Step 2, ensuring that the expenditure it not prohibited by another law. This section will discuss the relevant statutory provisions concerning the use of appropriations for meetings. Some of these statutes permit the use of appropriations for some meetings, while others prohibit the use of appropriations for meetings under some circumstances. For purposes of this discussion, the term “meeting” includes other designations, such as conference, congress, convention, seminar, symposium, and workshop; what the particular gathering is called is irrelevant for fiscal purposes.

a. Historical background

To understand the law in this area, it is necessary to understand several statutes, whose interrelationship is best seen by outlining their statutory evolution. Listed in the order of their enactment, they are:

- 5 U.S.C. § 5946, which generally prohibits the use of appropriated funds for fees for an individual employee membership in a society or association, and employee expenses to attend meetings of a society or association;
- 31 U.S.C. § 1345, which bars the use of appropriated funds for employee travel, transportation, and subsistence expenses for a meeting, when the employee is not carrying out an official duty;
- 5 U.S.C. § 4109, which permits agencies to use appropriated funds for training and related expenses; and

- 5 U.S.C. § 4110, which provides that an appropriation available to pay for travel is also available for expenses of attendance at meetings that concern the purpose for which the appropriation was made.

Congress enacted the first piece of legislation under our consideration in 1912. As relevant here, section 8 of the Act of June 26, 1912, (Pub. L. No. 201, ch. 182, 37 Stat. 139, 184), prohibited the payment, without specific statutory authority, of the expenses of attendance of an individual at meetings or conventions of members of a society or association. With exceptions to be noted below, this statute is now found at 5 U.S.C. § 5946, and has generally been viewed as applying to attendance by federal employees at non-federally sponsored meetings. *See, e.g.,* B-140912, Nov. 24, 1959.

GAO reviewed many early cases under the 1912 statute. For example, since the prohibition is directed at meetings of a "society or association," other types of meetings were not covered. Thus, the Federal Power Commission could, if determined to be in the furtherance of authorized activities, send a representative to the World Power Conference (in Basle, Switzerland) since it was not a meeting of a "society or association." 5 Comp. Gen. 834 (1926). Similarly, the statute did not prohibit travel by U.S. Attorneys "to attend a conference of attorneys not banded together into a society or association, but called together for one meeting only for conference in a matter bearing directly on their official duties." 1 Comp. Gen. 546 (1922).

However, if a gathering was viewed as a meeting or convention of a society or association, the expenses were consistently disallowed. *E.g.,* 16 Comp. Gen. 252 (1936); 5 Comp. Gen. 599 (1926), *aff'd,* 5 Comp. Gen. 746 (1926); 3 Comp. Gen. 883 (1924). GAO provided that if they thought attendance would be in the interest of the government, they should present the matter to Congress. *E.g.,* 5 Comp. Gen. at 747. In fact, Congress granted specific authority to a number of agencies (for an example, *see* B-136324, Aug. 1, 1958), and later, as will be seen below, enacted general legislation

that renders 5 U.S.C. § 5946, as it relates to attendance at meetings, of very limited applicability.

The next congressional venture in this field was aimed primarily at restricting the use of appropriated funds to pay expenses of nongovernment persons at conventions. Public Resolution No. 2, 74th Congress, ch. 4, 49 Stat. 19 (Feb. 2, 1935). This statute, now codified at 31 U.S.C. § 1345, provides in relevant part:

> "Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. This section does not prohibit—
>
> "(1) an agency from paying the expenses of an officer or employee of the United States Government carrying out an official duty; . . ."

Significantly, 31 U.S.C. § 1345 does not apply to government employees in the discharge of official duties. Thus, as of 1935, attendance by private parties at government expense was prohibited by 31 U.S.C. § 1345 and attendance by government employees was prohibited by the 1912 statute for meetings of a society or association (regardless of the relationship to official duties) and by 31 U.S.C. § 1345 (for other types of meetings unless attendance was in the discharge of official duties).

The next relevant legislative action came in 1958, with two provisions of the Government Employees Training Act, Pub. L. No. 85-507, 72 Stat. 327 (July 7, 1958). Section 10 of the Act, now at 5 U.S.C. § 4109, authorizes payment of certain expenses in connection with authorized training. Section 19(b) of the Act, now at 5 U.S.C. § 4110, makes travel appropriations available for expenses of attendance at meetings "which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities." When title 5 of the United States Code

was recodified in 1966, qualifying language was added to 5 U.S.C. § 5946 to make it clear that the requirement for specific statutory authority no longer applied to the extent payment was authorized by 5 U.S.C. § 4109 or § 4110. *See* 38 Comp. Gen. 800 (1959) (concluding that in most circumstances the Training Act repealed 5 U.S.C. § 5946 by implication).

b. Attendance at meetings: individuals other than federal employees

The statute that is now 31 U.S.C. § 1345 was first enacted in 1935. Pub. Res. no. 2, Feb. 2, 1935, 49 Stat. 19. The 1935 enactment read as follows:

> "Whereas numerous applications are being received from various organizations requesting lodging, food, and transportation for the purpose of holding conventions or meetings at Washington and elsewhere; and
>
> "Whereas the expenditure of Government funds for such purposes is against the policy of Congress: Therefore . . . unless specifically provided by law, no moneys from funds appropriated for any purpose shall be used for the purpose of lodging, feeding, conveying, or furnishing transportation to, any conventions or other form of assemblage or gathering to be held in the District of Columbia or elsewhere. This section shall not be construed to prohibit the payment of expenses of any officer or employee of the Government in the discharge of his official duties."

Except for a June 1935 enactment that provided a limited exception for the Secretary of Agriculture, Congress has never made a

substantive amendment to the original 1935 enactment.[190] Congress did, however, enact this provision into positive law in 1982. *See generally* Office of the Law Revision Counsel, *Positive Law Codification*, *available at* uscode.house.gov/codification/legislation.shtml (last visited July 18, 2017). Positive law codification results in a restated law that is intended to conform to the policy, intent, and purpose of Congress in the original enactment. *Id*. The codified provision restates existing law and may not be construed as making a substantive change in the law replaced. Pub. L. No. 97-258, § 4(b), 96 Stat. 877, 1067 (Sept. 13, 1982). The restated provision, 31 U.S.C. § 1345, made a few changes; one change we will discuss later is of the phrase "conventions or other form of assemblage or gathering" to the single word "meeting".

GAO first issued a decision on this provision shortly after its enactment. In 1935, the Federal Housing Administration (FHA) asked whether the provision that is now 31 U.S.C. § 1345 barred it from paying to transport citizens from various local communities to FHA meetings. The citizens served without pay as chairmen of committees that promoted a campaign to repair and modernize real estate under the National Housing Act. FHA stated that "[i]n view of the fact that these men are serving without pay and purely in the public interest, it is thought that they should not be asked to defray their traveling and hotel expenses while attending these meetings." 14 Comp. Gen. 638, 639 (1935).

[190] Congress may enact specific statutory authority exempting agencies from the prohibition of 31 U.S.C. § 1345. An example of such authority is language in an appropriation act making the sums available for "expenses of attendance at meetings," or similar language. 72 Comp. Gen. 146 (1993); 34 Comp. Gen. 321 (1955); 24 Comp. Gen. 86 (1944); 17 Comp. Gen. 838 (1938); 16 Comp. Gen. 839 (1937); B-117137, Sept. 25, 1953. (This is the same language used before enactment of the Government Employees Training Act to grant exceptions from 5 U.S.C. § 5946.) Some agencies have permanent authority. *See* 31 U.S.C. § 326(a) (Treasury Department, construed in 37 Comp. Gen. 708 (1958)); 31 U.S.C. § 1345(2) (concerning meetings of 4-H Clubs, noted in B-166506, July 15, 1975).

FHA noted that the member of Congress who offered the provision was concerned primarily with "organizations of all character all over the United States [who seek] to come [to Washington, D.C.] at the expense of the Government." 79 Cong. Rec. 710 (Jan. 21, 1935). Indeed, the preamble to the measure states that the legislation was intended to prevent providing funding to "various organizations requesting lodging, food, and transportation for the purpose of holding conventions or meetings at Washington and elsewhere." 49 Stat. 19. Thus, FHA intimated that perhaps the provision should not apply to its proposed meetings, as they did not feature private groups who were seeking to hold a meeting at government expense. Rather, FHA's meetings were organized entirely by the agency and for its benefit.

GAO concluded, however, that 31 U.S.C. § 1345 restrained FHA's use of its appropriation for the meetings. 14 Comp. Gen. 638 (1935). In decisions spanning the next few decades, GAO continued to conclude that appropriations were not available to transport, feed, or lodge attendees at any convention or other assemblage or gathering, unless the person at issue was a federal officer or employee carrying out official business. *S*ee, *e.g.*, 14 Comp. Gen. 851 (1935); B-166506, July 15, 1975, *aff'd,* 55 Comp. Gen. 750 (1976); B-193644, July 2, 1979; B-168627, May 26, 1970; B-176806-O.M., Sept. 18, 1972; 62 Comp. Gen. 531 (1983).

The original statutory prohibition barred the use of appropriations for expenses related to "any conventions or other form of assemblage or gathering." 49 Stat. 19 (Feb. 2, 1935). However, when Congress enacted title 31 into positive law, it substituted the word "meeting" for the previously quoted phrase. GAO noted this change of phrasing in 1993 when it considered whether a job fair and job interviews fell within the scope of the prohibition of 31 U.S.C. § 1345. The Department of Defense (DoD) was scaling down its overseas forces and would need to subject many of its teachers at the DoD Dependent Schools to reductions in force or early retirement. DoD sought to pay for the travel and lodging costs of public school recruiters who would attend a job fair to recruit DoD teachers. DoD estimated that the job fair would pay for itself if a

single teacher who was otherwise eligible for a $25,000 early retirement incentive instead accepted another job offered by a recruiter. 72 Comp. Gen. 229, 230 (1993).

GAO noted that the original language of the prohibition barred "conventions or other form of assemblage or gathering" and that, out of context, the word "meeting" might be interpreted more broadly than the former phrase. The decision concluded that the job fairs and interviews at issue were not "the type of 'meeting' the statute was intended to reach." 72 Comp. Gen. at 230 (1993). In another, similar case, GAO concluded that Job Corps could pay to transport guests who were to provide "social and recreational services" to Job Corps enrollees. The encounters at issue were not the sort of "convention[] or other form of assemblage or gathering" that fell within the ambit of the prohibition. 45 Comp. Gen. 166 (1966).

In 2005, a certifying officer at the National Institutes of Health (NIH) asked whether the agency could use appropriations to provide meals and light refreshments to federal and nonfederal attendees and presenters at an NIH conference. [191] B-300826, Mar. 3, 2005. In a nod to FHA's reasoning in 1935 in 14 Comp. Gen. 638, the NIH decision states that 31 U.S.C. § 1345 "has limited application, addressing only those conventions and other forms of assemblages or gatherings that private organizations seek to hold at government expense." B-300826, at 7 n. 5. Therefore, 31 U.S.C. § 1345 did not bar NIH from serving food to non-federal attendees at an NIH formal conference. The decision emphasized that "[b]ecause hosting this conference is reasonably related to NIH's statutory responsibilities and serves to advance its statutory mission, NIH is not barred by the prohibition of 31 U.S.C. § 1345 from providing food." B-300826, at 7 n.5.

Three years after the NIH decision, GAO again addressed the applicability of the prohibition of 31 U.S.C. § 1345. B-310023,

[191] We discuss most of the reasoning in this decision in section C. 5. f..

Apr. 17, 2008. A district of the U.S. Forest Service asked whether its appropriations were available to pay for light refreshments for nongovernmental attendees of an annual event aimed at introducing people to the benefits of trails. The district wished to provide snacks that would be appropriate as event attendees went hiking. GAO concluded that appropriations were not available for the food; we discuss this reasoning further in section C.5.l above.

Regarding 31 U.S.C. § 1345 specifically, GAO emphasized that

> "The use of the words 'travel, transportation, and subsistence' in section 1345 indicates Congress's desire to curb those costs incident to someone in government travel. Where, as here, no one is in travel status, we need not even reach the question of whether [the event] is a 'meeting' within the meaning of section 1345."

B-310023, at 5. Therefore, a threshold question is whether government travel is involved.

The Office of Legal Counsel (OLC) in the Department of Justice has opined on the scope of 31 U.S.C. § 1345. In OLC's view, "the statute is not limited to meetings for which outside organizations request funds." *Use of Appropriations to Pay Travel Expenses of International Trade Administration Fellows*, 28 Op. Off. Legal Counsel 269, 275. (2004). About three years later, OLC noted that under its interpretation, 31 U.S.C. § 1345 applies in more instances than it does under GAO's interpretation. 31 Op. Off. Legal Counsel 54, 55-56 (2007). In the decision concerning the Forest Service, which was issued about a year after the second of the two OLC opinions, GAO mentioned OLC's views and stated that "we read section 1345 more narrowly, consistent with Congress' original intent." B-310023, at 4 n. 2.

In summary, 31 U.S.C. §1345 may bar use of appropriations for a particular meeting if *all* of the following three tests are true:

1. There is a "meeting" as that word is used in 31 U.S.C. § 1345. Not every occasion involving an encounter between two or more people is a "meeting"; recall that the original version of the statue applied to "conventions or other form of assemblage or gathering." Consider the analysis in 72 Comp. Gen. 229 (1993) and 45 Comp. Gen. 476 (1966).

2. The meeting is one a private organization seeks to hold at government expense. B-300826, Mar. 3, 2005.

3. The costs at issue are incident to someone in government travel. B-310023, Apr. 17, 2008.

However, 31 U.S.C. § 1345 does *not* prohibit a particular expense if *either* of the following is true:

4. Congress has made a specific exception by law. 72 Comp. Gen. 146 (1993).

5. The expenses are those of an officer or employee of the United States Government carrying out an official duty. 31 U.S.C. § 1345(1).

c. Use of grant funds

One of the principles of the laws governing federal grants is that, where a grant is made for an authorized grant purpose, the grant funds in the hands of the grantee are not subject, generally, to many of the restrictions applicable to the direct expenditure of appropriations, unless there is a special condition of the grant to the contrary. B-153417, Feb. 17, 1964. One of those restrictions which does not apply to grant funds in the hands of a grantee is 31 U.S.C. § 1345.

For example, the American Law Institute could use funds provided by the Environmental Protection Agency in the form of a statutorily authorized training grant to defray transportation and subsistence expenses of law students and practicing environmental lawyers at an environmental law seminar. 55 Comp. Gen. 750 (1976). For this result to apply, the grant must be made for an authorized grant

purpose and there must be no provision to the contrary in the grant agreement. Once these conditions are met, the grantee's use of the funds is not impaired by 31 U.S.C. § 1345. However, an agency may not use the grant mechanism for the sole purpose of circumventing 31 U.S.C. § 1345, that is, to do indirectly that which it could not do directly. In other words, if an agency makes a grant for an authorized purpose, and the grantee sponsors a meeting or conference as a means of implementing that purpose, the grantee's use of the funds will not be restrained by 31 U.S.C. § 1345. However, unless otherwise authorized, the agency could not make the grant for the purpose of sponsoring the conference and thereby permitting payments it could not make by direct expenditure.

Depending on the precise statutory authority involved, there may be situations in which sponsoring or helping to sponsor a conference is, itself, an authorized grant purpose. One example is B-83261, Feb. 10, 1949 (grant to American Cancer Society under Public Health Service Act).

The treatment of grant funds described above does not apply to procurement contracts. 62 Comp. Gen. 531 (1983). *See also* B-262110, Mar. 19, 1997.

d. Attendance at meetings: federal employees

Appropriations are available to pay the cost of an employee's attendance at a meeting only if the officer or employee is carrying out an official duty. Furthermore, the meeting must (1) be part of an authorized training function; (2) be concerned with the functions or activities for which the appropriation is made; or (3) contribute to improved conduct, supervision, or management of the functions or activities. An interlocking labyrinth of statutes leads to this simple rule. We will explain the derivation of each segment of this rule.

The first segment of this rule, which is that the officer or employee must be carrying out an official duty, derives from 31 U.S.C. § 1345, under which "[e]xcept as specifically provided by law, an appropriation may not be used for travel, transportation, and

subsistence expenses for a meeting." However, 31 U.S.C. § 1345 does *not* bar expenses for attendance at a meeting by "an officer or employee of the United States Government carrying out an official duty." *E.g.,* 27 Comp. Gen. 627 (1948); 26 Comp. Gen. 53 (1946); 22 Comp. Gen. 315 (1942); B-117137, Sept. 25, 1953; B-87691, Aug. 2, 1949; B-80621, Oct. 8, 1948; B-77404, June 29, 1948; B-77613, June 23, 1948; B-13888, Dec. 10, 1940.[192]

The next segment of this rule is a three-part test; for meeting expenses to be an acceptable use of appropriations, the meeting must meet at least one of these three elements. The meeting must either be part of an authorized training function, or it must be concerned with the functions or activities for which the appropriation is made, or it must contribute to the improved conduct, supervision, or management of the functions or activities. 5 U.S.C. § 4109 authorizes use of appropriations for training, while 5 U.S.C. § 4110 authorizes payment for expenses of the latter two categories.

For practical purposes, 5 U.S.C. § 5946 has no impact on whether appropriations are available for attendance of agency employees at meetings. This statute, first enacted in 1912, barred the use of appropriations for "expenses of attendance of an individual at meetings or conventions of members of a society or association." The Government Employees Training Act, which contained the provisions now codified at 5 U.S.C. §§ 4109 and 4110, was enacted decades later, in 1958. A year after enactment, GAO concluded that in most circumstances the Training Act repealed 5 U.S.C. § 5946(2) by implication:

[192] All of these cases also involve the pre-Government Employees Training Act version of 5 U.S.C. § 5946 and may no longer be valid to that extent. The editors have made no attempt to examine each of the cases from this perspective. Thus, while the pre-1958 cases remain valid to the limited extent that they involve 31 U.S.C. § 1345, the results in those cases may no longer apply in view of the subsequent enactment of 5 U.S.C. §§ 4109 and 4110.

> "Although the training act does not repeal or modify [5 U.S.C. § 5946(2)] in specific terms, it is manifest that the intention of the Congress was to remove the restrictive provisions relating to attendance at meetings of that section with regard to the agencies and personnel covered by the training act. Continued application of those provisions to agencies and personnel covered by the act would ignore recognition by the Congress that general authority for attendance at meetings was necessary to the attainment of the objectives for which the training legislation was enacted. Therefore . . . the restriction against attendance at meetings contained in [5 U.S.C. § 5946(2)] is inapplicable so far as agencies and personnel covered by the Government Employees Training Act are concerned and . . . for those agencies and personnel, [5 U.S.C. § 4110] dispenses with the necessity for specific appropriation provisions authorizing attendance at meetings."

38 Comp. Gen. 800 (1959). Indeed, when Title 5 of the United States Code was enacted into positive law in 1966, qualifying language was added to 5 U.S.C. § 5946 to explicitly indicate that its provisions applied "[e]xcept as authorized . . . by sections 4109 and 4110 of this title." *See also* B-202028, May 14, 1981 (although 5 U.S.C. § 5946 bars use of appropriations for membership dues in a society or association, it does not apply for expenses of employee attendance at a meeting of a society or association pursuant to the employee's official functions).

Cases applying these statutes include:

- The Labor Department could use its Salaries and Expenses appropriation to pay the attendance fees of its Director of Personnel at a conference of the American Society of Training Directors, since the meeting qualified under the broad authority of 5 U.S.C. § 4110. 38 Comp. Gen. 26 (1958).

- Appropriations not available to reimburse employee for cost of attendance at a meeting of an association where attendance was not essential to the work of the agency and the meeting was concerned solely with the administrative and management affairs of the association. B-166560, May 27, 1969.

- The expenses of attendance may not be paid if the employing agency refuses to authorize attendance, even if authorization would have been permissible under the statute.[193] B-164372, June 12, 1968.

- Where attendance is authorized, the fact that the sponsor is a profit-making organization is immaterial. B-161777, July 11, 1967.

Federally sponsored meetings for employees (intra-agency or interagency), such as management or planning seminars, are not prohibited by 5 U.S.C. § 5946, since they are not meetings of a "society or association," nor are they prohibited by 31 U.S.C. § 1345 because they concern the discharge of official duties. The authority for this type of meeting is essentially a "necessary expense" question.

Occasionally, agencies have conducted "retreat" or "offsite" meetings. In this situation, an authorized agency official determines that the participants should get away from their normal work environment and its associated interruptions. Sometimes it seems

[193] This was an odd case. An employee wanted to attend a conference in Tokyo, Japan. The agency refused authorization because the employee had announced his intention to resign after the conference. The employee went anyway, and filed a claim for his expenses. GAO said no.

that the retreat location is just far enough away to justify the payment of per diem allowances. While this type of meeting may be criticized as extravagant, it is within the agency's administrative discretion under the necessary expense rule, and therefore not impermissible. *See* B-193137, July 23, 1979. Of course, such a meeting must also comport with other laws generally and appropriations law principles specifically.[194] For example, an agency may not pay for food at an "offsite" or "retreat" meeting unless one of the limited exceptions that we discuss in section C.5 above applies. For an example of an offsite meeting that was both extravagant and that apparently violated many laws, see Office of Inspector General, U.S. General Services Administration, *Management Deficiency Report: General Services Administration, Public Buildings Service, 2010 Western Regions Conference*, Apr. 2, 2012, *available at* www.gsaig.gov/news/western-regions-conference-management-deficiency-report (last visited Aug. 7, 2017).

Agency meetings at or near the participant's normal duty station may present special problems with respect to reimbursement for meals. In many cases, meals or snacks will be unauthorized, even though there is nothing improper about conducting the meeting itself. This area is discussed in detail in section C.5.e above.

Finally, a strict reading of these statutes might suggest that if neither 5 U.S.C. § 4109 nor 5 U.S.C. § 4110 authorizes attendance at a meeting, then 5 U.S.C. § 5946 would apply and would still bar the use of appropriations for expenses of attendance at a meeting or convention of members of a society or association. However, if neither § 4109 nor § 4110 authorizes payment for the expenses of attendance, then it is already clear that the meeting not only is not authorized training but, in addition, has no relationship to agency functions or management. Under the necessary expense rule,

[194] OMB and GSA issue guidance from time to time on the propriety of engaging in, and the process to execute, such meetings. The astute executive branch employee will review currently applicable guidance.

appropriations are not available for expenses that bear no relationship to the purpose of an appropriation. Therefore, if neither 5 U.S.C. § 4109 nor § 4110 authorizes attendance at a meeting, then appropriations are not available to pay for expenses of attendance, regardless of whether the meeting is one of a society or association under 5 U.S.C. § 5946.

e. Attendance at meetings: military personnel

Attendance at meetings by military personnel is governed by 37 U.S.C. § 455:

> "Appropriations of the Department of Defense that are available for travel may not, without the approval of the Secretary concerned or his designee, be used for expenses incident to attendance of a member of an armed force under that department at a meeting of a technical, scientific, professional, or similar organization."[195]

This statute, designed to provide a broad exception for the Defense Department from 5 U.S.C. § 5946, originated as an appropriation act rider in the mid-1940s and was enacted as permanent legislation by section 605 of the Department of Defense Appropriation Act for 1954, Pub. L. 83-179, 67 Stat. 349 (Aug. 1, 1953).

The Government Employees Training Act, enacted in 1958 and discussed above, applies to civilian employees of the military departments, but not to members of the uniformed services. 38 Comp. Gen. 312 (1958). Accordingly, the administrative approval specified in 37 U.S.C. § 455 was no longer required for

[195] This provision was previously designated as 37 U.S.C. § 412.

civilian employees covered by the Government Employees Training Act. However, the requirement of 37 U.S.C. § 455 remains applicable to members of the uniformed services. 38 Comp. Gen. 800 (1959). *See also* 55 Comp. Gen. 1332, 1335 (1976). The recodification of title 37 of the United States Code in 1962 recognized this distinction and reworded the statute to its present form so as to apply only to members of the armed forces.

The administrative approval required by the statute is a prerequisite to the availability of the appropriation, and has the effect of removing the appropriation from the prohibition of 5 U.S.C. § 5946 to the extent of such approval. 34 Comp. Gen. 573, 575 (1955). Oral approval, if satisfactorily established by the record, is sufficient to meet the requirement of the statute. B-140082, Aug. 19, 1959. However, where implementing departmental regulations establish more stringent requirements, such as advance approval in writing, the regulations will control. B-139173, June 2, 1959.

The administrative approval requirement of 37 U.S.C. § 455 does not apply to meetings sponsored by a federal department or agency. 50 Comp. Gen. 527 (1971).

f. Invitational travel

Another statute worth noting is 5 U.S.C. § 5703, which provides:

> "An employee serving intermittently in the Government service as an expert or consultant . . . or serving without pay or at $1 a year, may be allowed travel or transportation expenses, under this subchapter, while away from his home or regular place of business and at the place of employment or service."

This statute originated as an appropriation act rider in 1945 and was enacted as permanent legislation the following year as section 5 of the Administrative Expenses Act of 1946, Pub. L. No. 600, ch. 744, 60 Stat. 806, 808 (Aug. 2, 1946). To the extent it

authorizes payment in the so-called "invitational travel" situation—a private party called upon by the government to confer or advise on government business—it represents a limited exception to 31 U.S.C. § 1345.

Before 31 U.S.C. § 1345 and 5 U.S.C. § 5703 were enacted, GAO had recognized that a private individual "invited" by the government to confer on official business was entitled to reimbursement of travel expenses if specified in the request and justified as a necessary expense. 8 Comp. Gen. 465 (1929); 4 Comp. Gen. 281 (1924); A-41751, Apr. 15, 1932.

The enactment of 31 U.S.C. § 1345 in 1935 did not change this. Thus, the Comptroller General recognized that while the statute might prohibit the payment of expenses of private individuals called together as a group, it would not apply to "individuals called to Washington or elsewhere for consultation as individuals." 15 Comp. Gen. 91, 92 (1935). *See also* A-81080, Oct. 27, 1936. Viewed in this light, the 1946 enactment of 5 U.S.C. § 5703 in large measure merely gave express congressional sanction to a rule that had already developed in the decisions.

GAO did not directly address the relationship between 5 U.S.C. § 5703 and 31 U.S.C. § 1345 until 1976. 55 Comp. Gen. 750 (1976) (discussed below). However, the relevant principles were established in several earlier cases. In one of GAO's earliest decisions under 5 U.S.C. § 5703, the Comptroller General held that persons who are not government officers or employees may, "when requested by a proper officer to travel for the purpose of conferring upon official Government matters," be regarded as persons serving without pay and therefore entitled to travel expenses under 5 U.S.C. § 5703. 27 Comp. Gen. 183, 184 (1947). *See also* 39 Comp. Gen. 55 (1959). Thus, the rule of 8 Comp. Gen. 465 now had a statutory basis. A critical prerequisite is this: in order to qualify under 5 U.S.C. § 5703, the individual must be performing a direct service for the government. 37 Comp. Gen. 349 (1957).

Once the proposition of 27 Comp. Gen. 183 is accepted, it is but a short step to recognizing that a private individual called upon to

advise on government business may be called upon to do so in the form of making a presentation at a meeting or conference. *See*, for example, B-111310, Sept. 4, 1952, and 33 Comp. Gen. 39 (1953), in which payment under 5 U.S.C. § 5703 was authorized. The statute could not reasonably be limited to "one-on-one" consultations:

> "It is not unusual for the Government to invite an individual with a particular expertise to attend a meeting and to share the benefit of his views without compensation other than by way of reimbursement for his travel and transportation expenses."

B-196088, Nov. 1, 1979. Thus, travel expenses of private individuals "invited" to participate in meetings sponsored by the National Center for Productivity and Quality of Working Life were properly paid under 5 U.S.C. § 5703. B-192734, Nov. 24, 1978. Similarly, the Internal Revenue Service could invoke 5 U.S.C. § 5703 to buy lunches for guest speakers invited to participate in a ceremony observing National Black History Month since the ceremony was an authorized part of the agency's formal program to advance equal opportunity objectives. 60 Comp. Gen. 303 (1981).

There is a limit to this rationale and a point at which 5 U.S.C. § 5703 collides with 31 U.S.C. § 1345. This point was discussed in 55 Comp. Gen. 750, *supra,* and reiterated in B-193644, July 2, 1979. In 1976, 55 Comp. Gen. 750 affirmed B-166506, July 15, 1975, and held that 31 U.S.C. § 1345 prohibited the Environmental Protection Agency from paying travel and lodging expenses of state officials at a solid waste management convention; B-193644 reached the same result for safety and training seminars for miners and mine operators. In both cases, the Comptroller General rejected the suggestion that the expenses could somehow be authorized under the "invitational travel" statute. In neither case were the attendees providing a direct service for the government, even though in both cases the government may have derived some

incidental benefit in terms of enhancement of program objectives. The following passage illustrates the "collision point:"

> "We thus do not believe that [5 U.S.C. § 5703] was ever intended to establish the proposition that anyone may be deemed a person serving without compensation merely because he or she is attending a meeting or convention, the subject matter of which is related to the official business of some Federal department or agency. . . . We believe that being called upon to confer with agency staff on official business is different from attending a meeting or convention in which a department or agency is also interested."

55 Comp. Gen. at 752–53. Thus, 5 U.S.C. § 5703 permits an agency to invite a private individual (or individuals) to a meeting or conference at government expense, if that individual is legitimately performing a direct service for the government such as making a presentation or advising in an area of expertise. Invitational travel also encompasses private individuals whose travel is a necessary incident to the service which provides a direct benefit to the government. B-259620, Feb. 29, 1996 (cross-cultural training for spouses of Federal Aviation Administration employees living abroad directly benefits the agency). *See also* 71 Comp. Gen. 9 (1991); 71 Comp. Gen. 6 (1991).

However, 5 U.S.C. § 5703 is not a device for circumventing 31 U.S.C. § 1345. The "direct service" test is not met merely because the agency is interested in the subject matter of the conference or because the conference will enhance the agency's program objectives. *See B*-251921, Apr. 14, 1993 (the Environmental Protection Agency (EPA) cannot pay for participants who are not federal employees to attend a United Nations-sponsored conference on women's contributions to solving

environmental problems because EPA does not benefit directly from their attendance). In a somewhat unique set of circumstances, however, GAO held that the invitational travel statute permits a private individual, appointed by the government, to travel to participate in a state conference at government expense if the information imparted by the conference provides a direct service to the government. *See* B-260896, Oct. 17, 1996 (DOD may pay for nongovernment school board members appointed by DOD pursuant to 20 U.S.C. § 241(h) (authorizing assistance for local education agencies in areas affected by federal agencies, since repealed) to travel to participate in state school board conferences and workshops because the knowledge and information derived from participation provides a direct service for the government).

g. Rental of meeting space in District of Columbia

Originally enacted in 1877 (Act of March 3, 1877, ch. 106, 19 Stat. 363, 370), 40 U.S.C. § 8141 now provides:

> "A contract shall not be made for the rent of a building, or part of a building, to be used for the purposes of the Federal Government in the District of Columbia until Congress enacts an appropriation for the rent. This section is deemed to be notice to all contractors or lessors of the building or a part of a building."

In 1949, the Federal Property and Administrative Services Act granted broad leasing authority to the General Services Administration (GSA). 40 U.S.C. § 585. GAO has found that 40 U.S.C. § 8141 is satisfied where GSA arranges for the rental space or delegates authority to the renting agency. B-159633, May 20, 1974.

The statute does not prohibit the procurement of short-term conference facilities, if otherwise proper. 54 Comp. Gen. 1055 (1975) (construing the procurement of short-term conference

facilities as a service contract rather than a rental contract). However, the statute does prohibit the procurement of lodging accommodations in the District of Columbia in connection with a meeting or conference, without specific statutory authority. 56 Comp. Gen. 572 (1977), *modified and aff'd,* B-159633, Sept. 10, 1974; 49 Comp. Gen. 305 (1969).[196] See Chapter 13, *Real Property*, for additional information and case law.

6. Membership fees: 5 U.S.C. § 5946

Appropriated funds may not be used to pay membership fees of an employee of the United States or the District of Columbia in a society or association. 5 U.S.C. § 5946. The prohibition does not apply if an appropriation is expressly available for that purpose, or if the fee is authorized under the Government Employees Training Act. Under the Training Act, membership fees may be paid if the fee is a necessary cost directly related to the training or a condition precedent to undergoing the training. 5 U.S.C. § 4109(b).[197]

The rule that has evolved under 5 U.S.C. § 5946 is that membership fees for individuals may not be paid, regardless of the resulting benefit to the agency. An agency may, however, purchase a membership in its own name upon an administrative determination that the expenditure would further the authorized

[196] One of the decisions listed here, 49 Comp. Gen. 305, was identified in 54 Comp. Gen. 1055 as overruled. However, the overruling action was later recognized to be erroneous and 49 Comp. Gen. 305 was reinstated in 56 Comp. Gen. 572.

[197] The District of Columbia has specifically exempted its employees from the provisions of 5 U.S.C. § 5946 as well as the Government Employees Training Act, 5 U.S.C. ch. 41. *See* D.C. Official Code, 2016 ed. § 1-632.02.

activities of the agency, and this determination is not affected by any incidental benefits that may accrue to individual employees.[198]

In 24 Comp. Gen. 814 (1945), the Veterans Administration (VA) asked whether it could pay membership fees for VA facilities in the American Hospital Association. Facility membership would enable individual employees to apply for personal membership at reduced rates. The Comptroller General responded that the facility memberships were permissible if administratively determined necessary to accomplish the objectives of the appropriation to be charged. The indirect benefit to individual officials would not operate to invalidate the agency membership. However, the expenditure would be improper if its purpose was merely to enable the officials to obtain the reduced rates for personal memberships. VA could not, of course, pay for the individual memberships.

Similarly, GAO advised the Environmental Protection Agency (EPA) that it could not pay the membership fees for its employees in professional organizations (such as the National Environment Research Center and the National Solid Waste Management Association), notwithstanding the allegation that the benefits of membership would accrue more to the agency than to the individuals. EPA could, however, purchase a membership in its own name if it justified the expenditure as being of direct benefit to the agency and sufficiently related to carrying out the purposes of its appropriation.[199] 53 Comp. Gen. 429 (1973).

In another 1973 decision, the Comptroller General held that the Justice Department could not reimburse an electronics engineer

[198] A few very early decisions will be found to the effect that 5 U.S.C. § 5946 prohibits agency memberships as well as individual memberships. *E.g.*, 19 Comp. Gen. 838 (1940); 24 Comp. Dec. 473 (1918). While these decisions do not appear to have been explicitly overruled or modified, they must be regarded as implicitly repudiated by the subsequent body of case law to the extent they purport to prohibit adequately justified agency memberships.

[199] The last sentence of the decision uses the term “essential.” This word is too strong. The necessary expense doctrine does not require that an expenditure be “essential.”

employed by the Bureau of Narcotics and Dangerous Drugs for membership in the Institute of Electrical and Electronic Engineers. The Justice Department had argued that the government benefited from the membership by virtue of reduced subscription rates to Institute publications and because the membership contributed to employee development. These factors were not sufficient to overcome the prohibition of 5 U.S.C. § 5946. Once again, GAO pointed out that the Bureau could become a member of the Institute in its own name if membership was administratively determined to be necessary. 52 Comp. Gen. 495 (1973). To the same effect is B-205768, Mar. 2, 1982 (Federal Mediation and Conciliation Service can purchase agency membership in Association of Labor Related Agencies upon making appropriate administrative determinations).

In another case, the Comptroller General held that the National Oceanic and Atmospheric Administration could not pay the membership fee of one of its employees in Federally Employed Women, Inc., notwithstanding the employee's designation as the agency's regional representative. The mere fact that membership may be job-related does not overcome the statutory prohibition. B-198720, June 23, 1980. *See also* 19 Comp. Dec. 650 (1913) (Army could not pay for Adjutant General's membership in International Association of Chiefs of Police). Similarly, the fact that membership may result in savings to the government, such as reduced travel rates for members, does not overcome the prohibition against individual memberships. 3 Comp. Gen. 963 (1924).

As noted, an agency may purchase membership in its own name in a society or association, since 5 U.S.C. § 5946 prohibits only memberships for individual employees. The distinction, however, is not a distinction in name only. An expenditure for an agency membership must be justified on a "necessary expense" theory. To do this, the membership must provide benefits to the agency itself. For example, in 31 Comp. Gen. 398 (1952), the Economic Stabilization Agency was permitted to become a member of a credit association because members could purchase credit reports at reduced cost and the procurement of credit reports was determined

to be necessary to the enforcement of the Defense Production Act. In 33 Comp. Gen. 126 (1953), the Office of Technical Services, Commerce Department, was permitted to purchase membership in the American Management Association. The appropriation involved was an appropriation under the Mutual Security Act to conduct programs including technical assistance to Europe, and the membership benefit to the agency was the procurement of Association publications for foreign trainees and foreign productivity centers. *See also* B-305095, Dec. 8, 2005 (the United States Chemical Safety and Hazard Investigation Board appropriation is available to pay the membership fee for the Board to become a corporate associate member of the Risk Management and Decision Processes Center of the Wharton School, University of Pennsylvania, since the Board has determined that such membership will assist the Board in carrying out its duties under 42 U.S.C. § 7412(r)(6)); 70 Comp. Gen. 190 (1991) (prohibition in 5 U.S.C. § 5946 does not prohibit an agency from using appropriated funds to purchase access for its employees to a private fitness center's exercise facilities as part of the agency's health service program as authorized by 5 U.S.C. § 7901); B-241706, June 19, 1991 (Public Health Service may reimburse physicians for annual medical staff dues since hospital privileges are essential to the performance of the agency's business); B-236763, Jan. 10, 1990 (GAO may pay fees for agency membership in certain professional organizations and designate appropriate GAO employees to attend functions for recruitment purposes).

GAO has also approved membership by the Federal Law Enforcement Center in the local Chamber of Commerce, B-213535, July 26, 1984, and by a naval installation in the local Rotary Club, 61 Comp. Gen. 542 (1982). In the latter decision, however, GAO cautioned that the result was based on the specific justification presented, and that the decision should not be taken to mean that "every military installation or regional Government office can use appropriated funds to join the Rotary, Kiwanis, Lions, and similar organizations." *Id.* at 544.

The acquisition of publications significant to executing an agency's statutory responsibilities, and that can be acquired through no other means, may be sufficient to justify purchase of an agency membership. 20 Comp. Gen. 497 (1941) (membership of Naval Academy in American Council on Education); A-30185, Feb. 5, 1930 (membership of Phoenix Indian School in National Education Association). *See also* 33 Comp. Gen. 126 (1953). Compare 52 Comp. Gen. 495 (1973), holding that acquisition of publications is not sufficient to justify an individual, as opposed to agency, membership.

A variation occurred in 19 Comp. Gen. 937 (1940). The Cleveland office of the Securities and Exchange Commission (SEC) desired access to a law library maintained by the Cleveland Law Library Association. Access was available only to persons who were stockholders in the Association. The alternative to the SEC would have been the purchase of its own library at a much greater cost. Under the circumstances, GAO advised that 5 U.S.C. § 5946 did not prohibit the stock purchases or the payment of stockholders assessments. GAO further noted, however, that a preferable alternative would be a contract with the Association for a flat-rate service charge.

Where there is no demonstrable benefit to the agency, the membership expense is improper. Thus, in 32 Comp. Gen. 15 (1952), the cost of membership fees for the New York Ordnance District of the Army in the Society for Advancement of Management was disallowed. The membership was in actuality four separate memberships for four individuals and the primary purpose was to enhance the knowledge of those individuals.

Since the benefit to the agency must be in terms of furthering the purposes for which its appropriation was made, a benefit to the United States as a whole rather than the individual agency may not be sufficient. In 5 Comp. Gen. 645 (1926), the former Veterans Bureau owned herds of livestock and wanted to have them registered. Reduced registration costs could be obtained by joining certain livestock associations. The benefit of registration would be a higher price if the agency sold the livestock. However, sales

proceeds would have to be deposited in the Treasury as miscellaneous receipts and would thus not benefit the agency's appropriations. Membership was therefore improper. (The agency's appropriation language was subsequently changed and the membership was approved in A-38236, Mar. 30, 1932.)

Several of the decisions have pointed out that an agency may accept a gratuitous membership without violating the Antideficiency Act. 31 Comp. Gen. 398, 399 (1952); A-38236, Mar. 30, 1932, *quoted in* 24 Comp. Gen. 814, 815 (1945).

In addition, payment of a membership fee at the beginning of the period of membership does not violate the prohibition on advance payments found in 31 U.S.C. § 3324. For example, in B-221569, June 2, 1986, the Coast Guard could properly use its funds to pay the membership fees in certain unspecified private organizations (not physical fitness facilities) at the beginning of the membership period. The advance payment prohibition was not applicable since the agency got the benefit of what it purchased upon payment. What was being purchased was a "membership," and the membership was received upon payment. *Compare* B-288013, Dec. 11, 2001 (holding that agency payments of membership fees to a private fitness center at the beginning of each option year, under a contract for providing fitness facilities and services for government employees, before it is known how many and when agency employees use the contractor's facilities and services, would violate the advance payment provision in 31 U.S.C. § 3324). There is a fuller discussion of the advance payment provision in Chapter 5.

The evolution of the statutory law on membership fees produced a somewhat anomalous result in some of the early cases. Section 5946 of title 5 of the United States Code originally prohibited—and still prohibits—not only membership fees, but also the expenses of attending meetings. In the early decades of the statute, some agencies received specific authority to pay the expenses of attendance at meetings, but many did not. Thus, as the individual *versus* agency membership distinction developed, some of the decisions were forced to conclude that an agency could purchase a

membership in an association but that nobody could attend the meetings since attending meetings could not be done by "the agency" but only through an individual. *See, e.g.,* 24 Comp. Gen. 814, 815 (1945); A-30185, Feb. 5, 1930. Two provisions of the Government Employees Training Act, 5 U.S.C. §§ 4109 and 4110, now permit attendance at meetings and conferences in certain situations. Thus, as a general proposition, if an organization is closely enough related to an agency's official functions to justify agency membership, it is presumably closely enough related to justify sending a representative to its meetings. See also section D.5 above.

As noted above, the prohibition in 5 U.S.C. § 5946 against individual memberships does not apply if the fee is authorized by the Government Employees Training Act. An illustration is 61 Comp. Gen. 162 (1981), holding that the Defense Department could pay the licensing fees of Methods Time Measurement instructors for the Army Management Engineering Training Agency. The instructors had to be trained and certified—hence the fee—before they could train others. Further, the fee was not a matter of "personal qualification" since the certifications would be restricted to the training of Defense Department personnel and would be of no personal use to the instructors apart from their Defense Department jobs. For more on the issue of personal qualification expenses, see section C.4.g above.

Another example of the inapplicability of 5 U.S.C. § 5946 when the membership fee is authorized under the Government Employees Training Act is B-223447, Oct. 10, 1986, approving certain individual memberships for employees of the U.S. Army Corps of Engineers in the Toastmasters International organization as a source of public speaking training. The organization required membership in order to obtain the training. Because the Government Employees Training Act does not apply to active duty members of the uniformed services (68 Comp. Gen. 127 (1988)), the Act's exception to 5 U.S.C. § 5946, and cases applying the Act or the exception, apply to civilian employees of the military departments but not to uniformed personnel.

7. Sovereign immunity

Under the doctrine of sovereign immunity and the Supremacy Clause of the Constitution (U.S. Const. art. VI, cl. 2), a state or local government may not tax the federal government or its activities. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, the Supreme Court formulated this doctrine to preserve the federal system, which the Court indicated in its famous dictum that "the power to tax involves the power to destroy." 17 U.S. at 431. *See also Clallam County v. United States,* 263 U.S. 341, 343-44 (1923); *Van Brocklin v. Tennessee,* 117 U.S. 151, 180 (1886). In addition, the federal government and its activities are free from state regulation unless Congress enacts a law unambiguously consenting to such regulation.[200] *Hancock v. Train*, 426 U.S. 167, 178–81 (1976); 70 Comp. Gen. 153, 155–56 (1990). Therefore, appropriations are not available to pay taxes or fines to state or local governments or to pay for federal compliance with state or local laws, unless Congress has enacted specific statutory authority otherwise.[201]

Congress may always authorize the payment of a particular tax, fee, fine, or penalty, even if the federal government is constitutionally immune. For example, after GAO concluded that the federal government is constitutionally immune from paying

[200] One example of a law in which the federal government consented to state regulation of federal activity is section 313(a) of the Clean Water Act. It requires federal agencies to comply with all state and local requirements respecting the control and abatement of water pollution, including the payment of reasonable service charges. 33 U.S.C. § 1323(a).

[201] The United States' exemption from property-related taxes has an obvious effect on some state and local jurisdictions. Congress may choose to compensate local taxing authorities for the loss of income attributable to federal holdings of real property within a particular jurisdiction by payments in lieu of taxes. *See* B-149803, May 15, 1972. The most important statute in this area is the Payments in Lieu of Taxes Act (PILT), 31 U.S.C. §§ 6901–6907, which authorizes the Secretary of the Interior to make payments, pursuant to statutory criteria, to units of local governments in which "entitlement land" is located. GAO has issued a number of decisions and opinions construing the PILT statute. See, e.g., 65 Comp. Gen. 849 (1986); 58 Comp. Gen. 19 (1978); B-212145, Oct. 2, 1984; B-214267, Aug. 28, 1984.

particular charges included in its water bill, Congress amended the Clean Water Act to require agencies to pay such charges. B-321686, Mar. 14, 2011, discussed further in section D.7.a below.

From a bureaucratic standpoint, there are various means through which the government may assert its tax-exempt status. In some cases, use of a government credit card or purchase order will identify the purchaser as an agent, agency, or instrumentality of the United States that is exempt from a state or local tax.[202] Other methods, such as use of a state or local tax exempt number or the use of a standard "U.S. Tax Exemption Form," are listed in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 29.305.[203]

A two-step analysis determines whether appropriations are available to pay a particular charge levied against the federal government by a state or local government. First, consider whether the charge is a tax or a fee for a service. Appropriations are available to pay fees, but not taxes. Second, if the payment in question is a tax, consider whether the state or local government imposed the tax on the federal government or one of its instrumentalities. Issues of sovereign immunity arise only when a tax is imposed on the government itself, not upon another entity such as a contractor.

[202] The use of a government travel or purchase card does not necessarily demonstrate that the purchase was for the federal government, however. See, e.g., GAO, *Governmentwide Purchase Cards: Actions Needed to Strengthen Internal Controls to Reduce Fraudulent, Improper, and Abusive Purchases*, GAO-08-333 (Washington, D.C.: Mar. 14, 2008) (reporting government travel card use for improper meals, alcohol, consumer electronics, and other inappropriate transactions).

[203] The government may elect to pay tax from which it is exempt if the amount of the tax is so small as to not justify the administrative burden of asserting the exemption. *See* 52 Comp. Gen. 83 (1972) ("the administration costs of the use of the [tax exemption] certificate are prohibitive when dealing with such small amounts and, therefore, state and local taxes of one dollar or less may be paid in spite of the government's immunity to such taxation"). This is one of the few examples of a *de minimis* exception in appropriations law. *See also* B-206804-O.M., Feb. 7, 1983 (endorsing the use of a tax exempt number rather than tax exempt certificates where the former reduces administrative burden and expense relative to the latter).

a. Is the charge a tax or a fee?

A state or local government may denote its charge as a "tax," a "fee," or something else. The nomenclature the state or local government uses is irrelevant when determining whether a charge is, in fact, a tax or fee. Instead, the agency must examine the substance of the particular charge at issue facts and circumstances to make a determination. Though the federal government is constitutionally immune from paying taxes to state and local governments, the federal government may permissibly pay fees.

Generally, a charge made by a state or a political subdivision of a state for a service rendered or convenience provided is a fee, not a tax. *See Packed Co. v. Keokuk*, 95 U.S. 80, 85-86 (1877) (wharf fee levied only on those using the wharf is not a tax). Fees typically have three traits: (1) they are charged in exchange for a particular governmental service or privilege that benefits the party paying the fee in a manner not shared by other members of society; (2) they are paid voluntarily, in that the party paying the fee has the option of not utilizing the governmental service or applying for the privilege; (3) they are not collected to raise revenues but to compensate the governmental entity for the service provided or to defray the government's costs of regulating. *See National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974); B-320795, Sept. 29, 2010, at 10.

Taxes, on the other hand, are "enforced contribution[s] to provide for the support of government." *United States v. La Franca*, 282 U.S. 568, 572 (1931). A typical tax has three characteristics: it (1) is imposed by a legislature upon many, or all citizens (2) to raise revenue that (3) is spent for the benefit of the entire community. *San Juan Cellular Telephone Co. v. Public Service Comm'n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992).

Distinguishing a tax from a fee requires careful analysis because the line between a tax and fee can be a blurry one. *Collins Holding Corp. v. Jasper County, South Carolina*, 123 F.3d 797, 800 (4th Cir. 1997). To determine the real nature of the assessment at issue, it is critical is to apply the considerations discussed above in light of all

the facts and circumstances of the particular charge at issue. B-320795, at 11. For example, the District of Columbia government collected a "stormwater user fee" from each real property owner in the District. The amount of the fee was based upon the impervious service area of the property. Under District law, fees collected were available primarily to defray the District government's cost to implement programs to reduce the amount of pollutants discharged into area waterways as a result of stormwater runoff. GAO determined that the "stormwater user fee" was a tax, not a fee. The District government imposed the fee upon property owners generally, rather than upon the District government's provision of a service or the granting of a privilege. In addition, the government activities that the charges supported did not provide any particularized benefit to those who paid the charge. Rather, the charge funded activities, such as enhanced street cleaning and tree planting, that benefited the public generally rather than the property owners particularly. As a result, the "stormwater user fee" was a tax rather than a fee. Although the Clean Water Act required federal agencies to pay specified "reasonable service charges," GAO concluded that this tax was not a "service charge" for services rendered. Accordingly, GAO's appropriation was not available to pay the tax. B-320795, Sept. 29, 2010. (Congress has since amended the Clean Water Act to provide the requisite waiver of sovereign immunity to require agencies to pay charges such as this one. 33 U.S.C. § 1323(c).) *See also* B-306666, June 5, 2006 (surface water management fees assessed by a county was a tax).

In contrast, GAO concluded that another water-related charge was a user fee that GAO could pay from its appropriations. The District of Columbia Water and Sewer Authority (D.C. Water) collected an "Impervious Surface Area charge" from its customers. D.C. Water computed the fee based on the amount of impervious surface located on each property. It used the funds to recover costs of necessary capital improvements to D.C. Water's sewer system and treatment facilities. GAO concluded that this charge was a component of the utility rate a customer must pay to obtain water and sewer services. D.C. Water's method for calculating the charge represented a reasonable approximation of each user's fair share of the capital cost and a fair approximation of the cost of sewer

services. Accordingly, the "Impervious Surface Area charge" was a user fee, and GAO's appropriations were available to pay the fee. In contrast, the purpose of the "stormwater user fee" (discussed above) was not to cover the costs of providing a service to customers, or to cover the costs of a regulatory program. B-319556, Sept. 29, 2010; *see also* 42 Comp. Gen. 653 (1963) (where a local government finances major improvements, such as sewers, by means of issuing revenue bonds, and then levies a surcharge on its service charge to liquidate the bonded indebtedness, a federal user of the sewer service who is under a contractual obligation to pay the service charge may also pay the surcharge); *but see* B-180221-O.M., Mar. 19, 1974 (GAO has questioned the payment of bond interest where that interest was attributable to the municipality's share of initial construction costs).

(1) Firefighting services

Many cases concerning whether a particular charge is a tax or a fee concern firefighting services.

Where local law requires a firefighting organization (city or county fire department, fire protection district, *etc.*) to cover a particular territorial area and to respond to fires without direct charge to the property owners, this duty extends to federal as well as nonfederal property within that territorial area. Since the firefighting organization is required to provide services, payment of the fee does not confer a benefit. Accordingly, payment of a charge for firefighting in such a case is not a permissible fee but, rather, is a tax. *See* B-243004, Sept. 5, 1991. It follows that the government may not contract for firefighting services that it would be legally entitled to receive in any event, nor may it reimburse a political subdivision for the additional costs incurred in fighting a fire. *See* 53 Comp. Gen. 410 (1973) and cases cited therein; B-168024, Dec. 13, 1973; B-47142, Apr. 3, 1970; B-160936, Mar. 13, 1967.

Where no legal duty to receive services exists, the federal government may use appropriated funds to reimburse state or local government entities for firefighting services.[204] Thus, reimbursement was allowed in 3 Comp. Gen. 979 (1924) where a fire unit had no legal duty to respond to an emergency call outside its district. *See also* B-123294, May 2, 1955 (holding that a flat-fee service charge levied by a utility district for extinguishing a fire in a postal vehicle was held permissible where the utility district was under no legal obligation to provide the service).

In situations where the federal government has no entitlement to service, an agency may obligate funds under a contractual agreement for fire protection with the nearest fire district. 35 Comp. Gen. 311 (1955). Under the same theory, the Comptroller General held that the Bureau of Indian Affairs could make a financial contribution to the "Community Fire Truck," a volunteer firefighting organization which otherwise would have been under no obligation to respond to fires at an Indian school outside the limits of the city served by the organization. 34 Comp. Gen. 195 (1954). *See also* B-163089, Feb. 8, 1968; B-123294, May 2, 1955. However, there is no authority to pay for fire services rendered without a preexisting legal obligation if such services were necessary to protect adjoining

[204] In some rural areas, firefighting services may be unavailable or very limited. In such areas, the government may have to provide its own fire protection. The Comptroller General had stated, in 32 Comp. Gen. 91 (1952), that an agency could not enter into "mutual aid agreements" to extend that service to the general community beyond the boundaries of government property, even where the local inhabitants were predominantly government employees and where the additional protection could be accomplished without additional expense. Later, Congress enacted legislation specifically authorizing reciprocal agreements for mutual aid. 42 U.S.C. §§ 1856–1856d. This statutory authority is limited to mutual aid agreements and does not authorize an agency to enter into an agreement to reimburse a political subdivision for services unilaterally provided to the government. 35 Comp. Gen. 311, 313 (1955); B-243004, Sept. 5, 1991; B-126228, Jan. 6, 1956; B-40387-O.M., June 24, 1966. An agency participating in a mutual aid agreement under this authority may contribute, on a basis comparable to other participants, to a common fund to be used for training and equipment incident to responding to fires and related emergencies such as hazardous waste accidents. B-222821, Apr. 6, 1987.

state or privately owned property as to which such a legal duty existed. 30 Comp. Gen. 376 (1951).[205]

In the analysis of legal duty to provide protection, it is irrelevant that the government may have engaged in an activity causing the fire. 32 Comp. Gen. 401 (1953); B-167709, Sept. 9, 1969; B-147731, Dec. 28, 1961; B-6400, Aug. 28, 1940.[206] Similarly, there is no estoppel created by the fact that the United States operated its own fire protection at a given installation for a period of time. If the legal duty to provide protection exists, the United States is entitled to claim protection at any time its own service becomes obsolete, undesirable, or uneconomical. B-129013, Sept. 20, 1956; B-126228, Jan. 6, 1956.

An exception to the general rule may exist in the case of a "federal enclave." This term usually describes large tracts of land held under exclusive federal jurisdiction. In 45 Comp. Gen. 1 (1965), the Comptroller General held that, despite locally available protection, a federal enclave could provide its own fire protection on a contract basis. Further, adjacent land under federal control but not part of the federal enclave could be protected under the same contractual arrangement. However, an additional factor in 45 Comp. Gen. 1 was that legitimate doubt existed as to whether the fire district was under a legal obligation under state law to provide services to the federal property involved, and the district had petitioned the state government to redraw its boundaries to exclude the federal

[205] A variation occurred in B-116333-O.M., Oct. 15, 1953, in which it was held permissible to reimburse a private firefighting enterprise for repair and maintenance service to hydrants and fire alarm boxes on a government-owned and -operated housing facility, irrespective of the duty of the municipality.

[206] A claim for expenses (as opposed to damages) incurred by a state in suppressing a fire starting on federal property and allegedly caused by the negligence of a federal employee is not a claim for injury or loss of property under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, and is therefore not cognizable under that Act. *Oregon v. United States*, 308 F.2d 568 (9th Cir. 1962), cert. denied, 372 U.S. 941 (1963); *California v. United States*, 307 F.2d 941 (9th Cir. 1962), *cert. denied*, 372 U.S. 941 (1963); B-163089, Oct. 19, 1970.

property. The effect of this factor is unclear, and since that time, no case has been decided in which a federal enclave was involved. Note that the threatened exclusion of the federal property was based on a legitimate doubt as to whether protection was required by state law. If protection is required, exclusion would be improper. *See* B-129013, Sept. 20, 1956. *Cf*. B-192641, May 2, 1979 (nondecision letter) (questioning a redistricting to exclude federal property which was not a federal enclave).

A 1981 decision addressed the authority of the Bureau of Land Management to contract with rural fire districts in Oregon and Washington for fire protection and firefighting services for federally owned timberlands in those states. The Comptroller General reviewed the principles and precedents established over the years and concluded that, since the fire districts were legally required to protect the federal tracts, the Bureau could not enter into the desired contracts without specific statutory authority. However, Bureau installations with a federally maintained firefighting capacity could enter into mutual aid agreements under 42 U.S.C. § 1856.[207] 60 Comp. Gen. 637 (1981).

As a result of the huge losses suffered by local fire districts after a 1973 fire at a federal records center in St. Louis, Congress enacted section 11 of the Federal Fire Prevention and Control Act of 1974, Pub. L. No. 93-498, 88 Stat. 1535, 1543 (Oct. 29, 1974), *classified at* 15 U.S.C. § 2210. This provision allows a fire service fighting a fire on federal property to file a claim for the direct expenses and direct losses incurred. The claim is filed with the United States Fire Administration, Federal Emergency Management Agency (FEMA). The amount allowable is the amount by which the additional firefighting costs, over and above the claimant's normal operating costs, exceed the total of any payments made by the United States to the claimant or its parent jurisdiction for the support of fire services on the property in question, including taxes and payments in lieu of taxes. FEMA, upon determining the amount allowable,

[207] *See* note 204.

must forward it to the Treasury Department for payment. The Comptroller General has determined that section 11 constitutes a permanent, indefinite appropriation for the payment of these claims. B-160998, Apr. 13, 1978. Disputes under section 11 may be adjudicated in the United States Claims Court. FEMA has issued implementing regulations at 44 C.F.R. pt. 151.[208]

Notwithstanding this authority, the decisions discussed previously in this section remain significant for several reasons. First, they define the extent to which an agency may use its own appropriations apart from section 11. Second, they define the extent to which an agency may contract for fire protection services. Finally, section 11 provides that payment shall be subject to reimbursement by the federal agency under whose jurisdiction the fire occurred, "from any appropriations which may be available or which may be made available for the purpose."

(2) Other decisions and opinions considering whether a charge is a tax or a fee

- *Electronic waste*. The State of California assessed an "electronic waste recycling fee" against the Administrative Office of the United States Courts. The California legislature levied this "electronic waste recycling fee" against purchasers of particular electronic devices, while using the resulting proceeds to fund a program to provide consumers and the general public with cost-free and convenient opportunities to recycle electronic devices. Those who paid the fee were not guaranteed to receive waste recycling services; nor were they entitled to a refund if they did not avail themselves of recycling services in California. Thus, the benefit of the "electronic waste recycling fee" was not narrowly circumscribed to the consumers paying the "fee" but, rather, was conferred on the general public. Accordingly, GAO concluded that the "electronic waste

[208] Section 2465 of title 10 of the United States Code prohibits DOD contracts for firefighting or security guard functions.

recycling fee" was a tax and that appropriations were not available to pay it. B-320998, May 4, 2011.

- *Water and Sewer*. A charge for water and/or sewer services is a permissible service charge rather than a tax if it is based on the quantity of direct services actually furnished. A federal agency may generally pay service charges such as those for municipal sewer service, so long as the charges represent the fair and reasonable value received by the United States for the services. 73 Comp. Gen. 1 (1993) (holding that a sewerage charge may be paid only to the extent that the city makes and documents a nondiscriminatory assessment for the reasonable value of sewer services rendered; 29 Comp. Gen. 120 (1949) (sewer service charge held payable on *quantum meruit* basis); *see also* 70 Comp. Gen. 687 (1991) (holding that the federal government may pay county landfill user fees because the fees were for a service, were based on the levels of service provided, and were nondiscriminatory). Where the state or local government, however, assesses the fee based on a citywide basis or as a flat charge, it is charging the fee in its governmental capacity and therefore essentially taxing the federal government. The federal government may not use its appropriations to pay that type of fee. *See* 31 Comp. Gen. 405 (1952) (assessment for water/sewer services levied on citywide basis rather than quantity of service rendered held a tax); 20 Comp. Gen. 206 (1940) (water charge held to be a tax where it was levied as a flat charge rather than on the basis of actual water consumption); B-226503, Sept. 24, 1987 (holding that an assessment levied against a federal facility for sewer charges unrelated to actual sewer usage could not be paid).[209]

- *Tolls.* A toll is not a tax, but rather, it is a fee for the use of a road, bridge, or tunnel. *Sands v. Manistee River Improvement*

[209] A sewer service charge which is otherwise proper may be paid in advance if required by local law, notwithstanding 31 U.S.C. § 3324. 73 Comp. Gen. 1 (1993). The government's liability would also include late payment penalties to the extent required by local law. 39 Comp. Gen. 285 (1959).

Co., 123 U.S. 288, 294 (1887). Because tolls do not raise questions of federal tax immunity, they are properly payable where necessarily incurred in the performance of official business. 9 Comp. Gen. 41, 42 (1929); 4 Comp. Gen. 366 (1924); 24 Comp. Dec. 45 (1917).[210]

- *Police*. Cases involving police protection indicate that the federal government may not use appropriations to reimburse a state or local government when it has a legal duty to provide the service. The Comptroller General has held that a municipality may not levy direct charges against the United States for ordinary police protective services provided within its area of jurisdiction. 49 Comp. Gen. 284, 286–87 (1969); B-187733, Oct. 27, 1977. The theory is similar to that of the firefighting cases: payment for services that a state or local government must provide by law is not a permissible fee, because the payment will provide no particularized benefit to the federal government. Conversely, the federal government may pay on a *quantum meruit* basis for police services that the state or local government entity has no duty to provide. For example, the federal government may use appropriated funds for extra police for special events such has football games at the United States Coast Guard Academy (49 Comp. Gen. at 287) and special police details at Bicentennial ceremonies (B-187733, Oct. 27, 1977).

  Of course, Congress may make a specific appropriation for the reimbursement of law enforcement expenses. *See*, *e.g.*,

[210] Statutory authority now exists for the reimbursement of tolls incurred by government employees on official travel. 5 U.S.C. § 5704(d); 35 Comp. Gen. 91 (1955). GAO has also held that appropriated funds may be used to purchase annual toll road permits when justified by anticipated usage. 36 Comp. Gen. 829 (1957). (These purchases do not violate the statutory prohibition on advance payments because, GAO reasoned, the government did not make an advance payment but rather purchased a present right to use the thoroughfare in the future. *Id.*) Similarly, if an employee who frequently uses a toll road on official business purchases an annual permit for his or her own automobile, the agency may reimburse the toll charges that would otherwise have been incurred, on a per trip basis, not to exceed the cost of the annual permit. 34 Comp. Gen. 556 (1955).

Commerce, Justice, Science, and Related Agencies Appropriations Act, 2017, Pub. L. No. 115-31, div. B, ___ Stat. ___, ___, ___ (May 5, 2017) (appropriating $20 million for reimbursement of "extraordinary law enforcement and related costs directly associated with protection" of President-elect Trump); Department of Homeland Security Appropriations Act, 2017, Pub. L. No. 115-31, div. F, title V, § 544, ___ Stat. ___, ___, ___ (May 5, 2017) (appropriating $41 million for reimbursement of "extraordinary law enforcement personnel costs" for protection of particular presidential residences).

- *Traffic Signals.* Under certain circumstances, a federal agency may use appropriated funds to pay for installation of a traffic signal. First, the federal facility must be the primary beneficiary and any benefit for the general public must be incidental. Second, the state or local government must have no legal duty to provide the service and the charge may not discriminate against the United States—that is, any other resident would be subject to a similar charge. If those conditions are met, then a federal agency may use appropriated funds to pay for the installation of a traffic signal. *See, e.g.*, 61 Comp. Gen. 501 (1982); 55 Comp. Gen. 1437 (1976).

- *Parking.* Generally, parking meter charges established by local ordinance are primarily for the purpose of regulating traffic, rather than for the purpose of raising revenue. Therefore, such fees generally are fees, not taxes. Therefore, a federal agency may use appropriated funds to pay parking fees for a government vehicle because these are service charges unless a court has held that the fee is a tax or a revenue raising measure (as opposed to a traffic regulation device).[211] 46 Comp. Gen. 624 (1967). However, a tax on parking in a

[211] The government may also reimburse employees for parking meter charges they pay to park their private vehicles while on official business, albeit for a different reason, which is that the charge (regardless of whether it is a tax or fee) is imposed upon the employee, not the government. This is discussed later in this section.

parking lot or garage is a tax from which the federal government is immune. 51 Comp. Gen. 367 (1971).

- *Special Assessments*. These charges are generally considered to be taxes as opposed to fees because an assessment for local improvements is an involuntary exaction in the nature of a tax. *Hagar v. Reclamation District No. 108*, 111 U.S. 701, 707 (1884); *City of Cincinnati v. United States*, 39 Fed. Cl. 271, 275 (1997), *aff'd*, 153 F.3d 1375 (Fed. Cir. 1998). These charges are typically made to raise general revenue for paving or repairing streets or sidewalks, installing sewers, and similar local governmental services. Consequently, the decisions hold that the federal government is immune from paying special assessments. *E.g., United States v. City of Huntington,* 999 F.2d 71 (4th Cir. 1993), *cert. denied,* 510 U.S. 1109 (1994); *National Railroad Passenger Corp. v. Pennsylvania Public Utility Commission,* 665 F. Supp. 402 (E.D. Pa. 1987), *aff'd,* 848 F.2d 436 (3rd Cir.), *cert. denied,* 488 U.S. 893 (1988);[212] *United States v. Harford County,* 572 F. Supp. 239 (D. Md. 1983); 27 Comp. Gen. 20 (1947); 18 Comp. Gen. 562 (1938); B-243004, Sept. 5, 1991; B-226503, Sept. 24, 1987; B-184146, Aug. 20, 1975; B-160936, Mar. 13, 1967; B-155274, Oct. 7, 1964.

- *Private Assessments*. These assessments are private fees and the federal government's liability is determined by application of traditional concepts of contract and property law, subject to any applicable federal statutory provisions. *See, e.g.*, B-210361, Aug. 30, 1983 (holding that the Forest Service was liable for assessments levied by a private homeowners' association on a parcel the Forest Service had acquired by donation).

- *Taxes on personal property.* State and local governments may not impose taxes upon the federal government's personal

[212] Amtrak's status as an instrumentality of the United States for this purpose was irrelevant because Amtrak's enabling legislation specifically provides for tax immunity. *E.g., Pennsylvania Public Utility Commission*, 665 F. Supp. at 411; 49 U.S.C. § 24301.

property. *E.g.,* 27 Comp. Gen. 273 (1947) (no legal basis to pay state registration fee on government-owned outboard motors). Several earlier decisions applied the federal government's immunity against state motor vehicle license plate and title registration fees. 21 Comp. Gen. 769 (1942); 4 Comp. Gen. 412 (1924); 1 Comp. Gen. 150 (1921); 15 Comp. Dec. 231 (1908). (Most federal government-owned vehicles today would have federal government plates.)

b. Is the tax imposed upon the United States?

As the Supreme Court has held, the key question in determining whether the federal government may pay a sales or other tax imposed on its purchase of goods or services within a state depends upon where the legal incidence of the tax falls. *Alabama v. King & Boozer*, 314 U.S. 1 (1941). In that case, a construction contractor building a federal project objected to the state's imposition of sales tax on its purchase of building materials used in construction. It argued that such purchases should be exempt from state taxation, as the costs would ultimately be borne by the federal government and thereby violate federal immunity from state taxation. The Supreme Court disagreed, drawing a distinction between the economic burden imposed on the United States when it must pay more for goods and services because of sales taxes levied against the seller of goods, and the constitutionally impermissible burden occurring when the government, as a purchaser of goods, is directly liable to the state for taxes imposed on a transaction. In other words, if the "legal incidence" of a tax falls on the vendor-seller and the seller alone is obligated to pay, the government may reimburse the seller for the total cost, including

any tax.[213] But if the vendee-buyer is in any way legally responsible for the payment of the tax, the federal government as a buyer cannot be required to pay. *Id.* at 12–14. *See James v. Dravo Contracting Co.,* 302 U.S. 134 (1937) (state gross receipts tax imposed on a government contractor).[214]

The rule that the government is constitutionally immune from a "vendee tax" but may pay a valid "vendor tax"—even if the government ultimately bears its economic burden—has been recognized and applied in numerous Comptroller General decisions. *E.g.,* B-320998, May 4, 2011; B-302230, Dec. 30, 2003; B-288161, Apr. 8, 2002; 46 Comp. Gen. 363 (1966); 24 Comp. Gen. 150 (1944); 23 Comp. Gen. 957 (1944); 21 Comp. Gen. 1119 (1942); 21 Comp. Gen. 733 (1942). The same rule applies to state tax levies on rental fees. *See* 49 Comp. Gen. 204 (1969); B-168593, Jan. 13, 1971; B-170899, Nov. 16, 1970.

Determining whether the legal incidence of a particular tax is on the vendor or the vendee is a question of federal law, *e.g., United States v. Nevada Tax Commission,* 439 F.2d 435, 439 (9th Cir. 1971), and GAO will follow federal judicial precedent where available. If there are no federal judicial decisions on point, GAO will follow the determination of the state's highest court. 21 Comp. Gen. 843 (1942); B-211093, May 10, 1983.

[213] Of course, "no matter on whom the tax nominally falls, the market price (including the tax) and the quantity sold will be the same. Accordingly, the economic incidence will be shared in the same way: if the tax is nominally on the buyer, part of it will be passed back to the seller in the form of reduced quantity demanded." *United States v. Delaware*, 958 F.2d 555, 561 n.11 (3rd Cir. 1992). That the imposition of a particular fee may ultimately burden the Unites States financially is an insufficient ground to invalidate a tax. *United States Postal Service v. Town of Greenwich*, 901 F. Supp. 500, 507 (D. Conn. 1995).

[214] In the context of sales taxes, the hallmark of a vendor tax is that the law establishing the tax requires the seller to pay it notwithstanding any inability or unwillingness on the part of the seller to collect it from the purchaser. *E.g.*, B-239608, Dec. 14, 1990 (nondecision letter); B-225123, May 1, 1987 (nondecision letter).

(1) State gasoline taxes

Nowhere is the vendor/vendee concept more clearly illustrated than in the many cases considered by GAO on the payment of state gasoline taxes. In 57 Comp. Gen. 59 (1977), the Comptroller General held that the Vermont tax on gasoline distributors, which was required by law to be passed along to dealers and in turn to consumers, was a legal obligation on consumers to pay the tax. Since this tax collection mechanism constituted a vendee tax, the federal government was constitutionally immune from its payment as a purchaser. In 1979, Vermont amended its tax law to delete the requirement for pass-through to dealers and consumers. With this amendment, the tax became a vendor tax and the federal government's immunity no longer applied. 63 Comp. Gen. 49 (1983). It remains immaterial that, as a practical matter, the tax will be reflected in the retail price of the fuel. While the economic incidence still fell on the federal government as purchaser, the legal incidence no longer did.

Another example of a vendee tax for which the United States was immune was the California state gasoline tax, which the dealer was required to collect from a consumer "insofar as it can be done." 55 Comp. Gen. 1358 (1976). GAO's finding that this was a vendee tax drew support from *Diamond National Corp. v. State Board of Equalization,* 425 U.S. 268 (1976), where the Court concluded that an identically worded sales tax requirement was imposed on the vendee. [215]

In 55 Comp. Gen. 1358, GAO also considered gasoline taxes in Pennsylvania, Hawaii, and New Mexico. Pennsylvania's tax was an excise tax on dealer-users (meaning retail service station

[215] In the 1960s, California law provided for a refund of the tax paid on gasoline for vehicles operated entirely off state highways. The state courts had found that the term "highway" did not encompass roads running in and through national parks. Therefore, relying on the state's interpretation of its own statute, GAO concluded that no tax was payable on gasoline used in vehicles driven only on the grounds of a national monument. 42 Comp. Gen. 593 (1963).

operators). The statute did not provide any mechanism for the dealer-user to seek reimbursement from the consumer and therefore it was assumed that the tax levied against the dealer-user would become a part of that retailer's operating expenses. Accordingly, the federal government could pay, as a part of the purchase price, the amount of tax on the retailer who was statutorily required to assume that tax as a cost of doing business. In Hawaii the tax was in the form of a license fee paid by retail distributors of gasoline. This license fee was imposed directly on the distributors with no direct recourse against the consumers of gasoline, although the amount of the license fee was undoubtedly considered in setting the basic cost of fuel sold by those retailers. For this reason the federal government was authorized to pay the full retail price including any amount attributable to the tax.[216] The New Mexico gasoline tax, however, was a tax on the users of state highways, collected by the retail dealer of gasoline. The tax was added at the pump to the per-gallon cost of gasoline. Since the incidence of this tax was on the vendee, when the United States purchased fuel in New Mexico, it was exempt from the tax.

(2) Taxes upon government contractors

(a) Federal government contractors are subject to state and local taxation

The imposition of state taxes—sales, use, gross receipts, *etc.*—on federal government contractors has produced more than its share of litigation. A threshold question is whether the state may tax a contractor at all when the contractor is performing work for the federal government. The Supreme Court has concluded that, for the most part, states may indeed levy taxes upon government contractors: "[T]ax immunity is appropriate in only one

[216] In 28 Comp. Gen. 706 (1949), a Washington State tax on gasoline distributors was similarly found to be a vendor tax and the United States was therefore required to pay the amount added to the purchase price of gasoline to represent the tax. See also B-154266, June 25, 1964, considering the same tax as applied to government rented commercial vehicles.

circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *United States v. New Mexico,* 455 U.S. 720, 735 (1982).

Government contractors will generally be unable to meet this test except in very limited circumstances. Thus, a contractor can claim constitutional immunity from tax where there is an agency relationship between the United States and a contractor such that the contractor is acting solely as the government's purchasing agent and title to goods purchased never vests in the contractor. *Kern-Limerick v. Scurlock,* 347 U.S. 110, 120–23 (1954); *United States v. Lohman,* 74 F.3d 863, 867 (8th Cir.), *cert. denied,* 518 U.S. 1018 (1996); B-177215, Nov. 30, 1972. *See also United States v. Kabeiseman,* 970 F.2d 739 (10th Cir. 1992) (United States and not contractor was the real purchaser of diesel fuel, so state tax levied on the diesel fuel purchasers could not be enforced against the United States). However, the "contractor as agent" has limited application. For example, in *United States v. New Mexico,* 455 U.S. 720, 742 (1982), the Court sustained use and gross receipts taxes imposed on government contractors which, in that case, operated under an "advance funding" system whereby the contractors met their obligations by using Treasury funds which had been placed in a special bank account. *Id.* at 725–26.[217]

In imposing taxes on government contractors, a state may not discriminate against the federal government (*South Carolina v. Baker,* 485 U.S. 505, 523 (1988); *see, e.g.,* B-156561, June 22, 1965), or substantially interfere with its activities. *New Mexico,* 455 U.S. at 735 n.11; *Phillips Chemical Co. v. Dumas Independent*

[217] Some additional Supreme Court cases sustaining the imposition of state taxes on government contractors in various contexts include *Washington v. United States*, 460 U.S. 536 (1983); *United States v. Boyd*, 378 U.S. 39 (1964); *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *James v. Dravo Contracting Co*., 302 U.S. 134 (1937). *Dravo* is regarded as starting the current trend. *New Mexico*, 455 U.S. at 731–32.

School District, 361 U.S. 376, 387 (1960); *City of Detroit v. Murray Corp.,* 355 U.S. 489, 495 (1958); *United States v. City of Manassas,* 830 F.2d 530, 533 (4th Cir. 1987), *aff'd mem.,* 485 U.S. 1017 (1988). This does not prevent states from taxing private parties who use federal property, even when the private parties are providing goods to the United States. *United States v. Nye County,* 178 F.3d 1080, 1084 (9th Cir. 1999).

(b) Federal government may reimburse its contractors for taxes they pay

The United States can be required to pay a state tax obligation imposed on its contractor when the federal government assumes responsibility for the tax by contract. *United States v. Department of Revenue of State of Illinois,* 202 F. Supp. 757, 760 (N.D. Ill.), *aff'd per curiam,* 371 U.S. 21 (1962). The typical language in government contracts for the purchase of goods or services recites that the offered price includes all applicable state and local taxes. (See the Federal Acquisition Regulation (FAR) provisions on state and local taxes at 48 C.F.R. subpt. 29.3, and its prescribed contract clauses at 48 C.F.R. § 52.229.) Shifting the burden of determining which taxes apply to the contractor is premised on the belief that contractors are in a better position to know what taxes are applicable. B-251628, Apr. 2, 1993; B-242303, Mar. 21, 1991; B-209430, Jan. 25, 1983. Unless otherwise specified in the contract, the government cannot be required to pay any additional amount for taxes (B-162667, Dec. 19, 1967; B-134347, Mar. 1, 1966), even when the taxes were first imposed during contract performance. B-160129, Dec. 7, 1966. In such circumstances it is irrelevant that the tax involved is a valid vendor tax from which the United States is not immune; there can be no liability unless the contract so provides. 45 Comp. Gen. 192 (1965); 23 Comp. Gen. 957 (1944). Note however, that a contract can include a contingency clause for after-imposed state and local taxes. The failure to include such a clause is regarded as the contractor's business decision so that the government will not be liable for any additional taxes. *Cannon Structures, Inc.,* ICBA No. 3968-98, 99-1 B.C.A. ¶ 30,236 (1999); *Midcon of New Mexico, Inc.,* ASBCA No. 37249, 90-1 B.C.A. ¶ 22,621 (1990).

Other contract language, of course, may dictate different results. A contract that provides for the payment of "the actual direct costs" includes reimbursement of state taxes paid by a contractor. 72 Comp. Gen. 107 (1993). Similarly, a contract for the "actual costs" justifies reimbursement to a contractor of back taxes and interest assessed against him when a court found that the contractor was not exempt from taxation. B-147316-O.M., Jan. 9, 1962. The same result would apply in the case of a contract for a cost plus fixed fee, such as the contract in *Alabama v. King & Boozer, supra*. 35 Comp. Gen. 378 (1955). Likewise, a contract to pay 50 percent of any new tax imposed by a state would include the obligation to pay half of the business privilege tax assessed against a corporate contractor. B-152325, Dec. 12, 1963.

A contractor may be entitled to equitable relief in certain limited circumstances where both the contractor and the government are mistaken as to the applicability of a state tax to a particular contract and where the contractor reasonably relies on an innocent representation of a government agent that no tax applies. In such cases, the contract may be reformed and the price increased to include the applicable state tax. Cases reaching this result in various fact situations include 64 Comp. Gen. 718 (1985); B-186949, Oct. 20, 1976; B-180071, Feb. 25, 1974; B-169959, Aug. 3, 1970; B-159064, May 11, 1966; and B-153472, Dec. 2, 1965. The underlying legal principle is to avoid unjust enrichment so that a party making a misrepresentation, however innocently, should not benefit at the expense of a party who reasonably relies on that misrepresentation. Mutual mistake is an essential element of recovery in these cases. If the contractor cannot establish mutual mistake, the contract is payable as written and the contractor must absorb the additional expense. *E.g., Hugh S. Ferguson Co.,* PSBCA No. 2178, 89-1 B.C.A. ¶ 21,294 (1988) (*distinguishing* 64 Comp. Gen. 718); *see Foley Co. v. United States,* 36 Fed. Cl. 788, 792 (1996) (agency employee's misrepresentation about tax-exempt status is not a mutual mistake of fact requiring contract reformation); *see also Cannon Structures, Inc., supra* at 99-1 B.C.A. ¶ 30,236 (FAR prohibits post-contractual relief for after-imposed state taxes).

If a contractor entitled under the contract to be reimbursed for state taxes pays a state tax which is later judicially determined to be invalid, the contractor is nevertheless entitled to reimbursement (43 Comp. Gen. 721 (1964)), unless the contractor paid the tax without being required to do so (38 Comp. Gen. 624 (1959)).

(3) Public utilities

State sales taxes that qualify as vendor taxes and that have been factored into the utility rates through the applicable rate-setting process are payable by the government. B-300538, Mar. 24, 2003; 45 Comp. Gen. 192 (1965); B-134602, Dec. 26, 1957; B-123206, June 30, 1955. The same result applies with respect to a vendor sales tax on the utility billed separately to the agency. B-211093, May 10, 1983.

Business privilege or gross receipts taxes are frequently imposed on public utilities by law. The utility companies are permitted to treat these taxes as operating expenses and to incorporate them into their basic billing rates, thereby creating a constitutionally permissible vendor tax. B-300538, Mar. 24, 2003; B-144504, June 9, 1967; B-148667, May 15, 1962. This is true even where a state utility regulatory authority requires the pass-through, if the tax itself is a vendor tax. *See* 61 Comp. Gen. 257 (1982) (Veterans Administration medical centers were liable for that portion of their electric bills which were attributable to a rate increase reflecting the state's public utility license tax).[218]

Where the business privilege tax is a valid vendor tax, it can be paid even if it is attributed as a tax and stated on the utility bill as a separate item. B-300538, Mar. 24, 2003; B-260063, June 30, 1995; 32 Comp. Gen. 577 (1953); B-171756, Feb. 22, 1971; B-144504,

[218] The Department of Justice considered the same situation with the same result. 6 Op. Off. Legal Counsel 273 (1982).

June 30, 1970; B-225123, May 1, 1987 (nondecision letter).[219] The theory is that the "tax," even though separately stated, is, in effect, an authorized rate increase designed to recover the revenue necessary to permit the utility to maintain the allowed rate of return on its investment. *See* B-167999, Dec. 31, 1969. *See also* B-288161, Apr. 8, 2002 (vendees do not bear the legal incidence of a utility tax even when a utility increases its rates to pass the tax on to the vendee). However, payment may not be approved where the tax is collected only from the federal government or where the collection of the tax would have a discriminatory effect on federal activities. B-159685, Apr. 7, 1967.

Another charge occasionally encountered is a "lifeline" surcharge. This is a surcharge designed to subsidize the providing of reduced cost utility service to low-income or elderly customers. GAO regards a lifeline surcharge not as a tax, but merely part of the authorized rate properly payable by federal users. 67 Comp. Gen. 220 (1988); B-189149, Sept. 7, 1977.

(4) Other decisions and opinions concerning incidence of taxes

- *9-1-1 charges*. In a series of cases, GAO examined charges for 9-1-1 emergency services in several states and concluded that they amounted to a tax that could not be imposed upon the United States or its agencies. 66 Comp. Gen. 385 (1987) (Florida); 65 Comp. Gen. 879 (1986) (Maryland); 64 Comp. Gen. 655 (1985) (Texas); B-300737, June 27, 2003 (Alabama); B-230691, May 12, 1988 (Tennessee); B-239608, Dec. 14, 1990 (Rhode Island). In these cases, the 9-1-1 charge was imposed directly upon the telephone customer, not upon the telephone company, making the charge a vendee tax that the federal government could not pay. In contrast, Arizona levied a

[219] Another type of "tax" appearing on utility bills is a charge for 9-1-1 emergency service. See B-300737, June 27, 2003; B-253695, July 28, 1993; and the discussion in section D. 7. b. (4).

tax for the purpose of financing 9-1-1 services. Several factors showed that the tax was imposed upon telephone companies rather than their customers: for example, the amount of the tax was based upon the telephone company's gross receipts, and the tax statute was classified in the Arizona tax code with other excise taxes upon vendors. Therefore, as the incidence of the Arizona tax was upon the vendor, the federal government could pay the 9-1-1 service charges that appeared on its telephone bills. B-238410, Sept. 7, 1990.

- *Land Taxes.* Although federal land is exempt from state property taxes, the federal government's immunity does not extend to taxes imposed upon contractors. Thus, the Supreme Court has sustained a state property tax on federally owned land leased to a private party for the conduct of for-profit activities (*United States v. City of Detroit,* 355 U.S. 466, 469 (1958)), and on the "possessory interest" of Forest Service employees living in government-owned housing (*United States v. County of Fresno,* 429 U.S. 452 (1977)).[220] Similarly, the Court of Federal Claims in *Wright Runstad Properties Ltd. Partnership v. United States,* 40 Fed. Cl. 820, 824 (1998), ruled that a landlord to the federal government had to pay a special assessment levied against the property, observing that the government's tax immunity was not implicated because the government was not being taxed.

- *State Motor Vehicle Fees.* Although most federal government-owned vehicles have federal government plates, earlier cases

[220] A tax lien that attaches to property before title passes to the government is not a tax on government property. The lien is a valid encumbrance against the property, although it is unenforceable as long as the government holds the property. *United States v. Alabama*, 313 U.S. 274 (1941). *See United States v. Lewis County*, 175 F.3d 671, 678 (9th Cir.), *cert. denied*, 528 U.S. 1018 (1999) (foreclosure against federally owned property impossible without consent of the United States). In a series of early decisions, however, GAO advised that the acquiring agency could use its appropriations to extinguish the lien if administratively determined to be in the best interests of the government, for example, to clear title prior to disposition of the property. B-40548, Jan. 26, 1945; B-41677, May 8, 1944; B-28443, Dec. 9, 1943; B-21817, Feb. 12, 1942.

indicated that the federal government's immunity applied to state motor vehicle license plate and title registration fees. 21 Comp. Gen. 769 (1942); 4 Comp. Gen. 412 (1924); 1 Comp. Gen. 150 (1921); 15 Comp. Dec. 231 (1908).

- *Travel-Related Taxes.* When the federal government rents rooms by entering into a direct contractual relationship with a hotel or motel, then the government is entitled to assert its immunity from local taxes. 55 Comp. Gen. 1278 (1976). The Department of Justice reached the same result in 5 Op. Off. Legal Counsel 348 (1981), opining that the Office of the Vice President was not required to pay local hotel taxes when reserving a block of rooms for an official trip.[221] Similar results would occur where a tax was imposed on commercial rental of a vehicle or any other travel-related activity such as meals or other transportation. *See, e.g.*, B-167150, Apr. 3, 1972.

- *Federal Credit Unions.* The government's constitutional immunity from state taxation extends to federal credit unions because they are instrumentalities of the federal government. *United States v. Michigan*, 851 F.2d 803 (6th Cir. 1988).

- *Grant Funds.* A grantee may use a portion of federal grant money to pay for nondiscriminatory state sales taxes on purchases made with federal grant funds. 37 Comp. Gen. 85 (1957). Sovereign immunity does not apply to grant funds in the hands of the grantee because the funds are no longer in the possession of the federal government and subject to the same restrictions. *Id.* at 86–87; *see also* 46 Comp. Gen. 363 (1966) (concluding that materials purchased by local farmers under a Department of Agriculture cost-sharing program were subject to state and local taxes because the materials purchased would not become the property of the United States).

[221] The Department of Justice notes that even where an individual employee is procuring the accommodation, the government could, if it wanted to change existing practice, compel recognition of federal immunity. 5 Op. Off. Legal Counsel at 349 n.2.

- *Taxes incurred by government employees and agents.* When a federal employee rents a room directly from a proprietor, even when on official business, the federal employee becomes personally liable for the amount of the rental, including associated taxes.[222] Because the United States is not a party to the transaction, the tax is not levied on the federal government. Accordingly, the employee must pay the tax and cannot assert the government's immunity from local taxes.[223] That the government may reimburse the employee for the full rental price including the tax does not transform the tax into a tax on the federal government. 55 Comp. Gen. 1278 (1976).[224] *See also* B-130520, Nov. 30, 1970 (government could reimburse an employee for the amount of a tax paid, where the incidence of the tax fell upon the employee); 36 Comp. Gen. 681 (1957) (state gasoline tax); B-203151, Sept. 8, 1981 (local sales tax on rental vehicle); B-160040, July 13, 1976 (certain intangible property taxes reimbursable as relocation expenses incident to transfer).

- *Parking*. Sovereign immunity does not extend to a government employee operating his personally-owned vehicle on official business because the state or local government is taxing the employee, not the federal government. 51 Comp. Gen. 367, 369 (1971). The federal employee, however, may seek reimbursement under 5 U.S.C. § 5704. *Id.* Because the incidence of the charge does not fall upon the federal government, appropriations are available to reimburse the

[222] Federal employees are required to use credit cards issued by government contractors for their temporary duty travel, 41 C.F.R. § 301-51.1, and are personally responsible for paying the credit card bill according to the cardholder agreement. *See id.* § 301-52.24.

[223] 41 C.F.R. § 301-11.28.

[224] Note that 41 C.F.R. § 301-11.27 expressly permits reimbursement of lodging taxes to federal employees as a miscellaneous travel expense. It should also be noted that the federal employees should use tax exemption certificates to claim the exemption when local law exempts federal employees from the tax.

charge regardless of whether it is a tax or fee.[225] In contrast to privately-owned vehicles, the incidence of a parking tax on a government-owned vehicle falls upon the federal government, not the employee who pays the charge. 51 Comp. Gen. 367 (1971). Therefore, appropriations generally are not available to pay for parking taxes on government-owned vehicles.[226]

To sum up the rules on parking taxes and fees:

1. *Privately owned vehicles on official business.* Employee may be reimbursed for meter fees either on a street or in a municipal lot, and for taxes on parking in a lot or garage.
2. *Government-owned vehicle, metered parking:* Employee may be reimbursed for meter fees on a public street unless one of the exceptions in 46 Comp. Gen. 624 applies, and for meter fees in a municipal lot.
3. *Government-owned vehicle, unmetered parking:* Employee may be reimbursed for local taxes on parking in a lot or garage if the amount is too small for the issuance of a tax exemption certificate, at least where the taxing entity requires the certificate as evidence of tax-exempt status.

- *Beneficial Use Tax*. A tax on a federal contractor who had the beneficial use of a federal government-owned experimental fusion device was held lawful and payable by the contractor, even when the device was deemed a "fixture" annexed to the federal property by gravity. *United States v. County of San Diego*, 965 F.2d 691 (9th Cir. 1992); *United States v. County of*

[225] Appropriations are available to pay parking meter charges whose incidence does fall upon the federal government (that is, for conspicuously marked government vehicles) as long as the charge is a fee rather than a tax. This is discussed earlier in this section.

[226] As we discussed earlier in note 203, the government may elect to pay tax from which it is exempt if the amount of the tax is so small as to not justify the administrative burden of asserting the exemption.

San Diego, 53 F.3d 965, 968 (9th Cir.), *cert. denied*, 516 U.S. 867 (1995).

- *Death Taxes*. State or local government estate and inheritance taxes may be assessed against property bequeathed to the federal government because the taxes are imposed before the federal government possesses the property. *United States v. Burnison*, 339 U.S. 87, 93 (1950).

- *Village Corporations*. A municipal sales tax imposed on a "village corporation" established under the Alaska Native Claims Settlement Act and funded in part by federal funds is not a tax on the United States since the village corporation is not a federal agency and the funds, once distributed to the corporation, are essentially private funds. B-205150, Jan. 27, 1982.

c. Federal immunuity from state and local fines and penalties

The federal government is immune from state or local fines and penalties for the federal government's failure to comply with laws or ordinances.[227] *Missouri Pacific Railroad Co. v. Ault*, 256 U.S. 554, 563–64 (1921). Indeed, for a federal agency to be liable for a fine or penalty, there must be a waiver of sovereign immunity. *See, e.g.*, *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992).

For example, the Clean Air Act provides for the administrative imposition of civil penalties for violation of state or local air quality standards. The statute directs the federal government to comply with these standards and makes government agencies liable for the civil penalties to the same extent as nongovernmental entities. In view of this express waiver of sovereign immunity, the Comptroller General held that agency operating appropriations are available,

[227] Such immunity does not extend to federal employees, even where they are carrying out official duties, as discussed in section C. 6. i..

under the "necessary expense" theory, to pay administratively imposed civil penalties under the Clean Air Act. B-191747, June 6, 1978. If the penalty is imposed by court action, it may be paid from the permanent judgment appropriation, 31 U.S.C. § 1304. However, if there is no legitimate dispute over the basis for liability or the amount of the penalty, an agency may not avoid use of its own appropriations by the simple device of refusing to pay and forcing the state or local authority to sue. 58 Comp. Gen. 667 (1979).

Absent the requisite statutory waiver of sovereign immunity, the agency's appropriations would be unavailable to pay a fine or penalty. For example, in 65 Comp. Gen. 61 (1985), appropriated funds were unavailable to pay a "fee," which was clearly in the nature of a penalty, imposed by a City of Boston ordinance for equipment malfunctions resulting in the transmission of false fire alarms. *See also* B-227388, Sept. 3, 1987 (no authority to pay false alarm fines imposed by municipality).

d. Impermissible infringement upon federal activity

Along with protection from state or local government taxation, the constitutional doctrine of sovereign immunity also provides that a state or local government may not infringe on the right of the federal government to conduct its official activities free from state control or regulation. *See Mayo v. United States*, 319 U.S. 441, 447 (1943) (holding that imposition of state "inspection fees" on federal property interfered with federal functions in violation of the Supremacy Clause, U.S. Const. art. VI, cl. 2); 41 Comp. Gen. 668 (1962). In 41 Comp. Gen. 668, the General Services Administration requested a decision as to whether it could pay a voucher in the amount of $146.09 for sales tax that it collected from purchasers of federal surplus property. 41 Comp. Gen. at 668. A Texas statute required sellers to obtain a permit to conduct business as a seller within the state, collect sales taxes from purchasers, and then to remit the money quarterly to Texas. *Id.* The Comptroller General, however, determined that the General Services Administration did not need to comply with the Texas statute because it constituted an impermissible infringement upon the authority of the federal

government to conduct its business free from state interference. *Id.* at 670.

States also have infringed upon the federal government's operations with regard to state withholding taxes. 28 Comp. Gen 372 (1948). In 28 Comp. Gen. 372, the Attorney General sought the Comptroller General's advice as to whether it should comply with an Oregon statute mandating that employers deduct and retain a one percent state income tax and remit any collected amount on a quarterly basis to the state. 28 Comp. Gen. 372–73. The Comptroller General, however, concluded that the effect of the Oregon statute imposed a direct burden on the federal government's operations and therefore payment of the employees' salaries should be made without deducting the one percent tax. *Id.* at 373. Since that decision, statutes now exist that permit federal withholding of state or local income taxes. For the District of Columbia and any other state, city, or county that provides for the collection of income tax by withholding, the Secretary of the Treasury must enter into an agreement with the applicable jurisdiction to withhold the tax from federal employees. 5 U.S.C. §§ 5516, 5517, 5520.

Inspection fees are also considered to constitute an infringement on government operations. *See Mayo*, 319 U.S. at 447. In *Mayo*, Florida required each distributor of fertilizer to affix a stamp on each bag to evidence payment of an inspection fee. *Id.* at 442. The federal government, however, purchased fertilizer outside of Florida and distributed the bags to consumers within Florida as part of a national soil conservation program without paying Florida an inspection fee. *Id.* Florida objected to the sale of these bags within its borders. *Id.* at 443. The Court held that Florida could not impose the inspection fee on the federal government because "the federal function must be left free" and that "freedom is inherent in sovereignty." *Id.* at 447. Thus, the Court determined that the inspection fee, although not a traditional sales or wage tax, constituted an impermissible burden on federal government operations. *Id.* at 447–48.

e. Recovery of taxes improperly paid

Improperly paid taxes may be recovered by setoff against other moneys payable to a state. B-150228, Aug. 5, 1973; *see United States v. Munsey Trust Co.,* 332 U.S. 234, 239–40 (1947) (United States as a creditor is entitled to set off amounts it is owed from amounts otherwise payable). Setoff may be asserted against any money payable to any other agency of the state, whether or not related to the source of the erroneous payments. B-154778, Aug. 6, 1964; B-154113, June 24, 1964; B-150228, Aug. 5, 1963.

The federal government also may utilize any available state refund statutes. When the federal government seeks a refund of a state tax where the legal incidence rested with the federal government, the federal government is not bound by restrictions in state law, such as a statute of limitations, because its right to a refund is based on the federal constitution. *See United States v. Michigan,* 851 F.2d 803, 809–10 (6th Cir. 1988); B-154778, Aug. 6, 1964; B-100300, Feb. 10, 1956. Using an established refund mechanism is the preferred method of recovering improperly paid taxes. 42 Comp. Gen. 593 (1963). Thus, upon the request of a state, and as long as the interests of the United States will be protected, setoff may be deferred pending the filing of a formal claim with the appropriate state agency. B-151095, Jan. 2, 1964. However, if the state refuses a refund to which the United States is entitled, setoff is again the proper remedy if legally available. 39 Comp. Gen. 816 (1960); B-162005, Apr. 8, 1968.

Where a sales tax has been improperly paid, the vendor is little more than a collection agent for the state and the state is the ultimate beneficiary of the improper payment. Therefore, a collection action should proceed against the state rather than by setoff against the vendor. 42 Comp. Gen. 179 (1962).

When the federal government disputes whether it must pay a particular tax, it has entered into various arrangements pending the outcome of litigation. In one case, the government agreed with a state taxing authority to file tax forms without remitting any money, and to make the actual payments upon a final judicial determination

in a pending test case that the tax was valid. B-160920, May 10, 1967. (The decision, after the Supreme Court upheld the validity of the tax, held that the back taxes should be paid notwithstanding expiration of the state statute of limitations.) In another case, the government negotiated an agreement with contractors whose contracts were being subjected to a questionable state sales tax, under which the General Services Administration agreed to pay the tax and the contractors promised to refund the amounts paid if it was ultimately determined that the government's immunity applied. B-170899, Nov. 16, 1970. *See also* 50 Comp. Gen. 343 (1970).

f. Quantum meruit

Appropriations are not available to pay state or local taxes levied upon the federal government unless Congress specifically provides otherwise. However, even though a particular charge may not be payable as a tax, a state or municipality may be compensated on a *quantum meruit* basis for the fair and reasonable value of the services actually received by the United States. *Harford County,* 572 F. Supp. 239; 49 Comp. Gen. 72 (1969); 18 Comp. Gen. 562 (1938); B-226503, Sept. 24, 1987; B-168287, Nov. 9, 1970; *see* 70 Comp. Gen. 687 (1991) (federal government may pay reasonable user fees to a county for use of its landfill). To be paid on a *quantum meruit* basis, it must be clear that the government could have acquired the services it received in a normal procurement, that the federal government received and accepted the benefit of the services provided, the persons seeking payment acted in good faith, and the amount claimed represents the reasonable value of the benefit received. 64 Comp. Gen. 727, 728 (1985).

Not surprisingly, most of GAO's decisions in this area involve an evaluation of the reasonableness of the claim. The method for computing the assessment is the primary means of determining whether the charge represents the fair value of services received. *Quantum meruit* claimants must show how they arrived at the amount claimed: An unsupported statement that the sum represents the fair and reasonable value of the services rendered is insufficient. Although the claim need not be presented on a strict

"quantity of use" basis, only when it is clearly shown that the specified method of computation is based purely upon the value of the particular services rendered to the government may any payment be made. B-177325, Nov. 27, 1972; B-168287-O.M., July 28, 1972; B-168287-O.M., Mar. 29, 1971. However, where a precise determination of the benefit received by the government cannot reasonably be made, payment has been allowed where the method of computation used did not appear unreasonable under the circumstances. B-168287-O.M..

Applying the above principles, the Comptroller General concluded in one case that a special assessment based on the federal property's ratable share of the cost of necessary repairs and improvements to a septic sewage system could be paid on a *quantum meruit* basis. B-177325, Nov. 27, 1972. However, in B-179618, Nov. 13, 1973, an assessment against an Air Force base for maintenance of a drainage ditch based on the "benefit" to the land could not be paid since there was no indication of how the amount of the benefit had been computed and no showing that the assessment represented the fair and reasonable value of the services rendered to the government. Similarly, a municipal assessment based on such factors as land area, structure value, and size was found to be a tax and therefore not payable in B-183094, May 27, 1975.

Using the same analysis, GAO advised the Air Force in B-207695, June 13, 1983, that it was not required to pay fees for well registration and withdrawal of groundwater which a state had attempted to impose on the Air Force's right to draw water from wells on federal property. There was no showing that the fees bore any relationship to any services provided to the government. Similarly, an assessment levied against a federal facility for sewer charges unrelated to actual sewer usage could not be paid as a tax. B-226503, Sept. 24, 1987. However, fees for permits or certificates for the right to use state-owned water represent charges for services rendered rather than taxes and may therefore be paid. 5 Comp. Gen. 413 (1925); 1 Comp. Gen. 560 (1922). And one-time connection fees for hooking up federal facilities to local sewer systems, whether new construction or improvements, are payable

as authorized service charges. 39 Comp. Gen. 363 (1959); 9 Comp. Gen. 41 (1929). Where the hook-up is incident to new construction, the fee is chargeable to the construction appropriation. 19 Comp. Gen. 778 (1940).

8. Telephone services

a. Telephone service to private residences

(1) The statutory prohibition and its major exception

A problem which existed during the early years of the twentieth century was an apparent tendency on the part of government officials to have telephones installed in their homes at government expense. *See* 53 Comp. Gen. 195, 197 (1973); 19 Comp. Dec. 350, 352 (1912). It must be remembered that telephones were much more of a novelty in those days; we were still decades from the point where almost every American home has a private home telephone, not to mention a mobile or cellular phone. In any event, Congress enacted legislation in 1912 to prevent the use of public funds for private telephone service for government officials. The portion of the statute we are concerned with here, 31 U.S.C. § 1348(a)(1), provides:

> "Except as provided in this section, appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences."

Over time, statutory exceptions have been passed, however, eroding the once almost blanket prohibition against the payment for telephones in residences. For example, in 1995, with the advent of telecommuting and the flexible workplace, Congress passed a major exception to the latter prohibition. Agencies are expressly authorized to use appropriated funds:

> "to install telephone lines, and necessary equipment, and to pay monthly charges, in any private residence or private apartment of an employee who has been authorized to work at home in accordance with guidelines issued by the Office of Personnel Management: *Provided,* That the head of the department, division, bureau, or office certifies that adequate safeguards against private misuse exist, and that the service is necessary for direct support of the agency's mission."

Pub. L. No. 104-52, title VI, § 620, 109 Stat. 468, 501 (Nov. 19, 1995). So in the case of employees authorized to work at home under OPM's telework/telecommuting guidelines, (*see* www.telework.gov (last visited Aug. 1, 2016)), once the agency head certifies that adequate safeguards against private misuse exist, agencies may pay for the very same charges that 31 U.S.C. § 1348(a)(1) otherwise would have prohibited.

However, barring application of the 1995 statutory provision allowing payment for residential telephone expenses in a telework situation (and several other situation-specific statutory exceptions to be discussed later), the decisions under 31 U.S.C. § 1348(a)(1) are still applicable.

The decisions are fond of saying that the statute, for the most part, has been strictly applied. Indeed, the earlier decisions are packed with the "reflex" observations that the language of the statute is "plain and comprehensive," the "prohibition is mandatory," and the statute "leaves no room for the exercise of discretion on the part of the accounting officers of the Government." *E.g.,* 21 Comp. Gen. 997, 999 (1942). As late as 1996 one decision stated that:

> "The statute is plain on its face and although in today's era of instant communications the statute may appear

> outdated, we may not rewrite the statute to fit a fashionable view of what the norm should be. Certainly if the statute is to retain any meaning, we may not, under the guise of being essential, routinely grant exceptions of convenience, however beneficial the result may appear."

B-262013, Apr. 8, 1996.

Thus, the rule remains that charges for residential telephones (installation, connection, monthly equipment rental, and basic service charges) may not be paid from appropriated funds unless one of the statutory exceptions applies. As we shall see at the end of this section, technological advances have also created end runs around the statutory prohibition.

(2) Funds to which the statute applies

The statute is a direct restriction on the use of appropriated funds. As such, it applies not only to direct appropriations from the Treasury but also to funds which constitute appropriated funds by operation of law. Thus, the statute applies to expenditures from the revolving fund established by the Federal Credit Union Act since the authority to maintain a revolving fund constitutes a continuing appropriation. 35 Comp. Gen. 615, 618 (1956).

Along these same lines, the Comptroller General held in 4 Comp. Gen. 19 (1924) that the Alaska Railroad could not designate residential telephones as "operating expenses" and pay for them from revenues derived from operating the railroad. The Comptroller General pointed out in that case that the authority to do "all necessary things" to accomplish a statutory purpose confers legal discretion, not unlimited discretion, and the authority is therefore subject to statutory limitations such as 31 U.S.C. § 1348. *Id.* at 20. The same point was made in 35 Comp. Gen. at 618, and in B-130288, Feb. 27, 1957.

(3) What is a “private residence”?

Simply stated, a private residence is where you live as opposed to where you work, assuming the two can be distinguished. Cases where the two cannot be distinguished are discussed later. For purposes of 31 U.S.C. § 1348, it makes no difference that the residence is government-owned or on public land. 35 Comp. Gen. 28 (1955); 7 Comp. Gen. 651 (1928); 19 Comp. Dec. 198 (1912). The statute therefore fully applies to permanent residential quarters on a military installation. 21 Comp. Gen. 997 (1942); B-61938, Sept. 8, 1950; A-99355, Jan. 11, 1939. It does not apply, however, to tents or other temporary structures on a military post which are not available for family occupancy, notwithstanding that military personnel may use them as temporary sleeping quarters. 21 Comp. Gen. 905 (1942).

In 41 Comp. Gen. 190 (1961), the statutory prohibition was held not applicable to the installation of telephones in hotel rooms occupied by officials on temporary duty where necessitated by the demands of the mission. (One would have thought that all hotel rooms were already equipped with telephones by 1961.)

An early decision stated that “private” means set apart for the exclusive personal use of any one person or family. 19 Comp. Dec. at 199. In this light, the Comptroller General held that appropriated funds could be used to install and operate local-service telephones in Army barracks occupied by large numbers of enlisted personnel. 53 Comp. Gen. 195 (1973). An earlier decision, 35 Comp. Gen. 28, applied the prohibition to several government-owned residences, one of which was used to house a number of employees. While these two cases may appear inconsistent at first glance in that the telephones in both instances would be available for the personal use of the residents, the apparent distinction is that Army appropriations are available for the welfare and recreation of military personnel so that the “personal use” aspect in the Army barracks case was not necessarily dispositive.

Since the statute uses only the term “residence,” it has been held not to prohibit service charges for a dedicated telephone line, on

which a Navy-supplied fax machine was installed for official use, in the private business office of a Naval Reserve officer. B-236232, Oct. 25, 1990.

Note that although the principles in the above cases still are pertinent where 31 U.S.C. § 1348(a) applies, 31 U.S.C. § 1348(c) authorizes the Department of Defense to "install, repair, and maintain telephone wiring in residences owned or leased by the United States Government and, if necessary for national defense purposes, in other private residences."

(4) Application of the general rule

A large number of decisions have established that the prohibition applies even though the telephones are to be extensively used in the transaction of public business and even though they may be desirable or necessary from an official standpoint. 59 Comp. Gen. 723, 724 (1980) and cases cited therein. In this respect, there is no discretion involved. A rather stark application of this rule can be found in the 1996 decision quoted above which held that the Centers for Disease Control and Prevention could not use appropriated funds to install telephone lines in the private residence of its Director. The agency tried to justify the telephone lines by arguing that the Director might need to respond quickly to emerging health crises around the world, but the agency had not explained its role in responding to emergent or urgent health crises and the consequences for public health and safety if it were to fail to respond immediately upon learning of the problems. B-262013, Apr. 8, 1996.

Relevant factors are whether the telephone will be freely available for the employee's personal use and whether facilities other than the employee's residence exist for the transaction of official business. The employee's personal desires are irrelevant. Thus, it makes no difference that the employee does not want the telephone and has asked to have it removed. 33 Comp. Gen. 530 (1954); A-99355, Jan. 11, 1939. The fact that a telephone is unlisted is also immaterial. 15 Comp. Gen. 885 (1936).

The rule is well illustrated in a 1980 decision in which the District Commander of the Seventh Coast Guard District sought to be reimbursed for a telephone installed in his residence. The Commander was in charge of the Cuban Refugee Freedom Flotilla in the Florida Straits. He was in daily contact with the various federal, state, and local agencies involved and was required to be available 24 hours a day. Since this situation placed a burden on the Commander's immediate family by restricting their personal use of the home telephone, he had another telephone installed for official business. In view of the statutory prohibition, and since the Commander was already provided with an office by the Coast Guard, reimbursement could not be allowed. 59 Comp. Gen. 723. For an earlier decision applying the prohibition notwithstanding the need for employees to be available on a 24-hour basis, see 11 Comp. Gen. 87 (1931).

A somewhat similar situation was presented in B-130288, Feb. 27, 1957. There, the Federal Mediation and Conciliation Service sought authority to pay for telephones in the homes of mediators stationed in cities where office accommodations were not provided. The mediators had to work out of their homes and were required to be available 24 hours a day. Applying the statutory prohibition, the Comptroller General concluded that the agency could not pay for the telephones, nor could it pay for an answering service. However, there was no reason a mediator couldn't list his private telephone number under the agency's name, and the government could pay for this listing. By doing this, the government would not be paying for personal use of the telephone.

In B-175732, May 19, 1976, it was proposed to install a telephone in the "galley" (kitchen) of the Coast Guard Commandant's home, for use by a "subsistence specialist" who worked there and presumably had no access to other telephones. The argument was that while the galley may have been part of the Commandant's private residence, it was the subsistence specialist's duty station and since he had no other office, he had to conduct government business from the galley. GAO found the proposal prohibited by 31 U.S.C. § 1348(a)(1). Although the duties of the subsistence specialist—the procurement of food, supplies, and services—were

official to him, they nevertheless accrued largely if not exclusively to the personal benefit of the Commandant and were not sufficient to justify an exception.

(5) Exceptions

As we have seen above, although the statute has been strictly applied, there are exceptions. First, there are statutory exceptions:

- One example is 31 U.S.C. § 1348(a)(2), for residences owned or leased by the United States in foreign countries for use of the Foreign Service.

- Another statutory exception is 31 U.S.C. § 1348(b), enacted in 1922, covering telephones deemed necessary in connection with the construction and operation of locks and dams for navigation, flood control, and related water uses, under regulations of the Secretary of the Army.

- A further and broader exception enacted in 1984 provides that under regulations prescribed by the Secretary of Defense, Department of Defense appropriations are available to install, repair, and maintain telephone wiring in residences owned and leased by the United States government and, if necessary for national defense purposes, in other private residences. 31 U.S.C. § 1348(c).

- Yet another statutory exception is provided in 10 U.S.C. § 1588(f)(1) which allows the Secretary concerned to install telephone lines and any necessary telecommunications equipment in the private residences of persons, designated in accordance with the regulations, to provide voluntary services for programs providing services to members of the armed forces and their families.

- Still another is 16 U.S.C. § 580f, for telephones necessary for the protection of national forests.

Next, there are some non-statutory exceptions. They fall generally into two categories. The first, dictated by common sense, involves situations where private residence and official duty station are one and the same. If the government has made available office facilities elsewhere, it is clear that a residential telephone cannot be charged to appropriated funds no matter how badly it is needed for official business purposes. *E.g.,* 59 Comp. Gen. 723 (1980); 22 Comp. Dec. 602 (1916). However, exceptions have been recognized where a government-owned private residence was the only location available under the circumstances for the conduct of official business. *E.g.,* 4 Comp. Gen. 891 (1925) (isolated lighthouse keeper); 19 Comp. Dec. 350 (1912) (lock tender); 19 Comp. Dec. 212 (1912) (national park superintendent).

Note that in all of these cases the combined residence/duty station was government-owned. The exception has not been extended to privately owned residences which are also used for the conduct of official business. 26 Comp. Gen. 668 (1947); B-130288, Feb. 27, 1957; B-219084-O.M., June 10, 1985. The theory seems to be that, in a privately owned residence, the degree of personal use as opposed to likely official need is considered so great as to warrant a stricter prohibition since there would be no other practical way to control abuse, whereas some flexibility is afforded for government-owned residences where sufficient official use for telephones exists. 53 Comp. Gen. 195, 197–98 (1973). Note that, as stated, the express prohibition in 31 U.S.C. § 1348(a)(1) applies to residences and does not apply when telephone services are provided in a private business office. B-236232, Oct. 25, 1990.

It should also be noted that isolation alone is not sufficient to justify an exception. In 35 Comp. Gen. 28 (1955), 31 U.S.C. § 1348(a)(1) was held to prohibit payment for telephones in government-owned residences of Department of Agriculture employees at a sheep experiment station. The employees claimed a need for the telephones because they frequently received calls outside of normal office hours from Washington or to notify them of unexpected visitors and shipments of perishable goods, and because they were sometimes stranded in their residences by severe blizzards. Here 4 Comp. Gen. 891 was distinguished

because the telephone in that case was installed in a room equipped and used only as an office and was not readily available for personal use.

The second category of non-statutory exceptions stems from the recognition that the "evil" that 31 U.S.C. § 1348(a)(1) is intended to address is not the physical existence of a telephone, but the potential for charging the government for personal use. Thus, a series of cases has approved exceptions where (1) there is an adequate justification of necessity for a telephone in a private residence, and (2) there are adequate safeguards to prevent abuse.

This category seems to have first developed in the context of "military necessity" and national security justifications. For example, an exception was made to permit the installation in the residence of the Pearl Harbor Fire Marshal (a civilian employee) of a telephone extension which was mechanically limited to emergency fire calls. 32 Comp. Gen. 431 (1953), *modifying* 32 Comp. Gen. 271 (1952). *See also* 21 Comp. Gen. 905 (1942). In B-128144(3), June 29, 1956, GAO approved a proposal to install direct telephone lines from an Air Force Command Post switchboard to the private residences of certain high level civilian and military officials to ensure communications in the event of a national emergency. Air Force regulations prohibited the use of these lines for anything but urgent official business in the event of a national emergency and authorized the recording of conversations as a safeguard against abuse.

However, a "necessity" which is little more than a matter of convenience is not enough to overcome the prohibition. For example, in A-99355, Jan. 11, 1939, a telephone could not be maintained at government expense in the private quarters of the Officer-in-Charge on a Navy installation because several telephones were available in established offices on the station. This decision was followed in 21 Comp. Gen. 997 (1942) and 33 Comp. Gen. 530 (1954). The prohibition applies equally to an intra-base system not connected to outside commercial trunk lines. B-61938, Sept. 8, 1950. The Navy now has statutory authority to use its

appropriations to pay for the installation and use (except for personal long-distance calls) of extension telephones connecting public quarters occupied by naval personnel (but not civilian employees) with station switchboards. 10 U.S.C. § 7576.

Relying largely on B-128144(3), GAO approved a General Services Administration proposal to install Federal Secure Telephone Service telephones in the residences of certain high level civilian and military officials certified by their agency heads as having national security responsibilities. 61 Comp. Gen. 214 (1982). The system was designed to provide a secure communications capability to permit the discussion of classified material that could not be discussed over private telephones. As in B-128144(3), the proposal included a number of safeguards against abuse, which GAO deemed adequate.

The concept established in the military necessity/national security cases would subsequently be applied in other contexts as well. Thus, GAO approved exceptions in the following cases:

- Installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in the private residences of the commissioners of the Federal Communications Commission to the agency's local area network as it permitted data encryption necessary to secure confidential communications and the Commission had imposed adequate safeguards to prevent private use of the separate ISDN lines. In this decision it was also noted that, although section 620 of Public Law 104-52, 109 Stat. 468, 501 (Nov. 19, 1995), permitting installation of phone lines for employees permitted to work at home, did not by its terms address presidentially appointed officers such as the Commissioners, "it would be anomalous for us to overlook the public policy established in section 620 and apply the section 1348(a)(1) prohibition in a manner to preclude government officials who are on duty 24 hours from the same conveniences as other government employees." B-280698, Jan. 12, 1999. *Compare* B-262013, Apr. 8, 1996, a decision that was issued less than three years earlier, in which the GAO held that the Centers for

Disease Control and Prevention could not install telephone lines in the private residence of its Director, in part because the agency had not demonstrated that adequate safeguards to prevent misuse of the telephone lines would be in place.

- Installation of telephone equipment by the Internal Revenue Service in the homes of customer "assistors" who were intermittent, part-time employees. The phones to be installed had no outcall capability and could receive calls only from IRS switching equipment. Separate lines were essential because the employees' personal phones could not be used with the IRS equipment. B-220148, June 6, 1986. See also B-247857, Aug. 25, 1992, in which GAO held when telephone service installation in a private residence is of restricted use or when there are numerous safeguards and the service is deemed essential, the prohibition is inapplicable. The National Mediation Board had demonstrated the essential nature of the computer data transmission service and would prevent private misuse by installing dedicated telephone lines.

- Installation of telephones in the homes of Internal Revenue Service criminal investigators who were authorized to work from their homes, to be used for portable computer data transmission. GAO found the agency's justification adequate and approved the expenditure, contingent upon the establishment of adequate safeguards, such as those in 61 Comp. Gen. 214, to prevent personal use. 65 Comp. Gen. 835 (1986).

- Installation of separate telephone lines in the homes of IRS data transcribers authorized to work at home under a "telework" program, again subject to the establishment of adequate safeguards. 68 Comp. Gen. 502 (1989).

- Installation of telephones in the homes of certain high level Nuclear Regulatory Commission (NRC) officials to assure immediate communication capability in the event of a nuclear accident. The phones would be capable of dialing only internal

NRC numbers, with any other calls to be placed through the NRC operator. B-223837, Jan. 23, 1987.

Some of the cases noted earlier in which the prohibition was applied, such as 59 Comp. Gen. 723 and B-262013, also presented strong justifications. The primary feature distinguishing these cases from the exceptions described above is the existence in the latter group of adequate safeguards against abuse.

Finally, a couple of cases have dealt with payment for telephone services during periods of non-occupancy. In order to ensure continuous service, the government secured telephone service for the residence of the Air Deputy for the Allied Forces Northern Europe in Norway by long-term lease with the Norwegian Telephone Company. Normally, the Air Deputy paid the charges. The question presented in 60 Comp. Gen. 490 (1981) was who should pay the charges accruing during a vacancy in the position. The Comptroller General held that since the quarters were not the private residence of either the outgoing or the incoming Air Deputy during the period of vacancy, no public official received the benefit of the service during that period. Therefore, payment from appropriated funds would not thwart the statutory purpose.

The decision distinguished an earlier case, 11 Comp. Gen. 365 (1932), denying payment for telephone service to the residence of the U.S. Ambassador to Mexico during a period when the position was vacant. In the 1932 case, the service had been retained during the interim period mainly through inadvertence. In 60 Comp. Gen. 490, on the other hand, retention of the service was necessary to avoid delays in reinstallation when the new Air Deputy moved in. The decision did note, however, that except in limited situations of public necessity such as the one involved, telephone service should ordinarily be cancelled during periods of non-occupancy.

b. Long-distance calls

The long-distance telephone call certification requirement, which existed at former 31 U.S.C. § 1348(b), was repealed in 1996. Pub.

L. No. 104-201, div. A, title XVII, subtitle B, § 1721, 110 Stat. 2422, 2758 (Sept. 23, 1996). Note also that agencies have adopted policies to allow limited personal use of office equipment, including telephones. *See*, *e.g.,* 28 C.F.R. § 45.4(2) in which the Department of Justice allows limited personal telephone/fax calls to locations within the office's commuting area, or that are charged to nongovernment accounts.

c. Mobile or cellular telephones

Just as significant statutory exceptions have eroded the once almost blanket prohibition against the payment for telephones in residences, likewise, technological advancements are eroding the application of 31 U.S.C. § 1348(a) in a more practical manner as mobile or cellular phones become ubiquitous.

In a 1988 case, B-229406, Dec. 9, 1988, an agency official used his own funds to purchase a cellular telephone and have it installed in his personal automobile. GAO stated with respect to 31 U.S.C. § 1348(a) that the statute addresses residences, not automobiles. Concluding that "section 1348 does not apply to cellular phones located in private automobiles," GAO advised that the agency could reimburse business calls as long as there were adequate safeguards to prevent abuse. The safeguards existed in this case because all calls were individually itemized on a monthly basis. The decision cautioned, however, that "agency heads should strictly scrutinize automobile telephone calls before certifying them for reimbursement," to ensure that the most economical means of communication are being used.

Subsequent decisions have approved agencies' reimbursement, on an actual expense basis, for access to and use of an employee's personal cell phone. B-291076, Mar. 6, 2003; B-287524, Oct. 22, 2001. However the decisions have held that reimbursement may not be made on a flat rate basis. In B-287524, GAO found that flat rate reimbursement was prohibited by 5 U.S.C. § 5536 as a flat rate plan raises the risk of improperly reimbursing employees for personal use—setting a flat fee tends to result in either a gain or a loss to the reimbursed employee.

In B-291076, GAO stated that an agency may reimburse its employees for the actual costs of maintaining personal cell phone services that meet the agency's minimum needs and the additional costs that may arise from any official calls actually made or received on the employee's cell phone. Safeguards included in the agency proposal (requiring monthly, itemized service provider invoices, limiting claims to the expenses the agency would otherwise pay for such services, and adjusting claims to exclude hidden costs of "free" services included in the service provider's plan) provided adequate assurance that the reimbursements will be limited to government-related calls.

Going further, GAO concluded that the Consumer Product Safety Commission (CPSC) may use its appropriated funds to cover the costs of providing technical support services to an employee who is using his personally-owned smartphone, in lieu of an agency-issued phone. B-327376, Feb. 19, 2016. Citing a statute requiring the agency to implement information security protocols, GAO concluded it would be a necessary expense of CPSC's appropriation to provide such technical services so to comply with the statute.

GAO considered the purchase of cellular telephones for use by Members of the Senate and concluded that the expenditure was authorized from the Senate's contingent fund. B-227763, Sept. 17, 1987; B-186877, Aug. 12, 1976. The 1976 opinion had taken a negative view of the question from the policy perspective and suggested that more specific legislative authority would be appropriate. This was done and there is now express statutory authority to use the contingent fund of the Senate to provide telecommunications services and equipment. 2 U.S.C. §§ 6314(a)(1), 6315.

However, GAO's more recent decisions have assumed that an agency has the authority to purchase and issue government-owned cellular phones, along with accessories, to its employees so that the employees may conduct government business. B-327376, Feb. 19, 2016; B-291076, Mar. 6, 2003; B-287524, Oct. 22, 2001.

E. Step 3: expenditure must not be provided for in another appropriation

Once we have determined that an appropriation is either plainly or necessarily available for a particular expenditure and that it is not prohibited by any other law, we turn to the final step of our three-step purpose analysis: determining whether the expenditure is otherwise provided for in another appropriation. In some situations, a more specific appropriation will be available for the particular expenditure. In others, the agency may have more than one appropriation available for the same expenditure, and it will have to choose which one to use. Finally, there may be circumstances in which statutory language clearly provides that more than one appropriation is available for the same purpose. We address each of these scenarios below.

1. Specific appropriation prevails over the general one

It is a well-settled rule that even where an expenditure may be reasonably related to a general appropriation, it may not be paid out of that appropriation where the expenditure falls specifically within the scope of another appropriation. B-291241, Oct. 8, 2002; B-290005, July 1, 2002; B-289209, May 31, 2002; 63 Comp. Gen. 422 (1984). In other words, if an agency has a specific appropriation for a particular item, and also has a general appropriation broad enough to cover the same item, it does not have an option as to which to use. It must use the specific

appropriation.[228] Otherwise, an agency could evade or exceed congressionally established spending limits.

Thus, an appropriation for a specific object is available for that object to the exclusion of a more general appropriation that might otherwise be considered available for the same object. B-318426, Nov. 2, 2009. Once an agency has exhausted the specific appropriation, it is not then permitted to begin charging the general appropriation for that purpose unless Congress has specifically authorized it to do so. *See, e.g.,* B-272191, Nov. 4, 1997 (law provided that funds made available to the Secretary of Army for operation and maintenance were available "[i[n addition to … the funds specifically appropriated for real property maintenance under the heading 'Real Property Maintenance, Defense'").

A 1959 case involving the Navy illustrates this principle. B-139510, May 13, 1959. The Navy entered into a contract for construction of two nuclear submarines to be built in Pascagoula, Mississippi. Without dredging, the depth of the Singing River was inadequate to permit safe passage of the submarines to and from the shipyard in Pascagoula. The Navy sought to use its appropriation for "Shipbuilding and Conversion, Navy" to pay for dredging the river. This proposal satisfied the first two steps of our purpose analysis: the expense was reasonably necessary to the proper accomplishment of the purpose of the Shipbuilding and Conversion appropriation, and there was no other law prohibiting the use of the appropriation for dredging. However, the Navy's proposal failed at

[228] The rule that the specific governs over the general is not limited to appropriation law. As discussed in Chapter 2, it is a general and well-established principle of statutory construction. *See, e.g.,* 62 Comp. Gen. 617 (1983); B-152722, Aug. 16, 1965. This principle often works in concert with another principle of statutory construction, that that two statutes should be construed harmoniously so as to give maximum effect to both wherever possible. Generally, "[w]here there is a seeming conflict between a general provision and a specific provision and the general provision is broad enough to include the subject to which the specific provision relates the specific provision should be regarded as an exception to the general provision so that both may be given effect, the general applying only where the specific provision is inapplicable." B-163375, Sept. 2, 1971. *See also* B-255979, Oct. 30, 1995.

step three, because dredging rivers was a function for which funds were appropriated to the Army Corps of Engineers, not the Navy, and that the Corps was specifically charged by law to improve the nation's waterways. Further, the fact that appropriations had not been made to the Corps for this particular dredging project was irrelevant.

The cases illustrating this rule are legion.[229] In these cases, the existence of a more specific source of funds is the governing factor.[230] Generally, the fact patterns and the specific statutes involved are of secondary importance. The key point is that the agency does not have an option. If a specific appropriation exists for a particular item, then that appropriation must be used and it is improper to charge any other appropriation for that item. As one early decision noted, the rule has been well-established "from time immemorial."[231] 1 Comp. Dec. 126 (1894).

[229] *See, e.g.,* B-318426, Nov. 2, 2009 (payment of settlements and judgments by District of Columbia); B-290005, July 1, 2002 (expenses related to legal work for the Fish and Wildlife Service); B-289209, May 31, 2002 (administrative costs for Oil Pollution Act claims); B-290011, Mar. 25, 2002 (magistrate salaries and expenses); 64 Comp. Gen. 138 (1984) (expenses of representational events at foreign posts); 36 Comp. Gen. 526 (1957) (construction of an atomic ship); 31 Comp. Gen. 491 (1952) (purchase of penicillin for Civil Defense purposes); 20 Comp. Gen. 272 (1940) (construction of additional wing on Navy Department Building); 17 Comp. Gen. 974 (1938) (agricultural exhibits at fairs); 4 Comp. Gen. 476 (1924) (repairing courthouse and jail in Nome, Alaska); 1 Comp. Dec. 126 (1894) (purchase of books and maps); B-235086, Apr. 24, 1991 (construction and acquisition of a building).

[230] The rule has also been applied to expenditures by a government corporation from corporate funds for an object for which the corporation had received a specific appropriation. B-142011, June 19, 1969 (noting that "[w]e see no significant distinction between using an otherwise available general appropriation for a particular object, when there is a specific appropriation for such object, and using corporate funds for a purpose for which a specific appropriation has been made, in order to avoid a limitation pertaining to the specific appropriation").

[231] *See also Nevada v. Dept. of Energy, et al,* 400 F.3d 9 (D.C. Cir. 2005) (applying this principle to find that the existence of a $1 million appropriation specifically for Nevada in the Defense Environmental Services account would bar any grants from the $190 million Waste Fund appropriation for the same purpose).

This rule also applies in the earmark context.[232] The fact that an appropriation for a specific purpose is included as an earmark in a general appropriation does not deprive it of its character as an appropriation for the particular purpose designated. Where such specific appropriation is available for the expenses necessarily incidental to its particular purpose, such incidental expenses may not be charged to the more general appropriation unless Congress has specifically authorized an agency to do so. *See* 20 Comp. Gen. 739 (1941) (where general appropriation for Geological Survey provided "not to exceed $45,000 for the purchase and exchange . . . of . . . passenger-carrying vehicles," the costs of transportation incident to the delivery of the purchased vehicles had to be charged to the specific appropriation rather than the more general appropriation). Similarly, a more general appropriation would not be available simply because the agency has exhausted the earmark.

2. Multiple appropriations available for the same purpose

Although rare, there are situations in which either of two appropriations can be construed as available for a particular object, but neither can reasonably be called the more specific of the two. In such cases, the agency must select which to charge for the expenditure in question. Once that election has been made, the agency must continue to use the same appropriation for that purpose unless the agency informs Congress of its intent to change for the next fiscal year.[233] B-307382, Sept. 5, 2006; B-272191, Nov. 4, 1997. This notification should occur as early as possible in the fiscal year, so that Congress is aware of that information during the annual appropriations cycle. *Id. See also* 68 Comp. Gen. 337 (1989); 59 Comp. Gen. 518 (1980); GAO, *Unsubstantiated DOE*

[232] For a fuller discussion of the effect of earmarking language on the amount available to an agency, see Chapter 5.

[233] Colloquially, this is known as the "pick and stick" rule.

Travel Payments, GAO/RCED-96-58R, at 3 (Washington, D.C.: Dec. 28, 1995).

Even rarer are situations in which statutory language clearly demonstrates congressional intent to make a general appropriation available to supplement or increase a more specific appropriation, or to relieve an agency of the need to elect to use a single appropriation. In that case, both appropriations are available. For example, language providing that "not less than" $2.62 million of the lump-sum appropriation for the Commodity Futures Trading Commission was available for expenses related to the Office of Inspector General served a protective purpose to assure that at least a minimum amount would be available for the OIG and did not bar the CFTC lump-sum appropriation from also being used for these purposes. B-327003, Sept. 29, 2015 (further, even if both appropriations were arguably available for the same purpose, the agency was not required to choose one to the exclusion of the other because the statutory language clearly made both available for that purpose). *See also* B-322062, Dec. 5, 2011 (annual appropriation and supplemental appropriation both available for investigation of securities fraud based on language in supplemental act providing "an additional amount for necessary expenses"); B-272191, Nov. 4, 1997 (statutory language makes clear that Congress intended that the "funds appropriated to the Secretary [of the Army] for operation and maintenance" in the fiscal year 1993 Defense Appropriations Act are "[i]n addition to . . . the funds specifically appropriated for real property maintenance under the heading [RPM,D]" in that appropriation act).