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OFFICE OF GENERAL COUNSEL

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FOREWORD

This Manual was prepared by the staff of the General Government Matters division of the Office of General Counsel, U.S. General Accounting Office (GAO). The purpose of the Manual is to present the basic principles of appropriations law in a manner which we hope is clear and direct and yet sufficiently detailed to meet the needs of most readers. The Manual is intended for use by GAO staff, as well as other Government agencies, congressional staff, and the public. It includes discussion of the statutes and regulations governing appropriations matters as well as references to significant decisions rendered by the Comptroller General and the courts.

To our knowledge, this is the first attempt to present a comprehensive treatment of the body of law governing the expenditure of Federal funds.

The material in the Manual is, of course, subject to revision by statute or through the decision-making process. Accordingly, this Manual should be considered as a general guide only and should not be cited as an independent source of legal authority. We plan to revise the Manual periodically as developments in the law may warrant.

Readers may wish to read the introductory chapter, Chapter 1, first for further information on the scope and organization of the Manual. Our primary goal in preparing this Manual was to present a document that will be useful, and we welcome any comments or suggestions for improvement.

This Manual supersedes the Manual For General Government Matters - Federal Appropriations dated September 1972.

Harry R. Van Cleve
Acting General Counsel

June 1982

"Nothing in this world is palled
in such impenetrable obscurity
as a U.S. Treasury Comptroller's
understanding."

Mark Twain

The Complete Travel Books
of Mark Twain

PRINCIPLES OF FEDERAL APPROPRIATIONS LAW

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PRINCIPLES OF FEDERAL APPROPRIATIONS LAW

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CHAPTER 1

INTRODUCTION

A. NATURE OF APPROPRIATIONS LAW

Federal funds are made available for obligation and expenditure by means of appropriation acts (or occasionally by other legislation) and the subsequent administrative actions which release appropriations to the spending agencies. The use or "availability" of appropriations once enacted and released (that is, the rules governing the purpose, amounts, manner, and timing of obligations and expenditures) is governed by various authorities: the terms of the appropriation act itself; legislation, if any, authorizing the appropriation; the "organic" or "enabling" legislation which prescribes a function or creates a program and which the appropriation implements; general statutory provisions which allow or prohibit certain uses of appropriated funds; and general rules which have been developed largely through decisions of the Comptroller General and the courts. These sources, together with certain provisions of the Constitution of the United States, form the basis of "appropriations law"--an area where questions may arise in as may contexts as there are Federal actions that involve spending money.

Although the Manual attempts to incorporate all relevant authorities as indicated in the preceding paragraph, its primary focus is on the decisions and opinions of the "accounting officers of the Government"--the Comptroller General of the United States and his predecessor, the Comptroller of the Treasury.

CHAPTER 1

INTRODUCTION

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There is no legal requirement for the private party to come to GAO, under the doctrine of exhaustion of administrative remedies, before seeking judicial resolution.

The Office of General Counsel (OGC) prepares these decisions for the Comptroller General or Deputy Comptroller General. See 31 Comp. Gen. 596 (1952). In addition, the General Counsel has been delegated the authority to render decisions in certain specific contexts, for example, decisions granting or denying relief from liability to officers and employees who are accountable for public funds. (See Chapter 10, this Manual.)

The Office decides disputes between agencies and private entities concerning the award of Government contracts ("bid protests"), including disputes over grantee contract award actions. In addition, the Office of General Counsel prepares, for the Comptroller General, opinions concerning the interpretation of legislation and the legality of agency financial transactions, and informs the Congress of executive branch impoundments of available budget authority. Finally, OGC provides direct assistance to the Congress on a broad range of issues, whenever such assistance is requested by committees, subcommittees, or individual members, and provides legal support to GAO's audit divisions.

The more significant decisions or those with wide applicability are published annually as Decisions of the Comptroller General. (44 U.S.C. § 1311.) Most decisions, however, are unpublished, although they are readily available to other Government agencies and to the public. An unpublished decision has the same binding effect as a published decision. 28 Comp. Gen. 69 (1948).

There is no specific format for requesting a decision from the Comptroller General. A simple letter is usually sufficient. A request should, however, include all pertinent information and should present any arguments the requestor wishes to have considered.

The authority of certifying officers to request decisions under 31 U.S.C.§ 82d is limited to "any question of law involved in a payment on any vouchers presented to them for certification." Thus, a request under this provision should be accompanied by the voucher in question. If the voucher is not submitted, the Comptroller General may decline to render the decision, and this was done frequently in earlier times. See, e.g., 21 Comp. Gen. 1128 (1942). However, if the question is general in nature or appears likely to recur, the Comptroller

B. ROLE OF THE GAO OFFICE OF GENERAL COUNSEL

(1) Decisions of the Comptroller General

The General Accounting Office (GAO) is a nonpartisan, independent agency in the legislative branch of the Federal Government. GAO was established by title III of the Budget and Accounting Act of 1921 (31 U.S.C. § 41 et seq.) and placed under the control and direction of the Comptroller General of the United States. GAO conducts audits and reviews, and issues reports as an investigative arm of the Congress. See, e.g., 31 U.S.C. §§ 53, 60, 67, and 1154. GAO's principle functions include: auditing and evaluating the programs, activities, and financial transactions of the Federal Government; prescribing principles and standards for accounting in the Federal Government; providing various forms of direct assistance to the Congress; claims settlement and debt collection; detection and prevention of fraud; and the issuance of legal decisions.

Based on a number of statutory provisions, the Comptroller General has the authority to render decisions concerning the availability of appropriated funds. Certain Federal officials are entitled to decisions by statute. Thus, the Comptroller General renders decisions in advance of payment when requested by a disbursing officer, certifying officer, or the head of any department or establishment of the Government (known, logically, as "advance decisions"). 31 U.S.C. § 74, 82d; 26 Comp. Gen. 797, 799 (1947). Decisions are also rendered to disbursing and certifying officers who request review of settlements of their accounts, and to individual claimants who request review or reconsideration by the Comptroller General of settlements disallowing their claims in whole or in part. In addition, the Comptroller General may, in his discretion, render decisions to others.

A decision is binding on the executive branch, 1/ but is not binding on a private party, who, if dissatisfied, retains whatever recourse to the courts he would otherwise have had.

1/ See United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1,4, note 2 (1927); St. Louis, Brownsville & Mexico Railway Co. v. United States, 268 U.S. 169, 174 (1925); United States v. Standard Oil Co. of California, 545 F.2d 624, 637-38 (9th Cir. 1976); Burkley v. United States, 185 F.2d 267, 272 (7th Cir. 1950); United States ex rel. Steacy-Schmidt Mfg. Co. v. Globe Indemnity Co., 66 F.2d 302, 303 (3d Cir. 1933); United States ex rel. Brookfield Construction Co. v. Stewart, 234 F. Supp. 94, 99-100 (D.D.C. 1964); Pettit v. United States, 488 F.2d 1026, 1031 (Ct. Cl. 1973); 54 Comp. Gen. 921 (1975); 45 Comp. Gen. 335, 337 (1965).

Note on citations

Published decisions of the Comptroller General--those printed in the annual Decisions of the Comptroller General volumes--are cited by volume and page number, respectively, and the year, for example, 31 Comp. Gen. 350 (1952). Published decisions of the Comptroller of the Treasury, the predecessor of the Comptroller General, are cited in the same manner as Comptroller General decisions, using the abbreviation "Comp. Dec.".

Unpublished decisions are cited by file number and date, for example, B-193282, December 21, 1978. The present file numbering system ("B-numbers") has been in use since January 1939. From 1924 through 1938, file numbers used an "A" prefix. Cases prior to 1924 used various designations such as "A.D." (Advance Decision) and "D.M." (Division Memorandum). In addition, some of the earliest decisions, as well as unpublished decisions of the Comptroller of the Treasury, have no file designation. These must be cited by reference to the "manuscript volume" in which the decision appears. (These are volumes maintained by GAO for internal purposes containing the written product of the Office of General Counsel for a given month in chronological sequence.) Examples are: unpublished decision of September 1, 1921, 1 MS Comp. Gen. 712; unpublished decision of November 12, 1912, 63 MS Comp. Dec. 575. (These are infrequently encountered.)

A citation in the form "61 Comp. Gen. ___ (B-204517, February 22, 1982)" indicates that the decision has been selected for publication but that a page number has not yet been assigned.

(2) Matters Not Considered

There are a number of areas in which, as a matter of policy, the Comptroller General does not render decisions. Generally speaking, these are areas which are specifically within the jurisdiction of some other department or agency and concerning which GAO would not have the authority to make binding determinations.

Thus, GAO will not decide an issue involving the interpretation or application of criminal law, since this is within the jurisdiction of the Justice Department and the courts. 2/ If the use of public funds is an element of the

2/ 20 Comp. Gen. 488 (1941); 48 Comp. Gen. 24, 27 (1968).

General may elect to render a decision under the more general authority of 31 U.S.C. § 74. 52 Comp. Gen. 83 (1972); 53 Comp. Gen. 71 (1973); 53 Comp. Gen. 429 (1973); 55 Comp. Gen. 652 (1976).

An involved party or agency may request reconsideration of a decision. The standard applied is whether the request demonstrates error of fact or law (e.g., B-184062, July 6, 1976) or presents new information not considered in the earlier decision. As with any other administrative decision, a decision of the Comptroller General may be modified or overruled by a subsequent decision. In overruling its decisions, GAO tries to follow the approach summarized by a former Comptroller of the Treasury in a 1902 decision, made in language reflective of its time:

> "I regret exceedingly the necessity of overruling decisions of this office heretofore made for the guidance of heads of departments and the protection of paying officers, and fully appreciate that certainty in decisions is greatly to be desired in order that uniformity of practice may obtain in the expenditure of the public money, but when a decision is made not only wrong in principle but harmful in its workings, my pride of decision is not so strong that when my attention is directed to such decision I will not promptly overrule it. It is a very easy thing to be consistent, that is, to insist that the horse is 16 feet high, but not so easy to get right and keep right." 8 Comp. Dec. 695, 697 (1902).

Digests appear as headnotes preceding both published and unpublished decisions. It should be noted that, while the digest is an integral part of a legal decision, language in a headnote is only a paraphrase or summary, and cannot be relied upon in preference to the text of the decision itself. 56 Comp. Gen 275 (1977).

Informal opinions expressed by GAO officers or employees are given for whatever they may be worth and are in no way controlling on any subsequent official determinations by the Comptroller General. 4 Comp. Gen. 1024 (1925); 12 Comp. Gen. 207 (1932); 29 Comp. Gen. 335 (1950); 31 Comp. Gen. 613 (1952); 56 Comp. Gen. 768, 773-74 (1977). (Why such an obvious proposition has required so many decisions is unclear.)

(3) Organization of OGC

The Office of General Counsel is divided into four principal sections. Each is headed by an Associate General Counsel and deals with a distinct focus or issue-area. Procurement Law considers bid protests and other matters relating essentially to contract formation. Personnel Law Matters issues rulings on the pay, entitlements and benefits of Federal civilian and military personnel. Special Studies and Analysis provides legal support to the GAO audit divisions. General Government Matters primarily decides cases involving appropriations law, as reflected in this Manual.

In addition to this publication by the staff of the General Government Matters group, the other sections have published manuals which summarize and discuss the principal cases in their respective areas. They are as follows:

--Civilian Personnel Law Manual
  Title I - Compensation
  Title II - Leave
  Title III - Travel
  Title IV - Relocation

--Military Personnel Law Manual

--Government Contract Principles

--Transportation Law Manual

Some of the topics discussed in this Manual may overlap areas covered in the other OGC Manuals. The editors have tried to keep this to a minimum and have cross-referenced the other Manuals where appropriate.

An additional component of the Office of General Counsel is the Legal Information and Reference Service (LIRS). LIRS maintains a subject-card index of both published and unpublished decisions, and furnishes a telephone research service for Government employees and members of the public at no charge. While LIRS does not provide callers with legal analysis, it can provide the following types of information:

--whether an issue has been considered by GAO.

--citations to decisions of the Comptroller General involving a particular issue.

alleged violation, the extent of GAO's involvement will be to determine if appropriated funds were in fact used, and to refer the matter to the Justice Department if deemed appropriate or if requested to do so. Other examples are: antitrust law; 3/ the Hatch Act; 4/ and the application of the Internal Revenue Code. 5/

Apart from preparing litigation reports if requested by the Justice Department, GAO will not render an opinion on an issue which is the subject of current litigation except on stipulation of the parties or unless the court expresses an interest in receiving GAO's opinion. 6/ GAO has no similar policy on issues which are the subject of agency administrative proceedings. Rather, the determination is made on a case-by-case basis. 7/

Also, as an agent of the Congress, GAO has always considered it inappropriate to question the constitutionality of a statute enacted by the Congress, since this is a matter solely for determination by the courts. 8/ (In appropriate circumstances, GAO will, of course, apply clear judicial precedent on constitutional issues.)

Finally, GAO will not decide a question concerning which the determination of another agency is by law "final and conclusive." An example is agency determinations on the merits of a claim under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 242. This latter category is, of course, a matter of law rather than policy.

3/ 21 Comp. Gen. 56 (1941); 50 Comp. Gen 648 (1971); 59 Comp. Gen. 761 (1980); B-190983, December 21, 1979; B-194584, August 9, 1979.

4/ B-165548, January 3, 1969.

5/ B-147153, November 21, 1961; B-173783.127, February 7, 1975 (non-decision letter).

6/ 58 Comp. Gen. 282, 286 (1979); B-203737, July 14, 1981; B-179473, March 5, 1974. For examples of cases where GAO's opinion was requested by a court, see B-186494, July 22, 1976, and 56 Comp. Gen. 768 (1977).

7/ B-193920, April 10, 1979 (non-decision letter).

8/ B-114578, November 9, 1973; B-124985, August 17, 1955.

C. SCOPE AND ORGANIZATION OF THE FEDERAL APPROPRIATIONS LAW MANUAL

(1) Scope and Format

GAO's first attempt at issuing an "appropriations law manual" was a humble little booklet issued in September 1952 entitled "Federal Appropriations." It filled all of 22 pages, doubled spaced. The booklet was reissued in the 1960's and again in September 1972. Although much enlarged from the 1952 effort, the 1972 edition was still little more than a collection of case digests organized by subject matter.

This edition represents a total revision of both scope and content. Prompted largely by the scarcity of literature in this field, the editors have attempted to present as comprehensive a coverage as possible of the areas of law in which the Comptroller General renders decisions and which are not within the scope of the other OGC Manuals.

Manifestly, it is impossible to cover every decision. Thus, the Manual should be used as a starting point and not as a substitute for legal research. Considering the breadth of the subject matter, omissions are probably inevitable and, as they are discovered, they will be scheduled for inclusion in future revisions.

In addition, this edition tries to avoid, as far as possible, presenting a listing of decision digests with no connecting text. Rather, the approach has been to lay the foundation with textual discussion and to use the decisions to illustrate the application of a general principle and any exceptions. The objective is to make the Manual more useful to the novice or the occasional user who may be unfamiliar with a given subject, as well as to the more experienced user.

(2) Organization

This Manual has 15 chapters. Chapter 1 is a brief introductory chapter. The remaining chapters fall, very loosely, into two groups. The first group, Chapters 2 through 6, deals with broad concepts which are relevant regardless of the specific subject area. Chapter 2 provides some historical background and discusses several general principles of appropriations law and the appropriations process. Chapters 3 through 5 present

--whether a decision of the Comptroller General has been modified, overruled, or cited in subsequent decisions.

The telephone research service may be reached on (202) 275-5028. Copies of decisions for which a file number and date are known may be obtained, free of charge, by calling (202) 275-6241.

(a) Congressional Correspondence

As noted above, GAO prepares many legal opinions for committees and individual members of Congress. Formerly, documents prepared for Congress could not be released without the specific consent of the requestor or unless otherwise made public. Since 1977, generally speaking, they may be released after a waiting period of 30 days. If the document is signed by the Comptroller General or Deputy Comptroller General, or someone to whom the authority has been delegated in a particular context, it has the same effect as a decision, the only distinction being that it is prepared in letter rather than decision format. From the reader's perspective, there is and should be no difference. The citation form is identical to that for decisions, and some are now published.

(b) Office Memoranda

Questions are frequently presented by other divisions within GAO. The response is in the form of an internal memorandum, formerly signed by the Comptroller General, but now, with a few exceptions, signed by the General Counsel. The citation is the same for an unpublished decision, except that the suffix "O.M." (Office Memorandum) is added. Office Memoranda are not cited in decisions, and until 1977, were generally not releasable outside of GAO. Technically, an Office Memorandum is not a decision of the Comptroller General as provided in 31 U.S.C. §§ 74 and 82d, does not have the same legal or precedent effect, and should never be cited as a decision. This edition of the Manual includes some citations to Office Memoranda, to provide some guidance where there may be no formal decisions on a given point. As a caution, a footnote virtually identical to this paragraph or a similar comment in the text has been placed in a few chapters which contain citations to Office Memoranda.

(c) Audit Reports

Although most GAO audit reports do not contain discussion of legal issues, some do, often on the basis of an Office Memorandum provided by the Office of General Counsel. Where a legal conclusion is incorporated into an audit report signed by the Comptroller General, then the audit report would of course have more weight as authority than the "O.M.". An audit report is cited by its title, issuance date, and numerical designation. Until recent years, the same file numbering system was used as for decisions ("B-numbers"). Now, the designation for an audit report consists of the initials of the issuing division, the fiscal year, and the report number

the concept of "availability" of appropriations, that is, whether appropriated funds are "legally available" to be used in a given context. The three chapters recognize the three principal elements of availability--purpose, time, and amount. "Obligation of appropriations," Chapter 6, is a term of art and one of the most important concepts in appropriations law. Against the background of these general concepts, the second group, Chapters 7 through 15, explores a number of more specialized topics.

It will be apparent that the placement of a specific topic in a given chapter is frequently a close question, and while the editors have tried to use logic as a guide, some arbitrary decisions were made to achieve balance. Thus, the payment of judgments is closely related to Chapter 3 dealing with purpose restrictions, but occupies a separate chapter because there was sufficient material to warrant it. Similarly, the topic of firefighting services rendered by local bodies is treated as a purpose restriction although the cases frequently arise in the form of claims. There are many other examples, and the editors have attempted to cross-reference as much as possible.

(3) Authorities Cited 9/

One factor which restricted the coverage of prior versions of this Manual is that the only GAO materials cited were actual decisions. Policies then in effect precluded the citation of certain other relevant materials. As GAO policy on the release of GAO-produced documents has changed in recent years, it is now possible to cite other materials. In addition to the decisions, published and unpublished, which still constitute the most significant body of Comptroller General authority, this Manual includes, as appropriate, citations to the following GAO materials:

9/ Note on statutory citations: All citations to the United States Code (U.S.C.) are to the 1976 edition or its supplements unless specified otherwise. Section numbers and even title numbers may change over the years as a result of amendments or recodifications. For convenience, the editors have generally used current citations even though the reference decision may have used an older obsolete citation.

(although a "B-number" is also assigned). Reports are numbered sequentially within each fiscal year. Thus, the first report issued by the Energy and Minerals Division for FY 1980 would be designated EMD-80-1. Several audit reports are cited in this Manual, either as authority for some legal proposition or to provide useful supplementation to the discussion in the text.

(d) Non-Decision Letters

This is a letter, signed by an official other than the Comptroller General or Deputy Comptroller General, usually to an individual or organization not entitled by law to a formal decision. Several of these are cited throughout the Manual, either for a particularly clear statement of some policy or to supplement the material found in the decisions. Each is identified parenthetically. The citation form is identical to an unpublished decision.

(e) Circular Letters

A circular letter is a letter addressed simply to the "Heads of Federal Departments and Agencies." It is distributed automatically to all Federal agencies on GAO's distribution list. Circular letters are used for a variety of purposes and may emanate from a particular division within GAO or directly from the Comptroller General. Circular letters which announce significant changes in pertinent legal requirements or GAO audit policy or procedures are occasionally cited in this Manual. They are identified as such and often, but not always, bear file designations similar to unpublished decisions.

CHAPTER 2

THE LEGAL FRAMEWORK

A. BASIC DEFINITIONS

(1) Note on Definitions

The Congressional Budget Act of 1974, Public Law 93-344, contains the following provision:

> "The Comptroller General of the United States, in cooperation with the Secretary of the Treasury, the Director of the Office of Management and Budget, and the Director of the Congressional Budget Office, shall develop, establish, maintain, and publish standard terminology, definitions, classifications, and codes for Federal fiscal, budgetary, and program-related data and information. The authority contained in this section shall include, but not be limited to, data and information pertaining to Federal fiscal policy, revenues, receipts, expenditures, functions, programs, projects and activities. Such standard terms, definitions, classifications, and codes shall be used by all Federal agencies in supplying to the Congress fiscal, budgetary, and program-related data and information." 31 U.S.C. § 1152(a)(1).

The definitions developed pursuant to this authority are published in a GAO publication entitled "A Glossary of Terms Used in The Federal Budget Process," PAD-81-27 (March 1981). Definitions used throughout this Manual are based on this publication unless otherwise noted.

(2) Budget Authority vs. Appropriations

Congress finances Federal programs and activities by providing "budget authority." Budget authority is "authority provided by law to enter into obligations that will result in immediate or future outlays involving Federal Government funds." It includes appropriations, contract authority, and borrowing authority, but does not include the authority to insure or guarantee loans. 1/

1/ 31 U.S.C. § 1302(a)(2); "Glossary of Terms Used in the Federal Budget Process," p. 41. In references predating the Congressional Budget Act of 1974, the term "obligational authority" is frequently used instead of budget authority.

CHAPTER 2

THE LEGAL FRAMEWORK

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of (a) authority to borrow from the Treasury (authority to borrow funds from the Treasury that are realized from the sale of public debt securities), (b) authority to borrow from the public (authority to sell agency debt securities), or (c) a combination of the two. As with contract authority, new borrowing authority is generally limited to such extent or in such amounts as are provided in appropriation acts. 31 U.S.C. § 1351(a).

The authority to insure or guarantee loans is covered in Chapter 14 of this Manual. Unlike contract authority, an appropriation to liquidate loan guarantee authority does constitute budget authority. The difference is that in the case of loan guarantee authority, it is not known whether or to what extent liquidating appropriations will be necessary until there has been a default. See B-159687, March 16, 1976. Thus, contract authority is budget authority but its liquidating appropriation is not, whereas loan guarantee authority is not budget authority but its liquidating appropriation is.

An additional type of spending authority is "entitlement authority"--legislation that requires the payment of benefits to any person or government meeting the requirements established by such law, for example, social security benefits and veterans' pensions. 5/

As seen from the foregoing, not all budget authority is in the form of appropriations, and not all appropriations are budget authority.

(3) Types of Appropriations

Classification based on duration

(a) One-year appropriation. An appropriation which is available for obligation only during a specific fiscal year. This is the most common type of appropriation. It is also known as a "fiscal year" or "annual" appropriation.

(b) Multiple-year appropriation. An appropriation which is available for obligation for a definite period in excess of one fiscal year.

(c) No-year appropriation. An appropriation which is available for obligation for an indefinite period. A no-year appropriation is usually identified by such appropriation language as "to remain available until expended."

5/ Id., p. 57.

Appropriations are the most common form of budget authority. The term "appropriation" is defined as:

> "An authorization by an act of Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes." 2/

The term may also be used in a broader context to include "funds and authorizations to create obligations by contract in advance of appropriations, or any other authority making funds available for obligation or expenditure" (31 U.S.C. § 2), but for the most part it is used to refer to an act of Congress which makes funds available for withdrawal from the Treasury.

Appropriations do not represent cash actually set aside in the Treasury for the purposes specified in the appropriation act; they represent limitations of amounts which agencies may obligate for the purposes and during the time periods specified in the appropriation acts.

"Contract authority" is a form of budget authority under which contracts or other obligations may be entered into in advance of an appropriation or in excess of amounts otherwise available in a revolving fund. 3/ Legislation providing new contract authority must also provide that it shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation acts. 31 U.S.C. § 1351(a). Since contract authority itself is not an appropriation--that is, it provides the authority to enter into binding contracts but not the funds to make payments under them--it must be funded by a subsequent appropriation or the use of revolving fund collections to liquidate the obligations. An appropriation to liquidate contract authority is not counted as budget authority because the original contract authority itself constituted budget authority. B-171630, August 14, 1975.

"Borrowing authority" is statutory authority (in a substantive or appropriation act) "that permits a Federal agency to incur obligations and to make payments for specified purposes out of borrowed moneys." 4/ Borrowing authority may consist

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2/ "Glossary of Terms Used in the Federal Budget Process," p. 42.

3/ Id.

4/ Id.

B. HISTORICAL PERSPECTIVE

The first general appropriation act, passed by Congress in 1789, appropriated the total of $639,000 and illustrates what was once a relatively uncomplicated process:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage, the following sums, viz. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids." (1 Stat. 95)

However, as the size and scope of the Federal Government have grown, so has the complexity of the appropriations process.

In 1789, the House established the Ways and Means Committee to report on revenues and spending, only to disband it that same year following the creation of the Treasury Department. The House Ways and Means Committee was re-established to function permanently in 1795, and recognized as a standing committee in 1802.

On the Senate side, the Finance Committee was established as a standing committee in 1816. Up until that time, the Senate had referred appropriation measures to temporary select committees. By 1834 jurisdiction over all Senate appropriation bills was consolidated in the Senate Finance Committee.

In the mid-19th century, a move was begun to restrict appropriation acts to only those expenditures which had been previously authorized by law. The purpose was to avoid the delays caused when legislative items or "riders" were attached to appropriation bills. Rules were eventually passed by both Houses of Congress to require, in general, prior legislative authorizations for the enactment of appropriations.

Definite vs. indefinite

(a) Definite appropriation. An appropriation of a specific amount of money.

(b) Indefinite appropriation. An appropriation of an unspecified amount of money. An indefinite appropriation may appropriate all or part of the receipts from certain sources, the specific amount of which is determinable only at some future date, or it may appropriate "such sums as may be necessary" for a given purpose.

Current vs. permanent

(a) Current appropriation. An appropriation made by the Congress in, or immediately prior to, the fiscal year(s) during which it is available for obligation.

(b) Permanent appropriation. A "standing" appropriation which, once made, is always available for specified purposes and does not require repeated action by the Congress to authorize its use.

Unexpired vs. expired

(a) Unexpired appropriation. An appropriation which is available for obligation.

(b) Expired appropriation. An appropriation which is no longer available to incur new obligations although it is still available for the payment (liquidation) of existing obligations.

An appropriation may combine characteristics from the above groupings. For example, 31 U.S.C. §§ 724a and 725q-1, discussed in Chapters 12 and 15 of this Manual, respectively, are "permanent, indefinite" appropriations. The various types of appropriations are discussed in more detail in Chapter 4. The concept of obligation is covered in Chapter 6.

At present, appropriations are made in a series (currently 13) of regular appropriation acts plus one or more supplemental appropriation acts. 6/ Most regular appropriation acts are organized on the basis of one or more major departments and a number of smaller agencies (corresponding to the jurisdiction of appropriations subcommittees), although a few are based solely on function (e.g., foreign assistance, military construction).

6/ The most recent attempt at a consolidated appropriation act was the General Appropriation Act, 1951, 64 Stat. 595. It occupies over 170 pages in the Statutes at Large, and in the following year Congress resumed the practice of making several separate appropriation acts.

Under the financial strains caused by the Civil War, Appropriations Committees first appeared in both the House and the Senate, diminishing the jurisdiction of the Ways and Means and Finance Committees, respectively. Years later, the need for major reforms was again accentuated by the burdens of wartime, and following World War I Congress passed the Budget and Accounting Act of 1921 (31 U.S.C. §§ 1 et seq.).

Before 1921, departments and agencies generally made individual requests for appropriations. These submissions were compiled for congressional review in an uncoordinated "Book of Estimates." The Budget and Accounting Act authorized the President to submit a national budget each year and restricted the authority of the agencies to present their own proposals. With this centralization of authority for the formulation of the executive branch budget in the President and the newly established Bureau of the Budget, Congress also took steps to strengthen its jurisdiction over fiscal matters, including the establishment of the GAO.

Title III of the Budget and Accounting Act created the General Accounting Office as an independent agency in the legislative branch, with authority to investigate all matters pertaining to the use of appropriated funds by executive branch agencies. During this same time period, both the House and the Senate consolidated jurisdiction over all appropriation bills in a single committee in each body.

The most recent major changes were embodied in the Congressional Budget and Impoundment Control Act of 1974. Prompted by the growth of "backdoor spending," the Act restricts the use of borrowing authority and contract authority, and gives the Appropriations Committees a greater role in reviewing mandatory entitlements. Before this reform legislation was enacted, the extensive use of borrowing authority, contract authority and mandatory entitlements by legislative committees had significantly reduced the effective jurisdiction of the Appropriations Committees over the expenditure of public funds.

The Congressional Budget and Impoundment Control Act also established a detailed calendar governing the various stages of the budget and appropriations process, and imposed strict limitations on the impounding (or not spending) of appropriated funds by the executive branch. (See Section E of this Chapter for a discussion of the stages of the appropriations process and impoundment.)

in an appropriation, or from involving the Government in any obligation in advance of appropriations, except as authorized by law (31 U.S.C. § 665(a)). (See Chapter 5 for a detailed discussion of the Antideficiency Act.) Another statutory restriction prohibits the making of any contract or purchase unless, with certain exceptions, "the same is authorized by law or is under an appropriation adequate to its fulfillment" (41 U.S.C. § 11). These statutes have been applied broadly to prohibit not only direct obligations in excess or in advance of appropriations, but also any other liability which may ultimately require the expenditure of public funds. See, e.g., 48 Comp. Gen. 497 (1969); 42 Comp. Gen. 272 (1962).

One additional provision in the Constitution deserves brief mention. Article I, section 8, clause 12 provides that the Congress shall have power to "raise and support armies, but no appropriation of money to that use shall be for a longer term than two years." The two-year limit in clause 12 has been strictly construed and applies essentially to appropriations for personnel and for operations and maintenance, and not to other military appropriations such as weapon systems procurement or military construction. Notwithstanding, Congress has traditionally made appropriations for military personnel and operations and maintenance on a fiscal-year basis. See B-114578, November 9, 1973.

C. CONSTITUTIONAL BASE

The congressional appropriations power derives primarily from the Constitution. Article I, section 8 gives Congress the authority "to pay the debts and provide for the common defense and general welfare of the United States" and further empowers Congress

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers [assigned to the Congress] and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Article I, section 9 of the Constitution provides in part, "No money shall be drawn from the Treasury, but in consequence of appropriations made by law * * *." This is the basis of the so-called "power of the purse" and it means simply that no debt may be paid out of public funds, under any circumstances, unless the Congress has made an appropriation for that purpose. This does not mean that there must be a specific appropriation for each item of expenditure; rather, it means that there must be an appropriation which is "legally available" for the expenditure. The congressional appropriations power has been described as "the most important single curb in the Constitution on Presidential power." 7/

In addition to the basic power to determine whether or not to provide funds for a particular program or activity and the level of such funding, Congress has broad discretion to determine the purpose of appropriations, as well as the terms and conditions under which they are made. See, e.g., Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937); United States v. Price, 116 U.S. 43 (1885); Spaulding v. Douglas Aircraft Co., 60 F. Supp. 985 (S.D. Cal. 1945), aff'd, 154 F.2d 419 (9th Cir. 1946). Accordingly, the Congress is able to use the appropriations process as an affirmative tool to accomplish policy objectives and to establish priorities among Federal programs.

Several statutory provisions reflect the constitutional requirement for appropriations. For example, the Antideficiency Act prohibits any Government official from making an obligation or expenditure in excess of the amount available

7/ Corwin, The Constitution And What It Means Today, 101 (13th ed., 1975).

for the necessary appropriations. B-111810, March 8, 1974. However, statutory requirements for authorizations do exist in a number of specific situations. An example is section 660 of the Department of Energy Organization Act, 42 U.S.C. § 7270 ("Appropriations to carry out the provisions of this Act shall be subject to annual authorizations").

In addition, rules of the House of Representatives prohibit appropriations for expenditures not previously authorized by law. See Rule XXI(2), Rules of the House of Representatives. The effect of this Rule is to subject the offending appropriation to a "point of order." (Points of order are discussed separately in this Chapter.) A more limited provision exists in Rule XVI, Standing Rules of the Senate.

The majority of appropriations today are preceded by some form of authorization although, as noted, it is not statutorily required in all cases.

Authorizations take many different forms, depending in part on whether they are contained in the organic legislation or are separate. Authorizations contained in organic legislation may be "definite" (setting dollar limits either in the aggregate or for specific fiscal years) or "indefinite" (authorizing "such sums as may be necessary to carry out the provisions of this act"). An indefinite authorization serves little purpose other than to comply with House Rule XXI. Appropriation authorizations enacted as separate legislation resemble appropriation acts in structure, for example, the annual Department of Defense Appropriation Authorization Acts.

An authorization act is basically a directive to the Congress itself which Congress is free to follow or alter (up or down) in the subsequent appropriation act. (The relationship between authorization acts and appropriation acts is discussed in more detail in Section F of this Chapter.)

Thus, the typical sequence is: (1) organic legislation, (2) authorization of appropriations, if not contained in the organic legislation, and (3) the appropriation act.

Appropriations, in the broadest context, also come in many forms. Appropriations are usually stated in maximum dollar amounts and for definite periods of time. However, in some cases (formula grant and entitlement programs, for example) maximum dollar amounts may also be minimums, and certain appropriations (i.e., "no-year" and "permanent, indefinite") do not specify definite periods of availability.

D. DISTINCTION BETWEEN AUTHORIZATION AND APPROPRIATION

Appropriation acts must be distinguished from two other types of legislation: "enabling" or "organic" legislation and "appropriation authorization" legislation. Enabling or organic legislation is legislation which creates an agency, establishes a program, or prescribes a function, such as the Department of Education Organization Act or the Federal Water Pollution Control Act. While the organic legislation may provide the necessary authority to conduct the program or activity, it, with relatively rare exceptions, does not provide any money.

"Appropriation authorization" legislation, as the name implies, is legislation which authorizes the appropriation of funds to implement the organic legislation. It may be included as part of the organic legislation or it may be separate. It also does not provide any money. Except for statutes creating revolving funds (Chapter 15, this Manual), only the appropriation act itself permits the withdrawal of funds from the Treasury. The principle has been stated as follows:

> "The mere authorization of an appropriation does not authorize expenditures on the faith thereof or the making of contracts obligating the money authorized to be appropriated." 16 Comp. Gen. 1007, 1008 (1937).

Restated, an authorization of appropriations does not constitute an appropriation of public funds, but contemplates subsequent legislation by the Congress actually appropriating the funds. 27 Comp. Dec. 923 (1921); 35 Comp. Gen. 306 (1955). 8/

Like the organic legislation, authorization legislation is considered and reported by the committees with legislative jurisdiction over the particular subject matter, whereas the appropriation bills are exclusively within the jurisdiction of the appropriations committees.

There is no general requirement, either constitutional or statutory, that an appropriation act be preceded by a specific authorization act. The existence of a statute imposing substantive functions upon an agency which require funding for their performance is itself sufficient authorization

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8/ See also: 4 Comp. Gen. 219 (1924); 15 Comp. Gen. 802 (1936); 26 Comp. Gen. 452 (1947); 37 Comp. Gen. 732 (1958).

E. "LIFE CYCLE" OF AN APPROPRIATION

(1) Executive Formulation and Transmittal

The first step in the appropriations process is actually the formulation of the Federal budget--a function of the executive branch. The Budget and Accounting Act of 1921 (31 U.S.C. §§ 1 et seq.) authorized the President to submit a national budget each year and gave the (then) Bureau of the Budget the authority "to assemble, correlate, revise, reduce, or increase the requests for appropriations of the several departments or establishments." Prior to 1921 Congress had received the "Book of Estimates" which consisted primarily of uncoordinated separate agency submissions. The Budget and Accounting Act further reinforced the centralization of authority in the President and the Bureau by denying Federal agencies the right to seek funds outside of regular budget channels, except at legislative request. Finally, the Budget and Accounting Act required the Bureau to make efficiency studies and to aid any congressional committee with jurisdiction over revenues or appropriations.

The Office of Management and Budget (OMB) was established by Part 1 of Reorganization Plan No. 2 of 1970 (84 Stat. 2085) which designated the Bureau of the Budget as OMB and transferred all the authority vested in the Bureau and its Director to the President. By Executive Order 11541, July 1, 1970, the President, in turn, delegated that authority to the Director of OMB. The primary functions of OMB include assistance to the President in the preparation of the budget and the formulation of the fiscal program of the Government, supervision and control of the administration of the budget, review of the organization and management of the executive branch and evaluation of Federal programs.

The actual formulation of the President's budget for any given fiscal year begins several years before its transmittal to Congress. The multi-year budget planning system includes review of agency zero-based budget requests in relation to proposed total outlays and revenues. The probable effects of budget decisions in relation to current and prospective economic conditions are also considered. The President is required to transmit his budget estimates and detailed justification material to the Congress within 15 days of the start of each new session in January. 31 U.S.C. § 11.

(2) Congressional Action

In exercising the broad discretion granted by the Constitution, Congress can approve funding levels contained

In summary, the Congress usually enacts legislation that authorizes an agency to carry out a particular program and, in some cases, includes guidance on the amount that should later be appropriated for the program. Many programs are authorized for a specified number of years or indefinitely, while others (notably education and health programs and defense procurement) require annual authorizing legislation. An appropriation for the program is then usually provided in a separate, subsequent action. Generally, budget authority becomes available each year only as voted by the Congress. However, in a number of cases (for example, most trust fund appropriations) Congress has enacted permanent appropriations.

changes based on the second concurrent resolution must be reported in a reconciliation bill (or reconciliation resolution in cases where the legislation to be amended is not yet an enrolled bill). After action on the reconciliation bill is completed (which under the Congressional Budget Act must be no later than September 25th), Congess may not consider any spending or revenue legislation that would breach any of the budget limits contained in the second concurrent resolution. Supplemental appropriations (See Chapter 5, this Manual), which would cause spending to exceed or revenues to fall below the levels established by the secnd concurrent budget resolution, may be made only if the Congress first changes those levels by adopting a new budget resolution. (For a more detailed discussion of the process outlined in this paragraph, see B-115398, November 13, 1975.)

Continuing resolutions

The fiscal year now begins on the first of October (effective October 1, 1976, under the terms of the Congressional Budget and Impoundment Control Act of 1974). If action on appropriations is not completed by that date, the Congress may pass a "continuing resolution" to provide authority for the affected agencies to continue to operate, usually until their regular appropriations are enacted. (Continuing resolutions are discussed in detail in Chapter 7 of this Manual.)

Points of order

A number of requirements relevant to an understanding of appropriations law and the legislative process are found in rules of the Senate and/or House of Representatives. One example, noted earlier in this Chapter, is the prohibition against making appropriations for objects not previously authorized by law. Others are the prohibition against including general legislation in appropriation acts 9/ (Senate Rule XVI, House Rule XXI) and the prohibition against consideration by a conference committee of matters not committed to it by either House (Senate Rule XXVIII, House Rule XXVIII). The applicability of Senate and House rules is exclusively within the province of the particular House and a matter on which the Comptroller General will not render an opinion.

In addition, rather than expressly prohibiting a given item, legislation sometimes provides that it shall not be in order for the Senate or House to consider a bill or resolution which contains that item. An example is 31 U.S.C. § 1351(a), mentioned in Section A of this Chapter.

9/ Whether a given item is general legislation or merely a condition on the availability of an appropriation is frequently a difficult question.

in the President's budget, increase or decrease them, eliminate proposals, or add programs not requested by the Administration. The Congressional Budget Act requires that the Congress first agree on Government-wide budget totals before considering individual appropriation measures. Adoption of the first concurrent budget resolution (containing overall targets for receipts, budget authority and outlays) must occur no later than May 15th of each year. Both Houses of Congress have Budget Committees with responsibility for reporting on budget resolutions.

Review of individual appropriations then begins in the House of Representatives. Each subcommittee of the House Appropriations Committee studies appropriation proposals and evaluates the performance of the agencies within its oversight jurisdiction. Typically, appropriation hearings are conducted by each subcommittee. Federal officials give testimony concerning both the costs and achievements of the various programs administered by their agencies, and provide justifications for their funding requests. Eventually each subcommittee reports a single appropriation bill for consideration by the entire Committee and then the full House membership. At present, the Congress considers thirteen regular appropriation acts every year.

When the House passes an appropriation bill it is forwarded to the Senate. As in the House, each appropriation measure is first considered in subcommittee and then reported by the full Appropriations Committee to be voted upon by the full Senate. In the event of variations in the Senate and House passed versions of a particular appropriations bill, a conference committee including representatives of both Houses of Congress is formed. It is the function of the conference committee to resolve all differences, but the full House and Senate (in that order) must also vote to approve the conference report.

Following either the Senate's passage of the House version of an appropriation measure, or the approval of a conference report by both bodies, the enrolled bill is forwarded to the President for his signature or veto.

By September 15th of each year, Congress must enact a second concurrent budget resolution. This resolution is adopted after action has been completed on all appropriation and tax bills, and sets binding totals for the Federal budget. The second budget resolution may also direct certain committees to recommend changes in laws, bills or resolutions in order to bring them into conformity with the overall levels established for budget authority, revenues, and the public debt. Any

amount appropriated by Congress will not be expended or obligated by the administration. An impoundment is defined as an action or inaction by an officer or employee of the United States that precludes the obligation or expenditure of budget authority provided by the Congress. One of the key purposes of the Congressional Budget and Impoundment Control Act of 1974 was to give Congress greater control over the impoundment of appropriated funds. There are two types of impoundment action--deferral and rescission.

A deferral is a postponment of budget authority--withholding or delaying the obligation or expenditure of budget authority. Section 1013 of the Act requires a special message from the President to the Congess reporting any proposed deferral of budget authority. Deferrals may not extend beyond the end of the fiscal year in which the message reporting the defferal is transmitted, and may be overturned by the passage of an impoundment resolution by either the House or the Senate.

A rescission involves the cancellation of budget authority previously provided by Congress (before that authority would otherwise expire), and can only be accomplished through legislation. Section 1012 of the Impoundment Control Act requires the President to advise Congress of any proposed rescissions, again in a special message. Within 45 days of continuous session following receipt of the proposal, both Houses of Congress must pass a rescission bill or joint resolution in order to cancel, in whole or in part, previously granted budget authority. Unless Congress acts to approve the proposed rescission within that time, the budget authority must be made available for obligation.

In addition to the deferral or rescission of budget authority for policy reasons, portions of budget authority may be set aside for contingencies or to effect a savings whenever made possible by changes in requirements or greater efficiency of operations. Budgetary reserves are authorized by the Antideficiency Act (31 U.S.C. § 665). However, amendments to the Antideficiency Act contained in section 1002 of the Impoundment Control Act restrict the establishment of such reserves and require that they be reported to the Congress.

The Impoundment Control Act of 1974 requires the Comptroller General to monitor the performance of the executive branch in reporting proposed deferrals and rescissions to the Congress. A copy of each special message reporting a proposed deferral or rescission must be delivered to the Comptroller General, who must review each such message and present his views to the Senate and House of Representatives. If the

The effect of these rules and of statutes like 31 U.S.C. § 1351(a) is to subject the non-complying bill to a "point of order." A point of order is a procedural objection raised by a Member alleging a departure from rules governing the conduct of business. It differs from an absolute prohibition in that (a) it is always possible that no one will raise it, and (b) if raised, it may or may not be sustained. Also, some measures may be considered under special resolutions waiving points of order.

The potential effect of a rule or statute subjecting a provision to a point of order is limited to the pre-enactment stage. If a point of order is not raised, or raised and not sustained, the provision if enacted is no less valid. To restate, a rule subjecting a given provision to a point of order has no effect or application once the legislation or appropriation has been enacted. 57 Comp. Gen. 34 (1977); 34 Comp. Gen. 278 (1954); B-123469, April 14, 1955.

(3) Budget Execution and Control

Once approved, the budget becomes the financial plan for the operations of each agency during the fiscal year. The Office of Management and Budget apportions or distributes budgeted amounts to the executive branch agencies, thereby making funds in appropriation accounts (administered by the Treasury Department) available for obligation. 31 U.S.C. § 665(c)-(f). The apportionment system through which appropriations and other budgetary resources are distributed by time periods (usually quarterly) or by activities, is intended to achieve an effective and orderly use of available authority, and to reduce the need for supplemental or deficiency appropriations. Each agency then makes allotments pursuant to the OMB apportionments or other statutory authority. 31 U.S.C. § 665(g). An allotment is a delegation of authority to agency employees which allows them to incur obligations within a specified amount. 10/

Impoundment

In addition to the possibility that amounts appropriated for a given agency or activity may not be sufficient, there is also the possibility that, for a variety of reasons, the full

10/ Note the distinction in terminology: Congress appropriates, OMB apportions, and the receiving agency allots (or allocates) within the apportionment.

agency must submit a written statement of the actions taken with respect to the recommendations (1) to the Senate Committee on Governmental Affairs and the House Committee on Government Operations not later than sixty days after the date of the report, and (2) to the Senate and House Appropriations Committees in connection with the agency's first request for appropriations submitted more than sixty days after the date of the report.

"Federal agency" for purposes of the Legislative Reorganization Act is defined in 31 U.S.C. § 1157. The definition is broad. For example, it includes wholly-owned Government corporations (see Chapter 15, this Manual), but not "mixed-ownership" Government corporations such as the Federal Deposit Insurance Corporation. B-114831-O.M., July 28, 1975. 11/

Although "section 236" recommendations are most commonly made in audit reports, they are occasionally made in Comptroller General decisions as well. A "section 236" recommendation included in a decision will always cite that section. See, e.g., 59 Comp. Gen. 1 (1979); 58 Comp. Gen. 350 (1979); 53 Comp. Gen. 547 (1974).

Role of GAO: audit exceptions

Much of GAO's authority stems from its "account settlement" authority. 31 U.S.C. §§ 44, 71, 72, 74. By law, subject to certain exceptions, GAO is required to audit and settle the accounts of certifying and disbursing officers.

11/ Questions are frequently presented by other divisions within GAO. The response is in the form of an internal memorandum, formerly signed by the Comptroller General, but now, with few exceptions, signed by the General Counsel. The citation is the same as for an unpublished decision, except that the suffix "-O.M." (Office Memorandum) is added. Office Memoranda are not cited in decisions and, until 1977, were generally not releasable outside of GAO. Technically, an Office Memorandum is not a decision of the Comptroller General as provided in 31 U.S.C. §§ 74 and 82d, may not have the same legal or precedent effect, and should never be cited as a decision. This edition of the Manual includes some citations to Office Memoranda, to provide some guidance where there may be no formal decisions on a given point.

executive branch establishes a reserve or defers or proposes to defer budget authority and fails to transmit a special message to the Congress, the Comptroller General is authorized to make the report. The Comptroller General is also authorized to report to the Congress on any special message transmitted by the executive branch which has incorrectly classified a deferral or a rescission. 31 U.S.C. §§ 1404(b), 1405.

In the event Congress fails to pass a rescission bill, or either House of the Congress disapproves a deferral, and the President fails to make budget authority available for obligation as required, the Comptroller General is empowered to bring a civil action in the United States District Court for the District of Columbia to require that the budget authority be made available. 31 U.S.C. § 1406.

A comprehensive discussion of the Impoundment Control Act of 1974 and GAO's role under it may be found in 54 Comp. Gen. 453 (1974). For a detailed discussion of impoundment before the 1974 legislation, see B-135564, July 26, 1973.

(4) Disposition of Appropriation Balances

This topic is covered in Chapter 4 of this Manual.

(5) Audit and Review

In the broad sense, audit and review may be viewed as the final stage of the appropriation process. Each agency or department has the initial responsibility for assuring that its application of public funds adheres to the terms of the pertinent authorization and appropriation acts, as well as any other relevant statutory provisions. In addition, GAO regularly audits Federal programs as an investigator or "watchdog" for the Congress.

Role of GAO: recommendations

As noted in Chapter 1, GAO examines the financial, management, and program activities of Federal agencies, and evaluates the efficiency, effectiveness, and economy of agency operations. GAO's reports to the Congress contain both objective findings and recommendations for improvement. Recommendations may be addressed to the Congress (for changes in legislation) or to agency heads (for action which the agency is authorized to take under existing law).

Under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176, whenever GAO issues a report which contains recommendations to the head of any Federal agency, the

F. STATUTORY INTERPRETATION: DETERMINING CONGRESSIONAL INTENT

The complexity of the appropriations process necessarily means that questions arise concerning the interpretation of certain statutory provisions. In order to resolve such questions, it is often necessary to decide which provision controls, or what the Congress intended when the authorization or appropriation was enacted. This section will outline some of the principal issues of statutory construction as they occur in appropriations law. This section is essentially limited to principles which are not covered elsewhere in the Manual.

(1) What Constitutes An Appropriation

The starting point is 31 U.S.C. § 627, which provides:

> "No Act of Congress passed after June 30, 1906, shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed."

Thus, the rule is that the making of an appropriation must be expressly stated. An appropriation cannot be inferred or made by implication. E.g., 50 Comp. Gen. 863 (1971).

Regular annual and supplemental appropriation acts present no problems in this respect as they will be apparent on their face. They, as required by 1 U.S.C. § 105, bear the title "An Act making appropriations * * *." However, there are situations in which statutes other than regular appropriation acts may be construed as making appropriations.

Under the above rule, it is not necessary that the statute actually use the word "appropriation." If the statute contains a specific direction to pay and a designation of the funds to be used, such as a direction to make a specified payment or class of payments "out of any money in the Treasury not otherwise appropriated," then this amounts to an appropriation. 13 Comp. Gen. 77 (1933).

For example, a private relief act which directs the Secretary of the Treasury to pay, out of any money in the Treasury not otherwise appropriated, a specified sum of money to a named individual constitutes an appropriation. 23 Comp. Dec. 167, 170 (1916); 6 Comp. Dec. 514, 516 (1899). However,

(Chapter 10 of this Manual covers accountable officers, their liability, and provisions for their relief.) At one time, this function was accomplished by individual voucher examination. As the Federal government has grown, and as records have become increasingly computerized, the nature of the function has evolved. Now, "account settlement" consists of such elements as the testing of transactions, the examination of systems, the review of administrative surveillance and the effectiveness of collection and disbursement procedures. See Title 3, GAO Policy and Procedures Manual for Guidance of Federal Agencies (3 GAO), Chapter 8.

An "audit exception" is a formal action which may be used upon discovery of an irregularity in an account. Procedures for "taking an exception" are contained in 3 GAO, Chapter 7. The first step is the issuance of a "Notice of Exception" to the agency concerned. The issuance of a Notice of Exception does not itself constitute a definite determination of liability. It has been described as "in the nature of a challenge to the propriety of a certifying officer's action in certifying the voucher for payment." B-69611, October 27, 1947.

The certifying or disbursing officer, through his or her agency, then has the opportunity to respond to the exception. See, e.g., B-194727, October 30, 1979 (non-decision letter). It is the accountable officer's responsibility to establish the propriety of the payment. 13 Comp. Gen. 311 (1934). If the reply to the exception is satisfactory, the exception will be withdrawn. If the reply does not provide a satisfactory basis to remove the exception, the item will be disallowed in the account. In that event, the accountable officer is personally liable to the United States for the amount of the improper payment(s).

Technically, the term "disallowance" applies only to disbursing officers since a certifying officer does not have physical possession of funds and thus does not have an "account" in the same sense that a disbursing officer does. Thus, strictly speaking, GAO "disallows an expenditure" in the account of a disbursing officer and "raises a charge" against a certifying officer. See 32 Comp. Gen. 499, 501 (1953). For purposes of GAO's account settlement function, the certifying officer's "account" consists of certified vouchers and supporting documents. B-147293-O.M., February 21, 1962.

Gen. 323 (1970); the Department of Defense commissary surcharge fund, 57 Comp. Gen. 311 (1978); the Federal Prison Industries Fund established by 18 U.S.C. § 4126, 60 Comp. Gen. 323 (1981); and, to a limited extent, the National Defense Stockpile Transaction Fund, B-197118, January 14, 1980, and B-199216, July 21, 1980. These cases are essentially an outgrowth of a much earlier decision, 13 Comp. Dec. 219 (1906), which held that 31 U.S.C. § 627 refers to the general fund of the Treasury, not to money required to be deposited in the Treasury as a "special fund."

The "special fund" line of decisions was also applied with respect to mobile home inspection fees collected by the Secretary of Housing and Urban Development even though the statute involved did not expressly direct the establishment of a special fund, since it was apparent that such a fund was a necessary implementation procedure and the expenditure of the collections (to defray the cost of the inspection program) did not involve the payment of monies out of the general fund of the Treasury. 59 Comp. Gen. 215 (1980).

The question of whether a particular statute constitutes an appropriation is important for several reasons. First, as noted, it determines whether particular funds--which do not necessarily have to come from the Treasury--are available for obligation or expenditure without further congressional action. The determination is also important because many statutory restrictions apply only to "appropriated funds." Thus, funds which the Congress makes available for expenditure by Government corporations are considered "appropriated funds" even where they are derived from a source other than the Treasury. Under this concept, user fee toll charges collected by the Saint Lawrence Seaway Development Corporation were held to be appropriated funds in B-193573, January 8, 1979. This decision was modified and affirmed in B-193573, December 19, 1979, which noted that the capitalization of a Government corporation, whether a lump-sum appropriation in the form of capital stock or the authority to borrow through the issuance of long term bonds to the United States Treasury, consists of "appropriated funds." The decision states:

> "[A]ny time the Congress specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation or expenditure, that constitutes an appropriation, whether the language is found in an appropriation act or in other legislation."

it authorizes payment only to the individual named, and the Comptroller General has held that it does not authorize reimbursement to an agency where the agency erroneously paid the individual before the private act had been passed. In this situation, the purpose for which the appropriation was made had ceased to exist. B-151114, August 26, 1964. A private relief act which contains merely an authorization and direction to pay but no designation of the funds to be used does not make an appropriation. 21 Comp. Dec. 867 (1915); B-26414, January 7, 1944; unpublished decision of April 16, 1915, 73 MS Comp. Dec. 195. (Similar language in private relief legislation had been viewed as constituting an appropriation prior to the enactment of 31 U.S.C. § 627. See 4 Comp. Dec. 325, 327 (1897); 6 Comp. Dec. 514, 516 (1899).)

A 1978 decision concerned section 11 of the Federal Fire Prevention and Control Act of 1974, which authorizes the Secretary of the Treasury to reimburse local fire departments or districts for costs incurred in fighting fires on Federal property. Since the statute directed the Secretary to make payments "from any moneys in the Treasury not otherwise appropriated" (i.e., it contained both the specific direction to pay and a designation of the funds to be used), the Comptroller General concluded that section 11 constituted a permanent indefinite appropriation. B-160998, April 13, 1978.

Legislation enacted in 1978 authorized the U.S. Treasury to make an annual prepayment to Guam and the Virgin Islands of the amount estimated to be collected over the course of the year for certain taxes, duties, and fees. While it was apparent that the prepayment at least for the first year would have to come from the general fund of the Treasury, the legislation was silent as to the source of the funds for the prepayments, both for the first year and for subsequent years. It was concluded that, while the statute may have established a permanent authorization, it was not sufficient under 31 U.S.C. § 627 to constitute an actual appropriation. B-114808, August 7, 1979. (Congress subsequently made the necessary appropriation. Pub. L. No. 96-126, November 27, 1979, 93 Stat. 954, 966.)

Statutes which authorize the collection of fees and their deposit into a particular fund, and which make the fund available for expenditure for a specified purpose, have been viewed as constituting continuing or permanent appropriations; that is, the money is available for obligation or expenditure without further action by the Congress. This principle has been applied to revolving funds, 35 Comp. Gen. 615 (1956) and 35 Comp. Gen. 436 (1956); a special deposit account, 50 Comp.

(2) Effect of Budget Estimates

(a) "Lump-Sum" vs. "Line Item"

Years ago, it was the common practice of Congress to write appropriation acts quite specifically by breaking down particular spending objects into a number of separate "line item" appropriations. Under this approach, each line item would be legally available only for the specific object described. The trend in recent years has favored the enactment of "lump-sum" appropriations, which are stated in terms of broad object categories such as "salaries and expenses," "operations and maintenance," or "research and development."

(b) Budget Justifications

In supporting requests for lump-sum appropriations, agencies still present to the Appropriations Committees detailed justifications which explain how they propose to use the appropriation. For example, an agency seeking a $10 million lump-sum appropriation for research and development might identify ten $1 million projects to be funded.

Where an amount to be expended for a specific purpose is included in a budget estimate, and that amount is subsequently appropriated by the Congress, the appropriation is legally available for the expenditure even though the appropriation act does not make specific reference to it. 23 Comp. Dec. 547 (1917); 26 Comp. Gen. 545 (1947); 28 Comp. Gen. 296, 298 (1948); 35 Comp. Gen. 306, 308 (1955); A-22070, March 30, 1928; B-27425, August 7, 1942; B-51630, September 11, 1945; B-125404, September 16, 1955. However, the inclusion of an item in departmental budget estimates for an expenditure which is otherwise prohibited by law, and the subsequent appropriation of funds without specific reference to the item, do not constitute authority for the proposed expenditure or make the appropriation available for that purpose. 26 Comp. Gen. 545, supra; 6 Comp. Gen. 573 (1927); see also 18 Comp. Gen. 533 (1938).

Budget estimates are not legally binding on an agency unless carried into (either specified in or incorporated by reference) the appropriation act itself. Thus, an agency operating under a lump-sum appropriation may exceed the budget estimate for any given item as long as it does not exceed the lump-sum appropriation or violate any other provision of law. 17 Comp. Gen. 147 (1937); B-118357, February 17, 1954; B-149163, June 27, 1962; see also 39 Comp. Gen. 784 (1960).

However, the decision went on to point out that, even though the funds were "appropriated funds" under the broad definition in 31 U.S.C. § 2 (Section A, this Chapter), many of the restrictions on the use of appropriated funds would not be applicable by virtue of the Corporation's organic legislation and its status as a corporation. (See Chapter 15, this Manual.)

(3) Reprogramming and Transfer

Reprogramming must be distinguished from the related concept of transfer. Reprogramming is the utilizaton of funds in an appropriation account for purposes other than those contemplated at the time of appropriation; in other words, the shifting of funds from one object to another within an appropriation. Transfer is the shifting of funds between appropriations. Thus, if an agency receives a lump-sum appropriation for Operations and Maintenance and another for Capital Expenditures, a shifting of funds from Operations and Maintenance to Capital Expenditures is a transfer, while a shifting of funds from one project to another within the Capital Expenditures account is reprogramming.

Transfer is prohibited without statutory authority. See, e.g., 17 Comp. Dec. 7 (1910); 33 Comp. Gen. 216 (1953); 33 Comp. Gen. 214 (1953); B-178205, April 13, 1976. This rule follows from the requirements of 31 U.S.C. § 628, which prohibits the use of appropriations for other than their intended purpose (Chapter 3, this Manual), and 31 U.S.C. § 665, the Antideficiency Act, which prohibits obligations or expenditures in excess of or in advance of appropriations (Chapter 5, this Manual). The prohibition against transfer is now codified in 31 U.S.C. § 628-1. An agency's erroneous characterization of a proposed transfer as a "reprogramming" is irrelevant. See B-202362, March 24, 1981.

Some agencies have limited transfer authority. Such authority will commonly set a percentage limit on the amount that may be transferred from a given appropriation and/or the amount by which the receiving appropriation may be augmented. A transfer pursuant to such authority is, of course, entirely proper. B-167637, October 11, 1973. In B-151157, June 27, 1963, the Comptroller General concluded that the use of statutory transfer authority was not precluded by the fact that the amount of the "receiving appropriation" had been reduced from the budget request by the legislative committees.

The prohibition against tranfer without statutory authority applies equally to tranfers between agencies. 17 Comp. Dec. 174 (1910); 4 Comp. Gen. 848 (1925); 7 Comp. Gen. 524 (1928). See also 26 Comp. Gen. 545 (1947); 31 Comp. Gen. 109 (1951). The major source of interagency fund transfers today is the Economy Act (see Chapter 8, section entitled "Interagency Services").

This construction provides agencies with some flexibility when unforeseen developments, such as changes in requirements or operating conditions, occur.

Despite the fact that agencies are not required to adhere to budget estimates, there are practical constraints to be considered. As the House Appropriations Committee pointed out in its report on the 1974 Defense Department appropriation bill:

> "In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the detailed justifications which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills." H.R. Rep. No. 93-662, 93d Cong. 1st. Sess. 16 (1973).

One means of accommodating the agencies' desire for flexibility and the congressional interest in control has been the development of "reprogramming" procedures (see below).

Some agencies, such as the Defense Department, have detailed regulations on reprogramming. In 56 Comp. Gen. 201 (1976), failure by the Navy to complete a form required by Defense Department reprogramming regulations was held not sufficient to support a claim for proposal preparation costs by an unsuccessful bidder upon cancellation of the proposal.

Reprogramming is usually a non-statutory arrangement. This means that there is no general statutory provision either authorizing or prohibiting it, and it has evolved largely in the form of informal (i.e., non-statutory) agreements between various agencies and their congressional oversight committees. Thus, as a matter of law, an agency is free to reprogram unobligated funds as long as the expenditures are within the general purpose of the appropriation and are not in violation of any other specific limitation or otherwise prohibited. E.g., B-123469, May 9, 1955. This is true even though the agency may already have administratively allotted the funds to a particular object. 20 Comp. Gen. 631 (1941). Reprogramming policies, procedures, and practices vary considerably among Federal agencies. There are at present no general reprogramming guidelines applicable to all agencies.

In some cases, Congress has attempted to regulate reprogramming by statute, and of course any applicable statutory provisions must be followed. For example, a provision frequently found in Defense Department appropriation acts prohibits the use of funds to prepare or present a reprogramming request to the Appropriations Committees "where the item for which reprogramming is requested has been denied by the Congress." The Comptroller General has construed this provision as prohibiting a reprogramming request which would have the effect of restoring funds which had been specifically deleted in the legislative process; that is, the provision is not limited to the denial of an entire project. See "Legality of the Navy's Expenditures for Project Sanguine During Fiscal Year 1974," LCD-75-315, January 20, 1975. Absent such a statutory provision, a reprogramming which has the effect of restoring funds deleted in the legislative process, which had been approved by both the appropriations and the legislative committees, has been held not legally objectionable. B-195269, October 15, 1979.

Reprogramming frequently involves some form of notification to, and in some instances the affirmative approval by, the appropriations and/or legislative committees. In a few cases, the notification and/or approval process is prescribed by statute. However, in most cases, the committee review process is non-statutory, and derives from instructions in committee reports, hearings, or other correspondence. In this context, it provides an element of congressional control over spending flexibility short of resort to the full legislative process. Absent a statutory basis, requirements imposed by committees for approval of reprogrammings are not legally binding upon the agencies. B-174702, July 24, 1974. Compliance with such non-statutory requirements is largely a matter of "keeping faith" with the pertinent committees.

(c) A specific appropriation for the construction of an additional wing on the Navy Department Building could not be supplemented by a more general appropriation to build a larger wing desired because of increased needs. 20 Comp. Gen. 272 (1940).

(d) Appropriations of the District of Columbia Health Department could not be used to buy penicillin to be used for Civil Defense purposes because the District had received a specific appropriation for "all expenses necessary for the Office of Civil Defense." 31 Comp. Gen. 491 (1952).

Further, the fact that an appropriation for a specific purpose is included in a general appropriation does not deprive it of its character as an appropriation for the particular purpose designated, and where such specific appropriation is available for the expenses necessarily incident to its principal purpose, such incidental expenses may not be charged to the more general appropriation. 20 Comp. Gen. 739 (1941). In the cited decision, a general appropriation for the Geological Survey contained the provision "including not to exceed $45,000 for the purchase and exchange * * * of * * * passenger-carrying vehicles." It was held that the costs of transportation incident to the delivery of the purchased vehicles were chargeable to the specific $45,000 appropriation and not to the more general portion of the appropriation.

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, where the reason for using corporate funds was to avoid a restriction applicable to the specific appropriation. B-142011, June 19, 1969.

Of course, the rule that the specific governs over the general is not peculiar to appropriation law. It is a general principle of statutory construction and applies equally to provisions other than appropriation statutes. E.g., B-152722, August 16, 1965. However, another principle of statutory construction is that two statutes should be construed harmoniously so as to give maximum effect to both wherever possible. In dealing with non-appropriation statutes, the relationship between the two principles has been stated as follows:

(4) Specific vs. General Appropriations

RULE: An appropriation for a specific object is available for that object to the exclusion of a more general appropriation which might otherwise be considered available for the same object, and the exhaustion of the specific appropriation does not authorize charging any excess payment to the more general appropriation. 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.

The cases illustrating this rule are legion. 12/ Generally, the fact patterns and the specific statutes involved are of secondary importance. The 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 the more general appropriation or to use it as a "back-up." A few cases are summarized as examples:

(a) A State Department appropriation for "publication of consular and commercial reports" could not be used to purchase books in view of a specific appropriation for "books and maps." 1 Comp. Dec. 126 (1894). The Comptroller of the Treasury referred to the rule as having been well-established "from time immemorial." Id. at 127.

(b) The existence of a specific appropriation for the expenses of repairing the United States courthouse and jail in Nome, Alaska, precludes the charging of such expenses to more general appropriations such as "Miscellaneous expenses, U.S. Courts" or "Support of prisoners, U.S. Courts." 4 Comp. Gen. 476 (1924).

12/ See, for example: 6 Comp. Dec. 124 (1899); 4 Comp. Gen. 173 (1924), reversed by 4 Comp. Gen. 471 (1924) (based on additional information establishing that the expense was not properly chargeable to the specific appropriation); 5 Comp. Gen. 399 (1925) and cases cited therein; 7 Comp. Gen. 459 (1928); 11 Comp. Gen. 313 (1932); 17 Comp. Gen. 23 (1937); 17 Comp. Gen. 974 (1938); 18 Comp. Gen. 1013 (1939); 19 Comp. Gen. 324 (1939); 23 Comp. Gen. 749 (1944); 24 Comp. Gen. 807 (1945); 36 Comp. Gen. 526 (1957); 38 Comp. Gen. 758, 767 (1959); 46 Comp. Gen. 198 (1966); B-70219, January 19, 1948; B-183922, August 5, 1975; B-202362, March 24, 1981.

(5) General Provisions: When Construed As Permanent Legislation

Appropriation acts, in addition to making appropriations, frequently contain a variety of restrictions on the availability of the appropriations. They come in two forms: (a) "provisos" attached directly to the appropriating language, and (b) general provisions. A general provision may apply solely to the act in which it is contained ("No part of any appropriation contained in this Act shall be used * * * "), or it may have general applicability ("No part of any appropriation contained in this or any other Act shall be used * * *"). Such a restriction is no less effective merely because it is contained in an appropriation act. E.g., United States v. Dickerson, 310 U.S. 554 (1940). General provisions may also be phrased in the form of positive authority rather than restrictions on the use of appropriations.

As noted earlier in this Chapter, rules of both the Senate and the House of Representatives prohibit "legislating" in appropriation acts. However, this merely subjects the provision to a point of order and does not affect the validity of the legislation if the point of order is not raised, or is raised and not sustained. Thus, once a given provision has been enacted, the question of whether it is "general legislation" or merely a restriction on the use of an appropriation, i.e., whether it might have been subject to a point of order, is academic and largely immaterial.

This subsection deals with the question of when general provisions can be construed as permanent legislation.

Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision renders it clear that such was the intention of the Congress, but when the word "hereafter" or other words indicating futurity are used or when the provision is of a general character bearing no relation to the object of the appropriation, the provision generally has been construed to be permanent legislation. 7 Comp. Dec. 838 (1901); 5 Comp. Gen. 810 (1926); 10 Comp. Gen. 120 (1930); 24 Comp. Gen. 436 (1944); 32 Comp. Gen. 11 (1952); 36 Comp. Gen. 434 (1956).

It follows that a proviso or general provision that does not contain words of futurity will generally not be construed

"Where 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, September 2, 1971.

As stated before, however, in the appropriations context, this does not mean that a general appropriation is available when the specific appropriation has been exhausted. Were this the case, agencies could exceed congressionally-established spending limits. With respect to appropriation statutes, the rule set forth at the beginning of this subsection applies.

Two appropriations available for same purpose

RULE: Where either of two appropriations may reasonably be construed as available for expenditures not specifically mentioned under either appropriation, the determination of the agency as to which of the two appropriations to use will not be questioned. However, once the election has been made, the continued use of the appropriation selected to the exclusion of any other for the same purpose is required, in the absence of changes in the appropriation acts. 15 Comp. Dec. 101 (1908); 5 Comp. Gen. 479 (1926); 10 Comp. Gen. 440 (1931); 23 Comp. Gen. 827 (1944).

In 59 Comp. Gen. 518 (1980), the Environmental Protection Agency received separate lump-sum appropriations for "Research and Development" and "Abatement and Control." The contract in question, entered into in 1975, could arguably have been charged to either appropriation, but EPA had elected to charge it to Research and Development. Applying the above rule, the Comptroller General concluded that a 1979 modification to the contract had to be charged to Research and Development funds, and that the Abatement and Control appropriation could not be used.

Thus, in this type of situation (two appropriations, both arguably available, neither of which specifies the object in question), the agency may make an initial election as to which appropriation to use. However, once it has made that election and has in fact used the selected appropriation, it cannot thereafter, because of insufficient funds in the selected appropriation or for other reasons, change its election and use the other appropriation.

September 21, 1976. Since the cases are not definitive, it appears that the effect of an appropriation act restriction using the words "this or any other act" cannot be determined solely on the language used. The various other factors discussed below would have to be taken into consideration.

Other factors may also be taken into consideration. Thus, the repeated inclusion of a provision in annual appropriation acts indicates that it is not considered or intended by Congress to be permanent. 10 Comp. Gen. 120 (1930); 32 Comp. Gen. 11 (1952); A-89279, October 26, 1937. However, where adequate words of futurity exist, the repetition of a provision in the following year's appropriation act has been viewed simply as an "excess of caution." 36 Comp. Gen. 434 (1956). This factor is of limited usefulness, since the failure to repeat in subsequent appropriation acts a provision which does not contain words of futurity can also be viewed as an indication that Congress did not consider it to be permanent and simply did not want it to continue. Cf. 18 Comp. Gen. 37 (1938). Thus, if the provision does not contain words of futurity, repetition or non-repetition lead to the same result--that the provision is not permanent. If the provision does contain words of futurity, non-repetition indicates permanence but repetition, although it suggests non-permanence, is inconclusive.

The inclusion of a provision in the United States Code is relevant as an indication of permanence but is not controlling. 36 Comp. Gen. 434 (1956); 24 Comp. Gen. 436 (1944). Failure to include a provision in the Code would appear to be of no significance.

Legislative history is also relevant, but has been used for the most part to support a conclusion based on the presence or absence of words of futurity. See B-108245, March 19, 1952; B-57539, May 3, 1946; NLRB v. Thompson Products, Inc., supra. In B-192973, October 11, 1978, a general provision requiring the submission of a report "annually to the Congress" was held not permanent in view of conflicting expressions of congressional intent.

The degree of relationship between a given provision and the object of the appropriation act in which it appears or the appropriating language to which it is appended is a factor to be considered. If the provision bears no direct relationship to the appropriation act in which it appears, this is an indication of permanence. The closer the relationship, the less likely it is that the provision will be viewed as permanent. See 26 Comp. Gen. 354, 357 (1946); 32 Comp. Gen. 11 (1952); B-37032, October 5, 1943; A-88073, August 19, 1937.

as permanent. 3 Comp. Gen. 319 (1923); 5 Comp. Gen. 810 (1926); 10 Comp. Gen. 120 (1930); 20 Comp. Gen. 322 (1940); 32 Comp. Gen. 11 (1952); A-18614, May 25, 1927; Minis v. United States, 40 U.S. (15 Pet) 423 (1841); United States v. Vulte, 233 U.S. 509, 514 (1914); NLRB v. Thompson Products, Inc., 141 F.2d 794, 798 (9th Cir. 1944); City of Hialeah v. United States Housing Authority, 340 F. Supp. 885 (S.D. Fla. 1971).

As noted, the crucial factor is the language of the particular provision, i.e., whether it contains "words of futurity." The most common "word of futurity" is "hereafter" and provisions using this term will usually be construed as permanent. 26 Comp. Gen. 354, 357 (1946); 2 Comp. Gen. 535 (1923); B-108245, March 19, 1952; B-100983, February 8, 1951; B-76782, June 10, 1948.

However, words of futurity other than "hereafter" have been deemed sufficient. Thus, there is no significant difference in meaning between "hereafter" and "after the date of approval of this Act." 36 Comp. Gen. 434 (1956). In 24 Comp. Gen. 436 (1944), the words "at any time" were viewed as words of futurity in a provision which authorized reduced transportation rates to military personnel who were "given furloughs at any time." In that decision, however, the conclusion of permanence was further supported by the fact that Congress appropriated funds to carry out the provision in the following year as well, merely referring to the provision rather than repeating it.

The words "or any other act" in a provision restricting the expenditure of appropriations "contained in this or any other act" were held to be sufficient words of futurity in 26 Comp. Dec. 1066 (1920). However, a later decision viewed the effect of the words "or any other act" as inconclusive. B-37032, October 5, 1943. In Norcross v. United States, 142 Ct. Cl. 763 (1958), a general provision barring the payment of compensation to certain non-citizens which contained the words "this or any other Act" but which was preceded by the words "during the current fiscal year" was held applicable only to the funds of that year. In A-88073, August 19, 1937, a proviso restricting the use of funds provided in "this or any other appropriation" was held not to contain words of futurity and was therefore not permanent legislation. See also 18 Comp. Gen. 37, 38 (1938). More recently, GAO considered a restriction on the use of funds "appropriated in this or any other act" and concluded that the words "or any other act" did not indicate futurity but merely referred to other appropriation acts for the same fiscal year. B-145492,

(6) Appropriation Acts vs. Authorization Acts

This subsection deals with problems in the relationship of appropriation acts to authorization acts. The problem usually arises in the form of a real or perceived inconsistency between the two statutes. The solution, in general terms, lies primarily in the application of two principles of statutory construction:

--Statutes should be construed harmoniously so as to give maximum effect to both wherever possible.

--In cases of conflict, the latest expression of Congress governs.

As a general proposition, appropriations made to carry out authorizing laws "are made on the basis that the authorization acts in effect constitute an adjudication or legislative determination of the subject matter." B-151157, June 27, 1963. Thus, appropriations to carry out enabling or authorizing laws must be expended in strict accord with the original authorization both as to the amount of funds to be expended and the nature of the work authorized. 36 Comp. Gen. 240, 242 (1956); B-125404, August 31, 1956; B-151157, supra. A few examples of this relationship follow.

--In B-125404, supra, it was held that an appropriation to construct a bridge across the Potomac River pursuant to a statute authorizing construction of the bridge and prescribing its location was not available to construct the bridge at a slightly different location even though the planners favored the alternate location.

--The Flood Control Act of 1970 authorized construction of a dam and reservoir for the Ellicott Creek project in New York. Subsequently, legislation was proposed to authorize channel construction instead of the dam and reservoir, but was not enacted. A continuing resolution made a lump-sum appropriation for flood control projects "authorized by law." The Comptroller General concluded that the appropriation did not repeal the prior authority and that therefore the funds could not properly be used for the alternative channel construction. B-193307, February 6, 1979.

Finally, the phrasing of a provision as positive authorization rather than a restriction on the use of an appropriation is an indication of permanence, but usually has been considered in conjunction with a finding of adequate words of futurity. 24 Comp. Gen. 436 (1944); 36 Comp. Gen. 434 (1956). A provision was held permanent in 9 Comp. Gen. 248 (1929) although it contained no words of futurity because it was to become effective on the last day of the fiscal year and an alternative construction would have rendered it effective for only one day, clearly not the legislative intent. An early decision, 17 Comp. Dec. 146 (1910), held a proviso to be permanent based solely on the fact that it was not phrased as a restriction on the use of the appropriation to which it was attached, but this decision seems inconsistent with the weight of authority and certainly with the Supreme Court's decision in Minis v. United States, supra.

In sum, the additional factors mentioned above are all relevant as indicia of whether a given provision should be construed as permanent. However, the presence or absence of words of futurity remains the crucial factor, and the additional factors have been used for the most part to support a conclusion based primarily on this presence or absence.

These cases illustrate a point noted in Section D of this Chapter--that an authorization of a specific sum of money or ceiling is aimed not so much at the agency as at the Congress itself through the Appropriations Committees. Where the normal sequence occurs, that is, where the authorization precedes the appropriation, the appropriations committees have the opportunity to have the "last word" in the sense that Congress can appropriate more or less than the amount authorized.

The Congress can also, in an appropriation act, expand the period of availability beyond that specified in the authorization. In B-149372/B-158195, April 26, 1969, an appropriation of Presidential transition funds expressly made available beyond the period specified in the Presidential Transition Act of 1963 was held controlling. Similarly, an appropriation of funds "to remain available until expended" controls over a provision in the authorizing legislation authorizing appropriations on a fiscal year basis. B-182101, October 16, 1974.

By the same reasoning, it has been held that, where Congress appropriated funds for a program whose funding authorization was due to expire during the period of availability of the funds, the funds were available to continue the program during that period of availability, in the absence of indication of contrary intent. 55 Comp. Gen. 289, 292 (1975). This result also applies where the appropriations authorization had already expired. B-137063, March 21, 1966 (concerning an appropriation for a Department of the Interior program for the propagation and conservation of the Hawaiian nene goose). The result in these two cases follows from the fact that the total absence of appropriations authorization legislation would not have precluded the making of a valid appropriation for the programs. E.g., B-202992, May 15, 1981.

Another basic principle is that an authorization act does not expand the scope of availability of appropriations in the absence of provisions in the appropriation act to indicate such a purpose. Thus, an appropriation made for specific purposes is not available for related but more extended purposes contained in the authorization act but not included in the appropriation. 19 Comp. Gen. 961 (1940). See also 26 Comp. Gen. 452 (1947); 35 Comp. Gen. 306 (1955); 37 Comp. Gen. 732 (1958).

Since one Congress cannot bind a future Congress, or subsequent action by the same Congress, an appropriation act may appropriate more or less than the amount contained in the authorization act.

--In 36 Comp. Gen. 240 (1956), Congress had authorized $7 million for the construction of two bridges across the Potomac River. A subsequent appropriation act made a lump-sum appropriation which included funds for the bridge construction (although not specified in the appropriation) in excess of the amount authorized. The decision concluded that Congress has the power to make an appropriation in excess of a cost limitation contained in the original authorization act, and stated:

> "[T]he lack of specific legislation increasing the ceiling on the cost of construction of the two bridges as fixed in the original authorization act does not affect the validity or availability of the appropriation in question for the purpose for which provided." 36 Comp. Gen. at 242. 13/

--Similarly, it was held that the National Park Service could expend its lump-sum appropriation for planning and construction of parks even though the expenditures for specific parks would exceed amounts authorized to be appropriated for those parks. B-148736, September 15, 1977.

--In 53 Comp. Gen. 695 (1974), an authorization act had expressly earmarked $18 million for UNICEF for specific fiscal years. A subsequent appropriation act provided a lump-sum, out of which only $15 million was earmarked for UNICEF. The Comptroller General concluded that the $15 million specified in the appropriation act was controlling and represented the maximum available for UNICEF for that fiscal year.

13/ The decision also discusses contractual obligations in excess of the amount appropriated. Since the appropriation in question was a lump-sum appropriation which did not expressly mention the bridge construction item, this portion of the decision is no longer valid. See subsection F(8) of this Chapter and Chapter 5, infra.

(multiple-year) or until expended (no-year). If the subsequent appropriation act does not expressly repeat the language prescribing the period of availability, the question arises whether the multiple-year or no-year authority will automatically apply to the appropriation in view of the enacting clause of the appropriation act, which specifies the making of appropriations for a particular fiscal year. A further consideration in the case of no-year authority is 31 U.S.C. § 718 which precludes construction of an appropriation as available continuously without reference to fiscal year unless expressly provided in the appropriation act.

The traditional rule has been that, if the appropriation language specifically refers to the authorization act, then the provisions of the authorization act will be deemed to be incorporated by reference into the provisions of the appropriation. This is sufficient to satisfy 31 U.S.C. § 718 and to overcome the implication of fiscal year availability derived from the enacting clause. 45 Comp. Gen. 236 (1965); 45 Comp. Gen. 508 (1966); B-37398, October 26, 1943; B-127518, May 10, 1956; B-147196, April 5, 1965. If the appropriation language does not specifically refer to the authorization act, the appropriation will be available only for the fiscal year covered by the appropriation act.

A general provision that is now commonly included in appropriation acts provides "No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." If an appropriation act contains this provision, it will not be sufficient for an appropriation contained in that act to merely incorporate a multiple-year or no-year authorization provision by reference. The effect of this general provision is to require the appropriation language to expressly provide for availability beyond one year in order to overcome the enacting clause. 50 Comp. Gen. 857 (1971); 58 Comp. Gen. 321 (1979).

Changes in the law from year to year may produce additional complications. For example, the National Historic Preservation Act (authorization) provided that funds appropriated and apportioned to States would remain available for obligation for three fiscal years, after which time any unobligated balances would be reapportioned. This amounted to a no-year authorization. For several years, appropriations to fund the program were made on a no-year basis, thus permitting implementation of the authorization provision. However, starting with FY 1978, the appropriation act was changed and the funds were made available for two fiscal years. This

The cases discussed so far in this subsection deal with the normal sequence--that is, the authorization act is passed before the appropriation act. Sometimes, however, consideration of the authorization act is delayed and it is not enacted until after the appropriation act. Problems of construction can arise in this situation also. For example, the 1979 Justice Department authorization act authorized a lump-sum appropriation to the Immigration and Naturalization Service and provided that $2 million "shall be available" for the investigation and prosecution of certain cases involving alleged Nazi war criminals. The 1979 appropriation act made a lump-sum appropriation to INS but contained no specific mention of the Nazi war criminal item. The appropriation act was enacted on October 10, 1978, but the authorization act was not enacted until November. In response to a question as to the effect of the authorization provision on the appropriation, the Comptroller General advised that the two statutes could be construed harmoniously, and that the $2 million earmarked in the authorization act could be spent only for the purpose specified. It was further noted that the $2 million represented a minimum but not a maximum. B-193282, December 21, 1978, amplified by B-193282, January 25, 1979.

In another case, Congress appropriated $75 million for FY 1979 for urban formula grants "as authorized by the Urban Mass Transportation Act of 1964." When the appropriation was enacted, legislation was pending--and was enacted three months after the appropriation--repealing the existing formula and replacing it with a new and somewhat broader formula. The new formula provision specified that it was to be applicable to "sums appropriated pursuant to subparagraph (b) of this paragraph." On the one hand, since the original formula had been repealed, it could no longer control the use of the appropriation. Yet on the other hand, funds appropriated three months prior to passage of the new formula could not be said to have been appropriated "pursuant to" the new act. Hence, neither formula was clearly applicable to the $75 million. The Comptroller General concluded that UMTA was still required to honor the $75 million earmarked for the grant program, and that it should be distributed in accordance with those portions of the new formula that were "consistent with the terms of the appropriation," that is, the funds should be used in accordance with those elements of the new formula that had also been reflected in the original formula. B-175155, July 25, 1979.

No-year or multiple-year authorization

Authorization acts sometimes authorize the appropriation of funds to remain available for more than one fiscal year

enacted by Congress" (437 U.S. at 191), the Court held that the unspecified inclusion of the Tellico Dam funds in a lump-sum appropriation was not sufficient to constitute a repeal by implication of the Endangered Species Act insofar as it related to that project.

raised the question of whether the appropriation act had the effect of overriding the apparently conflicting authorizing language, or if it meant merely that reapportionment could occur after two fiscal years instead of three, thus effectively remaining a no-year appropriation.

GAO concluded that the literal language and plain meaning of the appropriation act must govern. In addition to the explicit appropriation language, the appropriation acts contained the general provision restricting availability to the current fiscal year unless expressly provided otherwise therein. Therefore, any funds not obligated by the end of the two-year period would expire and could not be reapportioned. B-151087, September 15, 1981; B-151087, February 17, 1982.

Tennessee Valley Authority v. Hill

Appropriation acts are sometimes perceived to be in conflict with statutes other than authorization acts. The principles involved are essentially the same.

In Tennessee Valley Authority v. Hill, 437 U.S. 153, 57 L.Ed. 2d 117, 98 S. Ct. 2279 (1978), the Supreme Court considered a problem of this type. In that case Congress had authorized construction of the Tellico Dam and Reservoir Project on the Little Tennessee River, and had appropriated initial funds for that purpose. Subsequently, Congress passed the Endangered Species Act of 1973. Under the provisions of that Act, the Secretary of the Interior declared the "snail darter", a small fish, to be an endangered species. It was eventually determined that the Little Tennessee River was the snail darter's critical habitat and that completion of the dam would result in extinction of the species. Consequently, environmental groups and others brought an action to halt further construction of the Tellico Project. In its decision, the Supreme Court held in favor of the plaintiffs, notwithstanding the fact that construction was well under way and that, even after the Secretary of the Interior's actions regarding the snail darter, Congress had continued to make yearly appropriations for the completion of the dam project.

The appropriation involved was a lump-sum appropriation which included funds for the Tellico Dam but made no specific reference to it. However, passages in the reports of the appropriations committees indicated that those committees intended the funds to be available notwithstanding the Endangered Species Act. The Court held that this was not enough. Noting that "Expressions of committees dealing with requests for appropriations cannot be equated with statutes

seemed apparent that the $36 million was the result of a typographical error, it was held that the language of the enrolled act signed by the President must control and that the full $36 million had been appropriated. The Comptroller General did, however, inform the Appropriations Committees. 58 Comp. Gen. 358 (1979). See also 2 Comp. Dec. 629 (1896).

However, if the amount appropriated is a total derived from specific sums enumerated in the appropriation act, then the amount appropriated will be the amount obtained by the correct addition, notwithstanding the specification of an erroneous total in the appropriation act. 31 U.S.C. § 670; 2 Comp. Gen. 592 (1923).

(7) Errors in Statutes

A statute may occasionally contain what is clearly a technical or typographical error which, if read literally, could alter the meaning of the statute or render execution effectively impossible. In such a case, if the legislative intent is clear, the intent will be given effect over the erroneous language.

In one situation, a supplemental appropriation act made an appropriation to pay certain claims and judgments as set forth in Senate Document 94-163. Examination of the documents made it clear that the reference should have been to Senate Document 94-164, as Senate Document 94-163 concerned a wholly unrelated subject. The manifest congressional intent was held controlling, and the appropriation was available to pay the items specified in Senate Document 94-164. B-158642-O.M., June 8, 1976. The same principle had been applied in a very early decision in which an 1894 appropriation provided funds for certain payments in connection with an election held on "November fifth," 1890. The election had in fact been held on November 4th. Recognizing the "evident intention of Congress," the decision held that the appropriation was available to make the specified payments. 1 Comp. Dec. 1 (1894). See also 11 Comp. Dec. 719 (1905); 1 Comp. Dec. 316 (1895).

In another case, a statute authorized the Department of Agriculture to purchase "section 12" of a certain township for inclusion in a national forest. However, section 12 was already included within the national forest, and it was clear from the legislative history that the "section 12" was a printing error and the statute should have read "section 13." The Comptroller General concluded that the clear intent should be given effect, and that the Department was authorized to purchase section 13. B-127507, December 10, 1962.

Courts have followed the same approach in correcting obvious typographical errors. See Ronson Patents Corp. v. Sparklets Devices, Inc., 102 F. Supp. 123 (E.D. Mo. 1951); Fleming v. Salem Box Co., 38 F. Supp. 997 (D. Ore. 1940).

Error in the amount appropriated

A 1979 decision illustrates one situation in which the above rule did not apply. A 1979 appropriation act contained an appropriation of $36 million for the Inspector General of the Department of Health, Education, and Welfare. The bills as passed by both Houses and the various committee reports specified an appropriation of only $35 million. While it

In construing appropriation acts, the Comptroller General has consistently applied traditional principles of statutory construction so as to give effect to the intent of Congress. In many cases, when the meaning of an appropriation act seemed clear, GAO has resolved questions concerning the propriety of expenditures without resort to legislative history. In other cases, the Comptroller General has referred to the legislative history of an appropriation act in order to properly interpret language in the act that purported to impose qualifications, requirements, or restrictions. See decisions cited at 55 Comp. Gen. 307, 317 (1975). For example, in 49 Comp. Gen. 679 (1970), the legislative history of various Defense Department appropriation acts was examined to determine whether a provision in the 1969 Act precluded payment of certain tuition fees for ROTC students.

Retroactivity of statutes

Statutes and amendments to statutes are construed to apply prospectively only (that is, from their date of enactment or other effective date if one is specified). Statutes will not be construed to apply retroactively unless a retroactive construction is required by express language or by necessary implication or unless it is demonstrated that this is what Congress clearly intended. 38 Comp. Gen. 103 (1958); 34 Comp. Gen. 404 (1955); 28 Comp. Gen. 162 (1948); 16 Comp. Gen. 1051 (1937); 7 Comp. Gen. 266 (1927); 5 Comp. Gen. 381 (1925); 2 Comp. Gen. 267 (1922); 26 Comp. Dec. 40 (1919); B-205180, November 27, 1981; B-191190, February 13, 1980; B-162208, August 28, 1967.

Another line of cases has dealt with a different aspect of retroactivity. GAO is reluctant to construe a statute to retroactively abolish or diminish rights which had accrued before its enactment unless this was clearly the legislative intent. For example, the Tax Reduction Act of 1975 authorized $50 "special payments" to certain taxpayers. Legislation in 1977 abolished the special payments as of its date of enactment. GAO held in B-190751, April 11, 1978, that payments could be made where payment vouchers were validly issued before the cutoff date but lost in the mail. Similarly, payments could be made to eligible claimants whose claims had been erroneously denied before the cutoff but were later found valid. B-190751, September 26, 1980. GAO has applied similar reasoning in a number of cases involving legislation which reduced entitlements to post-judgment interest, holding that the entitlement to interest should be governed by the law in effect when the judgment was rendered, not when it was submitted for payment. The cases are cited and discussed in the section on "Interest--District courts," Chapter 12, this Manual.

(8) Use of Legislative History

A fundamental principle basic to the interpretation of both Federal and State laws is that all statutes are to be construed so as to give effect to the intent of the legislature. United States v. American Trucking Association Inc., 310 U.S. 534 (1940); 2A Sutherland, Statutes and Statutory Construction § 45.05 (Sands ed. 1973); 38 Comp. Gen. 229 (1958). This intent may be determined from the words of the statute itself, from the "equity of the statute," from the statute's legislative history, and in a variety of other ways. See Sutherland § 45.05, supra. The legislative history may be examined as an aid in determining the intention of the lawmakers when the statute is not clear (see, e.g., United States v. Donruss Co., 393 U.S. 297 (1969); 53 Comp. Gen. 401 (1973)), or when application of the statutory language would produce an absurd or unreasonable result (46 Comp. Gen. 556 (1966)), or if the legislative history provides "persuasive evidence" of what Congress intended. (Boston Sand and Gravel Company v. United States, 278 U.S. 41, 48 (1928)). 55 Comp. Gen. 307, 317 (1975).

Legislative history is, with certain exceptions, used in appropriations law much the same as it is used in other areas of law involving the application of statutes. For example:

--A conference report is generally viewed as the most authoritative single source of legislative history. See, e.g., B-142011, April 30, 1971.

--Where there is direct conflict in the floor debates and there is no more authoritative source of legislative history available, it is legitimate to give weight to such factors as which House originated the provision in question and which House has the more detailed and "clear cut" history. 49 Comp. Gen. 411 (1970).

--Statements of an individual Member of Congress, even if that Member is the bill's sponsor or draftsman, are not controlling in the face of contrary indications in more authoritative portions of legislative history such as committee reports. However, those statements may be accepted in the absence of any other legislative history. B-114829, June 27, 1975.

--Post-enactment comments are normally not given much weight. However, they may be relevant in the absence of other more authoritative material. See B-169491, June 16, 1980.

--Instructions in committee reports provided that, out of a $2.4 billion lump-sum Comprehensive Manpower Assistance appropriation to the Department of Labor, $15 million was to be earmarked for aid to the Opportunities Industrialization Centers. Although recognizing the practical constraints on the Department to use the funds in the manner indicated, the Comptroller General concluded that the earmarking in the committee reports was not legally binding on the Department. B-163922.42, supra.

This rule, which has been recognized by the Congress, was discussed in 55 Comp. Gen. 307, supra, as follows:

> "[W]hen Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies.
>
> * * * * *
>
> "As observed above, this does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The executive branch * * * has a practical duty to abide by such expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty." 55 Comp. Gen. at 319, 325.

Stated succinctly:

> "[A]s a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in the statute and resorting to that history for the purpose of writing into the law that which is not there." Id. at 325.

Restrictions on lump-sum appropriations

This topic is covered in more depth in Chapter 5 of this Manual. It is touched upon briefly here because it illustrates a principle of statutory construction unique to appropriations law.

When Congress enacts a lump-sum appropriation, it is impossible to tell from the face of the statute how the appropriation is to be applied among the items for which it is available. The intended application of the appropriation must be found by examining the budget justification and the alterations to it made in the legislative process and reflected in documents such as committee reports. It is frequently argued that legislative history should be used to define the uses of a lump-sum appropriation in the same manner as it is used to define ambiguous terms in general; that is, that agencies should be bound by restrictions contained in legislative history. However, although legislative history may go far in accomplishing this result as a practical matter, it does not have this effect as a matter of law.

The rule is that restrictions on the use of a lump-sum appropriation are not legally binding on the department or agency concerned unless they are incorporated, either expressly or by reference, in the appropriation act itself (or, of course, in some other statute). E.g., 55 Comp. Gen. 307 (1975); 55 Comp. Gen. 812 (1976); B-163922.42, October 3, 1975. The cited decisions will serve as illustrations:

--A lump-sum appropriation included $20 million for a Navy combat fighter. The conference report indicated that adaptation of a particular Air Force combat fighter to be capable of carrier operations was the prerequisite for use of the funds. The condition in the conference report, while certainly an indication of congressional intent, was held not legally binding. 55 Comp. Gen. 307.

--An appropriation was made for the construction of two Navy ships. Committee reports subdivided the appropriation between the two, but the statute itself was silent. The exercise of a contract option for one ship, which would obligate funds in excess of the subdivision for that ship as specified in the committee reports, did not violate the Antideficiency Act. 55 Comp. Gen. 812.

and adopted by the agency." Privacy Act notices are another example. 5 U.S.C. § 552a(e)(4). Other items required or authorized to be published in the Federal Register are specified in 44 U.S.C. § 1505. Codifications of agency regulations are issued in bound and permanent form as the Code of Federal Regulations. The "C.F.R." is supplemented or republished at least once a year. 44 U.S.C. § 1510.

Agency regulations are, naturally, bound by the limits of the agency's statutory and organic authority. The following cases will illustrate:

--Where the program statute provided that Federal grants "shall be" a specified percentage of project construction costs, the grantor agency could not issue regulations providing a mechanism for reducing the grants below the specified percentage. 53 Comp. Gen. 547 (1974).

--Where a statute provided that administrative costs could not exceed a specified percentage of funds distributed to States under an allotment formula, the administering agency could not amend its regulations to relieve States of liability for overexpenditures or to raise the ceiling. B-178564, July 19, 1977, affirmed in 57 Comp. Gen. 163 (1977).

--Absent a clear statutory basis, an agency may not issue regulations establishing procedures to accept Government liability or to forgive indebtedness based on what it deems to be fair or equitable. B-201054, April 27, 1981.

See also 56 Comp. Gen. 943 (1977); B-201706, March 17, 1981.

Statutory regulations which are otherwise valid (that is, which are within the bounds of the agency's statutory authority) have the force and effect of law, must be uniform and general in their application, and may no more be waived than the statutes themselves. Statutory regulations may, of course, be modified or amended prospectively. In other words, a statutory regulation should be treated the same as the statute itself. This principle has been stated in numerous decisions. Some of them are: 21 Comp. Dec. 482 (1915); 26 Comp. Dec. 99 (1919); 2 Comp. Gen. 342 (1922); 15 Comp. Gen. 869 (1936); 18 Comp. Gen. 907 (1939); 22 Comp. Gen. 895 (1943); 31 Comp. Gen. 193 (1951); 33 Comp. Gen. 174 (1953); 37 Comp. Gen. 820 (1958); 43 Comp. Gen. 31 (1963); 43 Comp.

G. AGENCY REGULATIONS AND INTERPRETATIONS

(1) Agency Regulations

Agency regulations fall into two categories: statutory regulations and administrative regulations. One of the earliest cases discussing the distinction is 21 Comp. Dec. 482 (1915).

"Statutory regulations" are regulations issued pursuant to or in execution of a statute. For example, the Federal Claims Collection Act (Chapter 11, Part II, this Manual) directs GAO and the Justice Department to jointly issue regulations governing debt collection by Federal agencies.

Typically, when Congress enacts a new program statute, it does not prescribe every detail of its implementation. There are many reasons for this. It is often not possible to foresee in advance every detail that ought to be covered. In other cases, there may be a need for flexibility in implementation that is simply not practical to detail in the legislation. In many cases, Congress prefers to legislate a policy in terms of broad standards, leaving the details of implementation to the agency with program expertise. Finally, it is much easier for an agency to amend a regulation to reflect changing circumstances than it would be for Congress to have to go back and amend the basic legislation. Thus, statutory regulations have become an increasingly vital element of Federal law.

"Administrative regulations" are regulations an agency head may issue under his general authority to control and regulate the operations of his agency. For example, an agency may have internal regulations governing such things as conflicts of interest or employee travel, or delegating functions to organizational subdivisions. While the issuance of administrative regulations may be viewed as largely inherent in the agency head's authority as agency head, it is also authorized generally by 5 U.S.C. § 301.

Many agency regulations are published in the Federal Register, a daily publication printed and distributed by the Government Printing Office. Some types of regulations are required by statute to be published in the Federal Register. Several types are listed in 5 U.S.C. § 552(a)(1), part of the Administrative Procedure Act. An example is 5 U.S.C. § 552(a)(1)(D), "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated

For illustrations of how GAO has applied this principle in decisions, see:

--49 Comp. Gen. 510 (1970) (Department of Agriculture regulations under Meat Inspection Act).

--48 Comp. Gen. 5 (1968) (Veterans Administration interpretation of statutory educational assistance allowance).

--42 Comp. Gen. 467, 477 (1963) (long-standing Navy application of Buy American Act).

--A-51604, August 25, 1981, affirming A-51604, February 19, 1980 (Department of Agriculture regulations on administrative cost reimbursement under the Food Stamp Act).

--B-160573, June 6, 1967, affirming B-160573, January 17, 1967 (Office of Emergency Planning interpretation of coverage under the Federal Disaster Act).

The principle has also been recognized in numerous decisions of the courts. E.g., Udall v. Tallman, 380 U.S. 1 (1965); West Coast Construction Co. v. Oceano Sanitary District, 311 F. Supp. 378, 383 (N.D. Cal. 1970).

The degree of weight to be given an agency administrative interpretation varies with several factors: (1) the duration and consistency of the interpretation; (2) the degree of expertise possessed by the agency (an agency newly created to administer a new law might not be entitled to the same deference as an older agency with proven expertise in a given subject); and (3) evidence (or lack thereof) of congressional awareness of, and acquiescence in, the administrative position.

The principle of giving considerable deference to the administering agency's interpretation applies equally to the agency's interpretation of its own regulations. Udall v. Tallman, supra; 56 Comp. Gen. 160 (1976); 57 Comp. Gen. 347 (1978).

Gen. 516, 519 (1964); 46 Comp. Gen. 6 (1966); 49 Comp. Gen. 145 (1969); 53 Comp. Gen. 364 (1973); 57 Comp. Gen. 662 (1978); 60 Comp. Gen. 15, 26 (1980); B-170663(2), November 12, 1970; B-130515, July 20, 1973; B-130515, July 17, 1974; B-163922, February 10, 1978.

With respect to the authority to waive regulations, earlier decisions had distinguished between statutory regulations and administrative regulations, holding that the latter could be waived. E.g., 21 Comp. Dec. 484, supra; 26 Comp. Dec. 99, supra; 1 Comp. Gen. 13 (1921); 4 Comp. Gen. 767 (1925). As a result of Supreme Court decisions in the 1950's, GAO modified its position somewhat in 51 Comp. Gen. 30 (1971), noting cautiously that the former distinctions "are no longer regarded as applicable in all respects." Thus, administrative regulations may now be as binding on the agency as statutory regulations, at least where the purported waiver would be adverse to agency employees. Id. See also B-184068, August 22, 1975. However, other types of administrative regulations may still be open to waiver. E.g., 60 Comp. Gen. 208, 210 (1981) (Urban Mass Transportation Administration internal guideline on evidence of grantee financial capability).

(2) Agency Administrative Interpretations

The interpretation of a statute, by regulation or otherwise, by the agency Congress has charged with the responsibility for administering it, is entitled to considerable weight. This principle is really a matter of common sense. An agency that works with a program from day to day develops an expertise which should not be lightly disregarded. This, in addition to fundamental fairness, is why GAO considers it important to obtain agency comments wherever possible before rendering a decision.

In practical terms, what the rule means is that where a statute is capable of more than one more-or-less reasonable interpretation, GAO should defer to the administering agency's interpretation rather than substituting its own judgment. The agency's interpretation should be upheld unless it exceeds the agency's statutory authority or is plainly erroneous, demonstrably inconsistent with legislative intent or judicial precedent, or otherwise "arbitrary or capricious." (See "Agency Regulations," supra.)

CHAPTER 3

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

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CHAPTER 3

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

A. GENERAL PRINCIPLES

(1) Introduction: 31 U.S.C. § 628

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 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:

(1) The purpose of the expenditure must be proper;

(2) The obligation must occur within the time limits applicable to the appropriation; and

(3) The obligation 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 will be covered in Chapters 4 and 5 of this Manual. This Chapter discusses availability as to purpose.

One of the most fundamental statutes dealing with the use of appropriated funds is 31 U.S.C. § 628 (Revised Statutes § 3678):

> "Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

This statute was originally enacted in 1809 (2 Stat. 535) and is one of the cornerstones of congressional control over the Federal purse. Since money cannot be paid from the Treasury except under an appropriation (Article I, section 9 of the Constitution, discussed in Chapter 2, this Manual), and since 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. Simply stated, 31 U.S.C. § 628 says that public funds may be used only for the purpose or purposes for which they were appropriated. Anything less would render congressional control largely meaningless.

The rule expressed in 31 U.S.C. § 628 has always been construed literally and enforced strictly. Administrative applications can be traced back almost to the time the statute was enacted. See, for example, the decision of February 21, 1821, quoted in part in 36 Comp. Gen. 621, 622 (1957). In an 1898 decision captioned "Misapplication of Appropriations," the Comptroller of the Treasury talked about 31 U.S.C. § 628 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." 4 Comp. Dec. 569, 570 (1898).

The starting point in applying 31 U.S.C. § 628 is that, absent a clear indication of another specialized purpose, the common meaning of the words in the appropriation act governs the purposes to which the funds may be applied. To illustrate, the Comptroller General held in 41 Comp. Gen. 255 (1961) that 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.

If a proposed use of funds is inconsistent with the statutory language, nothing, not even the effecting of a substantial savings to the Government, can justify the expenditure. Thus, while the Federal Aviation Administration 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, August 15, 1960. See also 39 Comp. Gen. 388 (1959).

The concept of purpose permeates much of this Manual. Thus, many of the rules discussed in Chapter 2 relate to purpose. For example:

(1) An appropriation is available for an item included in a budget estimate even though the appropriation act does not make specific reference to it. However, if the item is prohibited by law, including it in a budget estimate will not make the appropriation available unless the appropriation act makes specific reference to the prohibited item. Chapter 2, Section F(2).

(2) A specific appropriation must be used to the exclusion of a more general appropriation which might otherwise have been viewed as available for the particular item. Chapter 2, Section F(4).

(3) Transfer between appropriations is prohibited without specific statutory authority. Chapter 2, Section F(3) and 31 U.S.C. § 628-1. This rule applies even though the transfer is intended to alleviate a temporary exhaustion of funds and the agency contemplates reimbursement. 36 Comp. Gen. 386 (1956); 7 Comp. Dec. 187 (1900). It also applies to the deliberate charging of the wrong appropriation for purposes of administrative convenience. B-97772, May 18, 1951; B-104135, August 2, 1951. (The situation dealt with in the two cited decisions--advances of travel expenses to Government employees serving as witnesses--is now authorized by 5 U.S.C. § 5751.)

The transfer rule illustrates the close relationship between 31 U.S.C. § 628 and statutes relating to amount such as the Antideficiency Act, 31 U.S.C. § 665 (Chapter 5, this Manual). An unauthorized transfer violates the Antideficiency Act because the receiving appropriation is being exceeded. It also violates 31 U.S.C. § 628 because the transferred funds would be used for a purpose other than that for which they were originally appropriated.

Although every violation of 31 U.S.C. § 628 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. § 628, cases frequently involve elements of both. Thus, an expenditure in excess of an available appropriation violates both statutes. The reason is that, unless the disbursing officer used personal funds, he must necessarily have used money appropriated for other purposes, thereby violating 31 U.S.C. § 628. 4 Comp. Dec. 314, 317 (1897).

In addition, several other chapters of this Manual are related to purpose availability, for example, Chapter 12 on the payment of judgments. Thus, the concept of purpose must always be kept in mind when analyzing an appropriations problem.

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 or grant 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). Similarly, a grant of funds for unspecified purposes would be improper. 55 Comp. Gen. 1059, 1062 (1976).

Working funds

31 U.S.C. § 628-1, enacted in 1950, prohibits the transfer of appropriations to a working fund without specific statutory authority. Prior decisions of the Comptroller General had reached the same result, based on 31 U.S.C. § 628. 19 Comp. Gen. 774 (1940). The prohibition applies not only to interagency working funds, as in 19 Comp. Gen. 774, but to the consolidation of all or parts of various intraagency appropriations into a single fund as well. 6 Comp. Gen. 748 (1927); 4 Comp. Gen. 703 (1925). The working fund rule is a corollary of the prohibition against transfer, discussed above, and also reflects the principle that an agency cannot do indirectly what it is not permitted to do directly.

The availability of an appropriation cannot be expanded or otherwise changed by transfer to a working fund or similar device. Where a working fund is authorized, the funds are available only for the purposes permissible under the source appropriation and remain subject to the same restrictions. 28 Comp. Gen. 365 (1948); 26 Comp. Gen. 545, 548 (1947); 18 Comp. Gen. 489 (1938). This principle is also now reflected in 31 U.S.C. § 628-1.

Where a working fund is authorized by statute on a reimbursement basis, advances to the fund are not authorized. 32 Comp. Gen. 99 (1952).

The primary example of a statutory working fund is the one authorized by the Economy Act, 31 U.S.C. § 686 (Chapter 8, this Manual).

Another example was discussed in B-195775, September 10, 1979. In that decision, the Comptroller General approved the transfer of portions of agency unit appropriations to an agency-wide pool to be used to fund the Merit Pay System established by the Civil Service Reform Act of 1978. The transfers, while not explicitly authorized in the statute, were seen as necessary to implement the law and carry out the legislative purpose. Following this decision, the Comptroller General held in 60 Comp. Gen. 686 (1981) that the Treasury Department could "pool" portions of appropriations made to several separate bureaus to fund an Executive Development Program authorized by the Civil Service Reform Act.

The prohibition against transfer would not apply to transfers of administrative allocations within a lump-sum appropriation since the allocations are not legally binding. Thus, where the (then) Department of Health, Education, and

Welfare received a lump-sum appropriation covering several grant programs, it could set aside a portion of each program's allocation for a single fund to be used for "cross-cutting" grants intended to serve more than one target population, as long as the grants were for projects within the scope or purpose of the lump-sum appropriation. B-157356, August 17, 1978.

(2) Statement of Purpose

Where does one look to find the authorized purposes of an appropriation? The first place, of course, is the appropriation act itself and its legislative history. If the appropriation is general, the purposes will be found in the appropriations authorization legislation, if any, and in the underlying program or organic legislation, together with their legislative histories.

The actual language of the appropriation act is always of paramount importance in determining the purpose of an appropriation. Every appropriation has a purpose, although purposes are stated with varying degrees of specificity. An example of a purpose stated so specifically as to permit no discretion by the disbursing authority is found in this old private relief act:

> "[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.

The appropriation was available to pay $148 to George H. Lott, and for absolutely nothing else.

An example of a general statement of purpose is the 1977 appropriation for Action, providing as follows:

> "For expenses necessary for Action to carry out the provisions of the Domestic Volunteer Service Act of 1973, as amended, $108,200,000." Pub. L. No. 94-439, 90 Stat. 1418, 1434.

To more specifically determine the purposes of this appropriation, it is necessary to examine the Domestic Volunteer Service Act and its legislative history.

Once the purposes have been determined by examining the various pieces of legislation, 31 U.S.C. § 628 comes into play to restrict the use of the appropriation to these purposes only. For example, the Forest Service would violate 31 U.S.C. § 628 by providing telephone service to an employee credit union, even on a reimbursable basis. This is not an authorized purpose of any Forest Service appropriation. 60 Comp. Gen. 653 (1981), modifying 58 Comp. Gen. 310 (1979). (Besides, the Forest Service couldn't keep the reimbursements anyway. See Chapter 5, this Manual.)

New or additional duties

There is one situation in which appropriations may be used for a purpose which will not be found either in the appropriation act or in any other statute existing on the date the appropriation act was enacted.

Appropriation acts tend to be bunched at certain times of the year while substantive legislation may be enacted any time. Thus, a frequently recurring situation is where a statute is passed imposing new duties on an agency but not providing any further appropriations. The question is whether the agency can use its existing appropriations to carry out the new function pending receipt of further appropriations through the normal budget process, or whether implementation of the new statute must wait until additional funds are appropriated.

The rule is that existing agency appropriations which generally cover the type of expenditures involved are available to defray the expenses of new or additional duties imposed by proper legal authority. 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.

For example, 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, enacted after the appropriation, since the purposes of the new act were basically similar to the purposes of the appropriation. 46 Comp. Gen. 604 (1967).

Similarly, the Interior Department could use its 1979 "Departmental Management" appropriation to begin performing duties imposed by the Public Utilities Regulatory Policies Act of 1978, and to provide reimbursable support costs for the Endangered Species Committee and Review Board created by the Endangered Species Act Amendments of 1978. Both statutes were enacted after Interior's 1979 appropriation. B-195007, July 15, 1980.

The rule has also been applied to additional duties imposed by Executive Order. 32 Comp. Gen. 347 (1953).

For additional cases, see 15 Comp. Gen. 167 (1935); 30 Comp. Gen. 205 (1950); 30 Comp. Gen. 258 (1951).

A variation occurred in 54 Comp. Gen. 1093 (1975). The unexpended balance of a Commerce Department appropriation, which had been used to administer a loan guarantee program and to make collateral protection payments under the Trade Expansion Act of 1962, was transferred to a similar but new program by the Trade Act of 1974. The 1974 statute repealed the earlier provisions. This meant that the transferred funds could no longer be used for expenses under the 1962 act--including payments on guarantee commitments--even though that was the purpose for which they were originally appropriated, unless the expenditures could also be viewed as relating to the Department's functions under the 1974 act. Applying the rationale of 46 Comp. Gen. 604, supra, the Comptroller General concluded that the purposes of the two programs were sufficiently related so that the Department could continue to use the transferred funds to make collateral protection payments and to honor guarantees made under the 1962 act.

(3) Specific Purpose Enumerated in Appropriation Act

Where an appropriation specifies the purpose for which the funds are to be used, the appropriation is simultaneously a grant of authority and a limitation. 31 U.S.C. § 628 in its purest form applies in this situation to restrict the use of the funds to the specified purpose.

For example, an appropriation for topographical surveys in the United States was held not available for topographical surveys in Puerto Rico. 5 Comp. Dec. 493 (1899). Similarly, an appropriation to install an electrical generating plant in the custom-house 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). As noted in Section A(1) above, an appropriation for the "replacement" of State roads could not be used to make improvements on them. 41 Comp. Gen. 255 (1961). An appropriation to assist the States in protecting the military and naval forces of the United States against "social diseases" was not available to protect sailors from venereal disease in the Canal Zone. 1 Comp. Gen. 370 (1922). (Although not cited in the decision, 31 U.S.C. § 628 must be viewed as the basis for the holding.)

In B-135232, April 2, 1962, the Comptroller General found the Squaw Valley Winter Olympics Committee indebted to the United States in the amount of $508,000. Congress had appropriated funds for use by the Committee to build a permanent indoor sports arena. Instead, the Committee used the $508,000 for two temporary ice rinks and a speed skating oval.

Although the funds had been channeled to the Committee through the Defense Department, it was the Committee's responsibility to see that they were properly applied.

The following cases will further illustrate the interpretation and application of appropriation acts denoting a specific purpose to which the funds are to be dedicated. In each of the examples, the appropriation in question was the United States Forest Service's appropriation for the construction and maintenance of "Forest Roads and Trails."

In 37 Comp. Gen. 472 (1958), the Forest Service sought to construct airstrips on land in or adjacent to national forests. The issue was the extent to which the costs could be charged to the "Roads and Trails" appropriation as opposed to other Forest Service appropriations such as "Forest Protection and Utilization." At hearings before the appropriations committees, Forest Service officials had announced their intent to charge most of the landing fields to the "Roads and Trails" appropriation. The appropriation act in question provided that "appropriations available to the Forest Service for the current fiscal year shall be available for" construction of the landing fields up to a specified dollar amount, but the item was not mentioned in any of the individual appropriations. GAO concluded that the proposal to indiscriminately charge the landing fields to "Roads and Trails" would violate 31 U.S.C. § 628. The "Roads and Trails" appropriation could be used for those landing fields only that were directly connected with and necessary to accomplishing the purposes of that appropriation. Landing fields not directly connected with the purposes of the "Roads and Trails" appropriation, for example, airstrips needed to assist in firefighting in remote areas, had to be charged to the appropriation to which they were related, such as "Forest Protection and Utilization." The mere mention of intent at the hearings was not sufficient to alter the availability of the appropriations.

Later, in 53 Comp. Gen. 328 (1973), the Comptroller General held that the "Forest Roads and Trails" appropriation could not be charged with the expense of closing roads or trails and returning them to their natural state, such activity being neither "construction" nor "maintenance."

Again, in B-164497(3), February 6, 1979, GAO decided that the Forest Service could not use the "Roads and Trails" appropriation to maintain a part of a Federally-constructed scenic highway on Forest Service land in West Virginia, although the State was prevented from maintaining it due to the fact that the scenic highway was closed to commercial traffic.

The "Roads and Trails" account was improper to charge with the maintenance because the term "forest road" was statutorily defined as a service or access road "necessary for the protection, administration, and utilization of the [national forest] system and the use and development of its resources." The highway, a scenic parkway reserved exclusively for recreational and passenger travel through a national forest, was not the type of forest road the appropriation was available to maintain. The decision further noted, however, that the "Forest Protection and Utilization" appropriation was somewhat broader and could be used for the contemplated maintenance.

If Congress appropriates money to implement a program, can the agency use that money to terminate the program? (Expenses of terminating a program could include such things as contract termination costs and personnel reduction-in-force expenses.) In a series of related cases, the Comptroller General held that funds appropriated for the design, development, construction, and operation of the Clinch River Nuclear Breeder Reactor could not be used to terminate the project. B-164105, December 5, 1977; B-164105, March 10, 1978; B-115398.33, June 23, 1977. However, this result will not necessarily apply where the project to be terminated is not specifically mandated in either the appropriation act or authorizing legislation, and where the proposed termination would not leave the remaining overall program inconsistent with the scheme of applicable program legislation. 61 Comp. Gen. ___ (B-206940.2, June 16, 1982) (holding that appropriations for fossil energy research and development could be used to terminate certain fossil energy programs). See also B-203074, August 6, 1981; B-115398, August 1, 1977.

B. NECESSARY EXPENSES

(1) The Theory

The preceding discussion establishes the primacy of 31 U.S.C. § 628 in any discussion of purpose availability. The next point to make is that 31 U.S.C. § 628 does not require--nor would it be reasonably possible--that every item of expenditure be specified in the appropriation act. While the statute is strict, it is applied with reason.

The spending agency has reasonable discretion in determining how to carry out the objects of the appropriation. This concept, known as the "necessary expense rule," has been around almost as long as the statute itself. An early statement of the rule is contained in 6 Comp. Gen. 619, 621 (1927):

> "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."

The necessary expense rule is really a combination of two slightly different but closely related concepts:

(1) Expenses incident to a specific purpose. An appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for. 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).

(2) "Necessary expenses" provided for in appropriation acts. Appropriations, even for broad categories such as salaries, frequently use the term "necessary expenses." An examination of a typical appropriation act will find this term many times. As used in this context, the term 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).

Although the theory is identical in both situations, the difference is that expenditures in the second category relate to somewhat broader objects.

The "necessary expense" language in an appropriation act is not sufficiently definite as to overcome a statutory prohibition. 38 Comp. Gen. 758, supra; 4 Comp. Gen. 1063, supra. In the two cited decisions, the Comptroller General held that the "necessary expense" language did not overcome the prohibition in 41 U.S.C. § 12 (Chapter 9, this Manual) against contracting for public buildings or public improvements in excess of appropriations for the specific purpose.

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. Consequently, the language used in stating the rule is not very helpful. The passage from 6 Comp. Gen. 619 quoted above uses the phrase "necessary or proper or incident." Other decisions use various permutations of this language- "necessarily incident," "reasonably necessary," etc. There is no significance to these variations in language.

On the one hand, the rule does not require that a given expenditure be "necessary" in the strict sense that the object of the appropriation could not possibly be fulfilled without it. Thus, 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. Yet on the other hand, it has to be more than merely desirable or even important. 34 Comp. Gen. 599 (1955). An expenditure cannot be justified merely because some agency official thinks it is a good idea. Language in some of the earlier decisions points out that appropriations are available only for "that which is needed" as distinguished from "that which is desired." E.g., B-42439, July 8, 1944.

For an expenditure to be justified under the necessary expense theory, the following tests must be met:

(1) 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. This is the crucial test. The important thing is not the significance of the proposed expenditure itself or its value to the Government or to some social purpose in abstract terms, but the extent to which it will contribute to accomplishing the purposes of the appropriation.

(2) The expenditure must not be prohibited by law.

(3) The expenditure must not be otherwise provided for, that is, an item that falls within the scope of some other appropriation.

The evident difficulty in stating a precise rule emphasizes the role and importance of agency discretion. It is in the first instance up to the administrative agency to determine that a given item is reasonably necessary to accomplishing an authorized purpose. Once the agency makes this determination, GAO will normally not substitute its own judgment for that of the agency. In other words, the agency's administrative determination of necessity will be given considerable deference.

However, the administrative determination is not binding on the Comptroller General. Decisions have frequently pointed out that discretion means legal discretion, not unlimited discretion. The point was stated as follows in 18 Comp. Gen. 285, 292 (1938):

> "Generally, the Congress in making appropriations leaves largely to administrative discretion the choice of ways and means to accomplish the objects of the appropriation, but, of course, administrative discretion may not transcend the statutes, nor be exercised in conflict with law, nor for the accomplishment of purposes unauthorized by the appropriation * * *."

See also 35 Comp. Gen. 615, 618 (1956); 4 Comp. Gen. 19, 20 (1924); 7 Comp. Dec. 31 (1900); 5 Comp. Dec. 151 (1898); B-130288, February 27, 1957; B-46169, May 5, 1945. Discretion must be exercised before the obligation is incurred. Approval after the fact is merely a condoning of what has already been done and does not constitute the exercise of discretion. 14 Comp. Gen. 698 (1935); 22 Comp. Gen. 1083 (1943).

A decision on a "necessary expense" question 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, to decide whether the agency has properly exercised, or exceeded its discretion.

The matter is further complicated by the fact that not all Federal establishments have the same range of discretion. For the typical Federal department or agency, the discretion will be the same. However, a Government corporation with the authority to determine the character and necessity of its expenditures has a broader measure of discretion. But even this discretion is not unlimited and is bound at least by considerations of sound public policy. See 14 Comp. Gen. 755 (1935), affirmed upon reconsideration in A-60467, June 24, 1936. Government corporations are further discussed in Chapter 15, this Manual.

Two decisions involving the Bonneville Power Administration will further illustrate. In 1951, the Interior Department asked whether funds appropriated to BPA could be used to enter into a contract to conduct a survey to determine the feasibility of "artificial nucleation and cloud modification" (artificial rainmaking in English) 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 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.

The Interior Department then asked whether, assuming the survey results were favorable, BPA could contract with the rainmakers. GAO thought this was going too far and questioned whether BPA's statutory authority to encourage the widest possible use of electric energy really contemplated artificial rainmaking. GAO emphasized that the expenditure would be improper for a department or agency with the "ordinary authority usually granted" to Federal agencies. However, the legislative history of BPA's enabling statute indicated that Congress intended that it have a degree of freedom similar to public corporations and that it be largely free from "the requirements and restrictions ordinarily applicable to the conduct of Government business." Therefore, while the Comptroller General expressly refused to "approve" the rainmaking contract, he felt compelled to hold that BPA's funds were legally available for it. B-105397, September 21, 1951.

(2) The Cases

A catalog of GAO's necessary expense cases would double the size of this Chapter. The sheer number of cases has forced the editors to be selective. Section C of this Chapter will discuss several specific purpose restrictions and the necessary expense concept is relevant in many of them. Thus, many recent and illustrative cases will be found throughout Section C. The cases here have been selected so as to avoid duplicating the coverage in Section C.

A review of the cases will reveal several things:

(1) Some expenditures would be proper for virtually any agency as incident to the ordinary authority of that agency. For example, if programmed incentive music can be justified in terms of enhancing employee morale and productivity, it makes no difference which agency is asking. (See 51 Comp. Gen. 797 (1972), subsection C(4)(d), this Chapter.)

(2) Similarly, some expenditures will be improper for any agency since they can never reasonably relate to carrying out the purposes of an appropriation. An example is seasonal greeting cards, subsection C(12)(f), this Chapter.

(3) Other expenditures may be proper for one agency but improper for another agency with different statutory authority. Thus, the rainmaking contract discussed above may have been permissible for the Bonneville Power Administration but the Federal Home Loan Bank Board could hardly have justified it.

Accordingly, a given decision may have general applicability or it may apply only to agencies with a particular type of statutory authority. Again, it should be emphasized that the cases cited below should not be viewed as the most recent or necessarily the most illustrative in the entire necessary expense area as many other cases are scattered throughout Section C.

The following cases illustrate the application of the necessary expense rule in various contexts.

Air conditioning

The Public Health Service wanted to install two portable air conditioners in a dental clinic it operated (but did not own) in Florida. The justification was to maintain optimum year-round efficiency of operation and to provide essential patient comfort. In view of the climatic conditions in the

area, the administrative justification was adequate and the expenditure was permissible from the Health Service's appropriation for its dental health activities. B-119485, April 15, 1954.

Normally, appropriations are not available for permanent improvements to privately-owned property without specific statutory authority. (See Chapter 9, this Manual.) In 53 Comp. Gen. 351 (1973), the Veterans Administration sought to install central air conditioning in the home of a disabled veteran. VA received appropriations for necessary inpatient and outpatient care, and its authorizing legislation defined authorized medical care as including home health services. The legislative history indicated an intent to emphasize non-hospital treatment. Accordingly, upon an administrative determination that the expense was necessary for the effective and economical treatment of the veteran, and that the alternative would be admission to a hospital, the expenditure was authorized.

Books and periodicals

Legislation in the early part of the century prohibited the purchase of reference books and periodicals without specific authority. The prohibition was repealed in 1946, and such purchases are now subject to the necessary expense rule.

Thus, the American Battle Monuments Commission could use its "salaries and expenses" appropriation to buy books on military leaders to help it decide what people and events to memorialize. 27 Comp. Gen. 746 (1948).

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 "salaries and expenses" appropriation. 39 Comp. Gen. 320 (1959). Similarly, 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).

In B-171856, March 3, 1971, the Interior Department was permitted to purchase newspapers to send to a number of Eskimo 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 voluntarism.

Fairs and expositions

Generally, appropriated funds are not available for participation in fairs or expositions without specific statutory authority. 2 Comp. Gen. 581 (1923). When Congress desires Federal participation, it has authorized it by specific legislation. See, e.g., B-160493, January 16, 1967, discussing legislation which authorized Federal participation in HemisFair 1968 in San Antonio. For another example, U.S. participation in the 1927 International Exposition in Seville, Spain, was specifically authorized by statute. See 10 Comp. Gen. 563, 564 (1931).

However, if participation is directly connected with and 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. 16 Comp. Gen. 53 (1936); 10 Comp. Gen. 282 (1930); 7 Comp. Gen. 357 (1927); 4 Comp. Gen. 457 (1924). The authority to disseminate information (see below), for example, will usually be sufficient. E.g., 7 Comp. Gen. 357, supra; 4 Comp. Gen. 457, supra.

Informational activities

An agency with authority to disseminate information on its functions and activities has discretion to choose the means to do so. The selection is governed by the necessary expense theory. The agency may use common devices such as newsletters. See, e.g., B-128938, July 12, 1976. 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, January 7, 1947.

However, in 18 Comp. Gen. 978 (1939), radio broadcasts by the Veterans Administration were held to violate 31 U.S.C. § 628 because the agency did not have statutory authority to disseminate information about its activities.

Law enforcement activities

An agency with law enforcement responsibilities may make necessary expenditures to carry out its function. For example, the Immigration and Naturalization Service could use

its "salaries and expenses" appropriation to purchase and install lights, automatic warning devices, and observation towers along the boundary between the United States and Mexico. 29 Comp. Gen. 419 (1950). See also 7 Comp. Dec. 712 (1901).

The procurement of evidence is also authorized as 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, March 8, 1977. See also 27 Comp. Gen. 516 (1948); 26 Comp. Dec. 780, 783 (1920).

For related discussion, see "Rewards," Section C, this Chapter.

Training

Training of Government employees is governed by the Government Employees Training Act, discussed in several places in Section C of this Chapter. For an entity not covered by the definition of "agency" in the Act, the authority to conduct training is very limited. The particular training program must be (1) essential 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).

In B-148826, July 23, 1962, the Comptroller General held that the Defense Department could pay $1 each to students participating in a civil defense training course as consideration for a release from liability.

Travel

Reimbursement for travel expenses incurred on official travel is now authorized by statute. However, even before the legislation was enacted, expenses incurred on authorized official travel were reimbursable as a necessary expense. 4 Comp. Dec. 475 (1898).

Travel expenses of Congressional spouses (Members and staff) may not be paid from appropriated funds. B-204877, November 27, 1981.

Miscellaneous cases: payment unauthorized

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. The tube system was not necessary to accomplish the purpose of the appropriation. 42 Comp. Gen. 226 (1962).

Absent specific statutory authority, the Interior Department could not construct a sewerage system in excess of the capacity required by the Government, the excess to benefit the local community. 34 Comp. Gen. 599 (1955).

Similarly, the Veterans Administration could use its appropriation for "cemeterial expenses" to maintain that portion of the Congressional Cemetery in Washington owned by the Government, but could not use its funds to maintain the major portion of the cemetery which was not owned by the Government. B-194031, May 1, 1979.

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).

Agency appropriations are not available to reimburse the Civil Service Retirement Fund for losses sustained by the Fund due to erroneous certifications by the agency. 54 Comp. Gen. 205 (1974). (For further coverage of interagency claims, see Chapter 11, this Manual.)

The Federal Reserve Board could not match employee contributions to an employee savings plan established by the Board. B-174174, September 24, 1971.

Miscellaneous cases: payment authorized

The Forest Service could use its appropriation for "Forest Protection and Utilization" to buy plastic litter bags for use in a national forest. 50 Comp. Gen. 534 (1971).

Where an agency transfers excess real property to another agency under the Federal Property and Administrative Services Act, the receiving agency may reimburse the "donor agency" for the fair market value of the property from the appropriation for the program for which the property is to be used. 38 Comp. Gen. 782 (1959).

Appropriations under the Public Health Service Act could be used to purchase clothing for indigent narcotic patients upon release from Public Health Service hospitals if a medical determination is made that providing the clothing is a necessary therapeutic device in aid of the patient's recovery and rehabilitation. 29 Comp. Gen. 507 (1950).

Under an appropriation for the purchase of maps, the Interior Department could also purchase the necessary material, such as paste, for properly mounting the maps. 4 Comp. Dec. 24 (1897).

Where highway construction under the Federal Highway Act necessitated the relocation of telephone poles which had been placed on public land under license from the Federal Power Commission, appropriations under the Federal Highway Act could be used to bear the expense of relocation as a necessary expense of the construction. B-122171, April 5, 1955.

Construction of a timber access road on a national forest uncovered a site of old Indian ruins. The Forest Service could pay, from its "Forest Roads and Trails" appropriation, as a necessary expense of the construction, the cost of archaeological and exploratory work necessary to obtain and preserve historical data from the ruins before they were destroyed by the construction. (Perouting was apparently not possible.) B-125309, December 6, 1955. (The protection of archaeological data is now provided by statute. See 16 U.S.C. § 469a-1 and the Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721.)

The Defense Department could use its appropriations to enter into an Economy Act agreement (Chapter 8, this Manual) with the (then) Bureau of Federal Credit Unions to conduct examinations of credit unions established at overseas military installations if the examinations were administratively determined to be necessary to the successful operation of the credit unions. B-158818, May 19, 1966.

The "salaries and expenses" appropriation of the Internal Revenue Service could be used to procure credit bureau reports if administratively determined to be necessary in connection with investigating applicants for employment with the IRS. B-117975, December 29, 1953.

Finally, no discussion would be complete without some mention of the "marauding woodpecker" case. It appears that in 1951, "marauding woodpeckers" were causing considerable damage to Government-owned transmission lines and the Southwestern Power Administration, Department of the Interior, wanted to buy guns with which to shoot the woodpeckers. Interior first went to the Army, but the Army advised that the types of guns and ammunition desired were not available, so Interior next came to GAO. The Comptroller General held that, if administratively determined to be necessary to protect the transmission lines, Interior could buy the guns and ammunition

from the Southwestern Power Administration's construction appropriation. The views of the woodpeckers were not solicited. B-105977, December 3, 1951. Actually, this was not a totally novel issue. Several years earlier, GAO had approved the use of an Interior Department "maintenance of range improvements" appropriation for the control of coyotes, rodents, and other "predatory animals." A-82570, December 30, 1936. See also A-82570/B-120739, August 21, 1957. 1/

Expenditure otherwise provided for

As noted previously, an expenditure cannot be authorized under a necessary expense theory if it is prohibited by law or if it is otherwise provided for under a more specific appropriation. The fact that the more specific appropriation may be exhausted is immaterial. Thus, in B-139510, May 13, 1959, the Navy could not use its shipbuilding appropriation to deepen a channel in the Singing River near Pascagoula, Mississippi, to permit submarines then under construction upriver to operate to deep water. The reason was that this was a function for which funds were traditionally appropriated to the Corps of Engineers, not the Navy. The fact that appropriations had not been made in this particular instance was irrelevant.

Similarly, the Navy could not use appropriations made for the construction or procurement of vessels and aircraft to provide housing for civilian employees engaged in defense production activities because funds for that purpose were otherwise available. 20 Comp. Gen. 102 (1940).

In these cases, the existence of a more specific source of funds is the governing factor and overrides the "necessary expense" considerations.

1/ 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 B-47255, February 6, 1945 (burial of three dead bulls); A-92649, April 22, 1936 (removal of a deceased "Federally owned horse"). These cases are being memorialized here because they will probably never be cited anywhere else.

"Absolutely essential" expenses

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 rule 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 air mail 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 22 Comp. Dec. 317 (1916) and 17 Comp. Gen. 636 (1938). (The latter decision cites the rule but the decision itself is an ordinary necessary expense case.) Another case which may be viewed as a member of this group is 35 Comp. Gen. 129 (1955), discussed later in this Chapter in the section entitled "Attendance at Meetings and Conventions."

C. SPECIFIC PURPOSE LIMITATIONS

Restrictions on the purposes for which appropriated funds may be spent come from a variety of sources. Some may stem from the Constitution itself. An example is the prohibition on paying certain State and local taxes, Section C(14). Others are found in permanent legislation, such as the restrictions on residential and long distance telephone service discussed in Section C(15).

A common source of purpose restrictions is the appropriation act itself. Restrictions are often included as provisos to the appropriating language or as general provisions or "riders." For example, B-202716, October 29, 1981, construes an appropriation act restriction prohibiting the use of Legal Services Corporation funds for the representation of illegal aliens. Another example is the restriction on "publicity and propaganda" expenditures discussed in Section C(10).

Finally, a number of restrictions have evolved from decisions of the Comptroller General and his predecessor, the Comptroller of the Treasury. An example is the Government's policy on self-insurance, Section C(9). The restrictions that have evolved administratively usually date back to the 19th Century, are firmly embedded in appropriations law, and for the most part have been recognized by Congress at least implicitly by the practice of legislating the occasional exception.

In reading decisions especially in this latter category, one frequently finds it stated that "the accounting officers of the Government" have long held this or that. While this language has fallen into disuse in recent decades, its purpose is to distinguish those matters within the jurisdiction of the Comptroller General and the General Accounting Office from those matters within the jurisdiction of the "law officers of the Government," i.e., the Attorney General and the Department of Justice.

A purpose restriction will commonly prohibit the use of funds for an item except "under specific statutory authority," or except under "an appropriation specifically available therefor," or similar language. The "specific authority" needed to create an exception in these situations need not be found in the appropriation act itself, but may be contained in authorizing or enabling legislation as long as it is clearly applicable to the appropriation sought to be charged. 23 Comp. Gen. 859 (1944); 16 Comp. Gen. 773 (1937).

The remainder of this Section will discuss a number of the more common purpose restrictions which the "accounting officers of the Government" have had frequent occasion to consider and apply.

(1) Attendance at Meetings and Conventions

Meetings have become a way of life in contemporary American society and the Federal bureaucracy is no exception. It seems that there are meetings on just about everything. Quite often they can be very useful. They can also be expensive. It is no surprise that lots of meetings are held in places like Honolulu and San Francisco. This Section will explore when appropriated funds may be used to send people to meetings. Congress has passed a number of statutes in this area and the cases usually involve the interpretation and application of the various statutory provisions. 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.

(a) Government Employees

To understand the law in this area, it is necessary to understand the interrelationship of several statutes. Listed in the order of their enactment, they are: 5 U.S.C. § 5946; 31 U.S.C. § 551; 5 U.S.C. § 4109; and 5 U.S.C. § 4110. This interrelationship is best seen by outlining the statutory evolution.

1. 1912. Section 8 of the Act of June 26, 1912, 37 Stat. 184, prohibited the payment, without specific statutory authority, of (a) membership fees or dues of an employee of the United States or the District of Columbia in a society or association, and (b) 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. For the most part, it has always been viewed as applying to attendance by Federal employees at non-Federally sponsored meetings. See, e.g., B-140912, November 24, 1959. (Membership fees are discussed separately in section C(11) later in this Chapter.)

There were many early cases under the 1912 statute. 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 United States 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). For meetings outside the scope of the statute, the test of propriety was simply the application of the "necessary expense" doctrine.

However, if a given gathering was viewed as a meeting or convention of a society or association, the expenses were consistently disallowed. E.g., 3 Comp. Gen. 883 (1924); 4 Comp. Gen. 421 (1924), as modified by 4 Comp Gen. 630 (1925); 5 Comp. Gen. 599 (1926), affirmed by 5 Comp. Gen. 746 (1926); 16 Comp. Gen. 252 (1936). GAO often told agencies in those days 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. 746, 747, supra. In fact Congress granted specific authority to a number of agencies (for an example, see B-136324, August 1, 1958), and later, as will be seen below, enacted general legislation which renders 5 U.S.C. § 5946, as it relates to attendance at meetings, of very limited applicability.

2. 1935. The next congressional venture in this field was Public Resolution No. 2 (February 2, 1935), 74th Congress, 49 Stat. 19, aimed primarily at restricting the use of appropriated funds to pay expenses of nongovernment persons at conventions. This statute, now codified at 31 U.S.C. § 551, provides:

> "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."

The cases involving 31 U.S.C. § 551 will be discussed later in this Section. For now, it is sufficient to note that it does not apply to Government employees in the discharge of official duties. Thus, as of 1935, attendance by private parties was governed by 31 U.S.C. § 551; attendance by Government employees was governed by the 1912 statute for meetings of a society or association and by 31 U.S.C. § 551 for other types of "assemblages" unless attendance was in the discharge of official duties.

3. 1958. Two provisions of the Government Employees Training Act, 72 Stat. 327, enacted in this year, are relevant here. Section 10 of the Act, 5 U.S.C. § 4109, authorizes payment of certain expenses in connection with authorized training, including membership fees if a necessary cost of or a condition precedent to the training. Section 19(b) of the Act, 5 U.S.C. § 4110, makes travel appropriations available for expenses of attendance at meetings "which are concerned with 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).

With this statutory framework as background, it is now possible to attempt to state some rules.

A Government employee may attend a non-Government sponsored meeting at Government expense (1) if it is part of an authorized training program under 5 U.S.C. § 4109, or (2) if it is related to agency functions or management under 5 U.S.C. § 4110.

For example, 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). 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. B-164372, June 12, 1968. (This was sort of 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 for some reason filed a claim for his expenses. GAO said no.) Where attendance is authorized, the fact that the sponsor is a profit-making organization is immaterial. B-161777, July 11, 1967.

The express inclusion of "management" in 5 U.S.C. § 4110 is significant. Before the Training Act, GAO had strictly construed grants of statutory authority for attendance at meetings. Thus, where statutory authority was conferred in language similar to the first part of section 4110 (attendance at meetings which are concerned with the functions or activities for which the appropriation is made), GAO had construed

this as excluding meetings concerning general problems such as management which are common to all agencies. 37 Comp. Gen. 335 (1957). This type of meeting is now expressly authorized.

If neither 5 U.S.C. § 4109 nor 5 U.S.C. § 4110 applies and the meeting is a meeting of a "society or association," then it is subject to the prohibition of 5 U.S.C. § 5946. Further coverage of these statutes and the cases under them, including a discussion of registration fees, will be found in Section C(4) of this Chapter, "Entertainment and Recreation," subsection entitled "Food for Government Employees."

The continuing viability of 5 U.S.C. § 5946 requires further elaboration. GAO held in 38 Comp. Gen. 800 (1959) that the Government Employees Training Act repealed § 5946 by implication to the extent that the two statutes were incompatible. However, some of the language in that decision has generated some confusion. The decision stated that the restriction in § 5946 "is inapplicable so far as agencies and personnel covered by the Government Employees Training Act are concerned" and that those agencies no longer need to obtain specific appropriation provisions to authorize attendance at meetings. Of course this statement is based on the premise that an agency is not likely to seek, nor is Congress likely to grant, specific appropriation authority for an agency to send its employees to meetings which have nothing to do with agency business. Thus, it is not accurate to say that § 5946 simply no longer applies to civilian employees of the Government. It does apply, except that its scope is considerably reduced by virtue of the broad authority of the Training Act. If attendance cannot be authorized under either of the Training Act provisions, 5 U.S.C. § 5946 still applies. This relationship is correctly stated in 55 Comp. Gen. 1332, 1335-36 (1976). For cases where expenses were disallowed because they could not be justified under these standards, see B-202028, May 14, 1981; B-195045, February 8, 1980; B-166560, May 27, 1969. (These cases are all discussed in Section C(4), this Chapter.)

It is also possible for 31 U.S.C. § 551 to apply to Government employees, although it would be the rare case. As noted above, 31 U.S.C. § 551 does not apply to Government employees in the discharge of official duties. A number of earlier cases will be found which cite the statute in passing for this proposition. E.g., 22 Comp. Gen. 315 (1942); 26 Comp. Gen. 53 (1946); 27 Comp. Gen. 627 (1948); B-13888,

December 10, 1940; B-77613, June 23, 1948; B-77404, June 29, 1948; B-80621, October 8, 1948; B-87691, August 2, 1949; B-117137, September 25, 1953. 2/

Since the exception for Government employees in 31 U.S.C. § 551 is limited to the discharge of official duties, the statutory prohibition applies to Government employees to the extent that a given meeting is not part of the discharge of official duties. If a meeting cannot qualify as related to agency functions under 5 U.S.C. § 4110, it would certainly not be within the exception in 31 U.S.C. § 551 for the discharge of official duties. If the meeting is a meeting of a "society or association," it is, as noted above, subject to 5 U.S.C. § 5946. If the meeting is not a meeting of a "society or association" and is not within the exception for the discharge of official duties, 31 U.S.C. § 551 would apply. An example of a situation in which this rationale might apply is B-195045, February 8, 1980, cited above and in Section C(4), in which attendance expenses at an executive board meeting of the Combined Federal Campaign were disallowed. (The case was decided on the basis of regulations and prior decisions.)

Inability to attend

If an employee is scheduled to participate in a meeting or conference and is unable to attend, the Government may be liable for attendance fees in certain situations. Two cases will illustrate.

In B-159059, June 28, 1966, an Interior Department employee had been accepted to attend an energy seminar. The seminar announcement provided a cut-off date for cancellation of reservations but permitted substitutions. Due to the press of other necessary work, the employee did not attend the seminar, nor did he send a substitute or request cancellation before the cut-off date. GAO found that the sponsor's

2/ All of these cases also involve the pre-Training Act version of 5 U.S.C. § 5946. Thus, that portion of the cases may no longer be valid. The editors have made no attempt to examine each of the cases from this perspective. The point is simply that, while the pre-1958 cases remain valid to the limited extent that they involve 31 U.S.C. § 551, the results in those cases may no longer apply in view of the subsequent enactment of 5 U.S.C. §§ 4109 and 4110.

acceptance of the employee's application, which had been duly approved (in this particular case, the applicant was also the approving official), obligated the Government to pay the seminar fee subject to timely cancellation. Since the agency failed to give timely notice of cancellation, it was liable for the seminar fee.

In another 1966 case, a Defense Department employee was scheduled to attend a training seminar in New York but a severe snow storm prevented him from leaving Washington. (By Washington standards, this could have been two inches.) Since the employee's nonattendance was in no way attributable to the organization conducting the seminar, GAO concluded (citing B-159059, supra) that the seminar fee should be paid. GAO rejected a contention that the Government's obligation should be excused on the grounds of impossibility (the employee's nonattendance resulted from an "act of God") since the arrangement permitted substitution of personnel. B-159820, September 30, 1966.

For a related topic, see "Cancelled Hotel Reservations," Chapter 11 (Part I), this Manual.

Federally-sponsored meetings

Federally-sponsored meetings for employees (intraagency 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. § 551 because they concern the discharge of official duties. The authority for this type of meeting is essentially a "necessary expense" question.

An increasingly common type of agency meeting is the "retreat type" conference. In this situation, some agency official with authority to do so determines that the participants should get away from their normal work environment and its associated interruptions such as telephones. Usually, they need to get 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 illegal. See B-193137, July 23, 1979.

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(4), this Chapter.

Rental of space in District of Columbia

Originally enacted in 1877 (19 Stat. 370), 40 U.S.C. § 34 provides:

> "No contract shall be made for the rent of any building, or part of any building, to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and this clause shall be regarded as notice to all contractors or lessors of any such building or any part of building."

The statute does not prohibit the procurement of short-term conference facilities if otherwise proper. 54 Comp. Gen. 1055 (1975). In rendering this decision, which overruled several earlier cases, the Comptroller General relied heavily on the Federal Property Management Regulations, in which the General Services Administration construed 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), modifying and affirming B-159633, September 10, 1974; 49 Comp. Gen. 305 (1969). 3/ In 56 Comp. Gen. 572, supra, GAO permitted payment to the hotel of the difference between full per diem and the reduced per diem actually paid to the participating employees. This is because the agency could, without violating the statute, have paid full per diem to the employees if they had made the arrangements themselves on an individual basis. Thus, the difference represented a cost the agency would have properly incurred had it not procured the accommodations directly.

For further discussion of 40 U.S.C. § 34, see Chapter 9, this Manual.

3/ 49 Comp. Gen. 305 was one of the decisions listed as overruled in 54 Comp. Gen. 1055. However, the overruling action was later recognized to be erroneous and 49 Comp. Gen. 305 was reinstated in 56 Comp. Gen. 572, 574.

Military personnel

Attendance at meetings by military personnel is governed by 37 U.S.C. § 412:

> "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."

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-1940's and was enacted as permanent legislation as section 605 of the Department of Defense Appropriation Act for 1954, 67 Stat. 349.

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 Comptroller General held in 1959 that the administrative approval specified in 37 U.S.C. § 412 was no longer required for civilian employees covered by the Training Act. However, the requirement of 37 U.S.C. § 412 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 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, August 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. § 412 does not apply to meetings sponsored by a Federal department or agency. 50 Comp. Gen. 527 (1971).

(b) Non-Government Personnel

The primary statute to consider here is 31 U.S.C. § 551, quoted previously in subsection (a) of this Section. It prohibits the payment of travel, transportation, or subsistence expenses of private parties at meetings without specific statutory authority.

The Comptroller General set the tone for GAO's approach to 31 U.S.C. § 551 in two cases decided shortly after the statute was enacted. In 14 Comp. Gen. 638 (1935), the Comptroller held that the Federal Housing Administration could not pay the travel and lodging expenses for attendance at meetings of private citizens who were cooperating with the FHA in a campaign to encourage the repair and modernization of real estate. GAO had no difficulty in finding that the statute barred payment:

> "There seems very little if any room for doubt as to the reasonable meaning and legal effect of [31 U.S.C. § 551]. Simply stated, it is that no convention or other form of assemblage or gathering may be lodged, fed, conveyed, or furnished transportation at Government expense unless authority therefor is specifically granted by law." Id., at 640.

(GAO found FHA's campaign to drum up business objectionable on other grounds as well. See "Lobbying and Related Matters," infra, this Chapter.)

A few months later, relying on 14 Comp. Gen. 638, the Comptroller General held similarly that 31 U.S.C. § 551 prohibited the American Battle Monuments Commission from providing transportation and refreshments for private individuals at monument dedication ceremonies in Europe. 14 Comp. Gen. 851 (1935). Other early decisions applying the statutory prohibition are 15 Comp. Gen. 1081 (1936); A-66869, January 31, 1936; B-27441, August 25, 1942; and B-53554, November 6, 1945.

Some more recent cases in which GAO found expenditures prohibited by 31 U.S.C. § 551 are summarized below:

--The Environmental Protection Agency could not pay transportation and lodging expenses of State officials attending a National Solid Waste Management Association Convention (in San Francisco). B-166506, July 15, 1975, affirmed in 55 Comp. Gen. 750 (1976).

--The Mine Safety and Health Administration, Department of Labor, could not pay travel and subsistence expenses of miners and mine operators attending safety and health training seminars. B-193644, July 2, 1979.

--Maritime Administration could not pay transportation and subsistence expenses of non-Governmental participants in a 2-week seminar for general publication maritime writers. B-168627, May 26, 1970.

--Navy could not pay for a dinner and cocktail party for non-Government minority group leaders. B-176806-O.M., September 18, 1972.

GAO has not attempted to define precisely what types of gatherings are within the scope of the statutory prohibition. The determination is made on a case-by-case basis. The statutory language is broad and could presumably be construed to cover any situation where two or more persons are gathered together in one place. However, GAO has never adopted such a rigid view. For example, in 45 Comp. Gen. 476 (1966), a certifying officer of the Department of Agriculture asked whether he could "properly certify for payment a voucher covering payment for rental of a chartered bus for the transportation of female guests from Albuquerque to Grants, New Mexico, and return, for purposes of providing social and recreational services to Job Corps enrollees." (This is what the case says. The editors are not making it up.) The Comptroller General found that this was simply not the kind of "assemblage or gathering" 31 U.S.C. § 551 was intended to prohibit. Further, there was statutory authority for providing "recreational services" for the enrollees. Therefore, the expenditure was not illegal. The decision does not specify precisely what "social and recreational services" the women were bused in to provide.

As noted, the prohibition of 31 U.S.C. § 551 can be overcome by specific statutory authority. An example of such authority is language in an appropriation act making the appropriation available for "expenses of attendance at meetings" or similar language. See 16 Comp. Gen. 839 (1937); 17 Comp. Gen. 838 (1938); 24 Comp. Gen. 86 (1944); 34 Comp. Gen. 321 (1955); B-117137, September 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. See subsection (a), supra.)

In addition, the authority has been made permanent in some cases. An example is 31 U.S.C. § 1031 for the Treasury Department, construed in 37 Comp. Gen. 708 (1958). Another example is 31 U.S.C. § 552 concerning meetings of 4-H Clubs (quoted in B-166506, July 15, 1975).

However, general statutory authority to disseminate information to the public, or to promote or encourage cooperation with the private sector, or to provide technical assistance or education to specified segments of the private sector, is not sufficiently specific to overcome 31 U.S.C. § 551. See B-193644, July 2, 1979; B-166506, July 15, 1975; B-168627, May 26, 1970.

A distinction must be drawn between the authority to sponsor a meeting and the authority to pay the types of expenses prohibited by 31 U.S.C. § 551. An agency may be able to do the former but not the latter. Thus, in B-166506, July 15, 1975, summarized above, GAO pointed out that the Environmental Protection Agency could hold the convention as a legitimate means of implementing its functions under the Solid Waste Disposal Act. What it could not do without more specific statutory authority was pay the travel and lodging expenses of the State participants. Sponsoring the meeting itself is essentially a "necessary expense" question. Cf. 45 Comp. Gen. 333 (1965); B-147552, November 29, 1961.

Thus, depending on the agency's statutory authority, it may be authorized to incur such expenses as renting conference facilities, financing the participation of its own employees, bringing in guest speakers, both Federal and non-Federal, and preparing and disseminating literature. 31 U.S.C. § 551 comes into play only when the agency purports to pay the travel, transportation, or subsistence expenses of non-Federal attendees.

In one case, less-than-specific authority was found adequate. In 35 Comp. Gen. 129 (1955), GAO considered a statute which (1) provided for a "White House Conference on Education;" (2) specified that the conference be broadly representative of educators and other interested persons from all parts of the United States; and (3) authorized appropriations necessary for the "administration" of the act. The decision held this sufficient to make the ensuing appropriations available for the travel costs of the invitees. While the decision does not mention 31 U.S.C. § 551, the distinction is readily apparent. Here, holding the conference was more than merely a legitimate means of implementing the enabling

statute; it was the very purpose of the statute and hence the only means. (A subsequent related decision is 35 Comp. Gen. 198 (1955).)

Another thing the agency may be able to do is permit the use of Government facilities for the meeting. For example, in B-168627, May 26, 1970 (summarized above), while the Maritime Administration could not pick up the tab for the participation of non-Government parties at the seminar, it could permit the seminar to be held at the United States Merchant Marine Academy. The rule, stated in that decision, is that an agency has authority to grant to a private individual or business a "revocable license" to use Government property, subject to termination at any time at the will of the Government, provided that such use does not injure the property in question and serves some purpose useful or beneficial to the Government. (For further discussion of this principle, see Chapter 9, this Manual.)

Invitational travel

5 U.S.C. § 5703 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 (60 Stat. 608). It relates to this discussion insofar as 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. To this extent, it may be viewed as a limited exception to 31 U.S.C. § 551.

Even before 5 U.S.C. § 5703 was 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, April 15, 1932.

The enactment of 31 U.S.C. § 551 in 1935 did not change this. Thus, the Comptroller General recognized in 15 Comp. Gen. 91, 92 (1935) that while the newly-enacted 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." See also A-81080, October 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.

Although GAO did not directly address the relationship between 5 U.S.C. § 5703 and 31 U.S.C. § 551 until 1976 (55 Comp. Gen. 750, below), 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 (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, September 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. As stated in B-196088, November 1, 1979, "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."

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, November 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 head-on with 31 U.S.C. § 551. This point was discussed in 55 Comp. Gen. 750 (1976) and reiterated in B-193644, July 2, 1979. As noted above, 55 Comp. Gen. 750 affirmed B-166506, July 15, 1975, holding that 31 U.S.C. § 551 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. The reason: the attendees in both cases were not 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 more than one) to a meeting or conference at Government expense, but only if that individual is legitimately performing a direct service for the Government such as making a presentation or advising in an area of expertise. However, it is not a device for circumventing 31 U.S.C. § 551. 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.

The application of 5 U.S.C. § 5703 in other contexts is beyond the scope of this Manual and is treated further in the Personnel Law Manuals.

Use of grant funds

One of the principles of grant law is that, where a grant is made for an authorized grant purpose, the 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 applicable to the direct expenditure of appropriations. One of those restrictions which does not apply to grant funds in the hands of a grantee is 31 U.S.C. § 551.

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). See also B-83261, February 10, 1949. 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. § 551. However, an agency may not use the grant mechanism for the sole purpose of circumventing 31 U.S.C. § 551, that is, to do indirectly that which it could not do directly.

This concept is discussed in more detail in Chapter 13, this Manual.

(2) Attorney's Fees

(a) Introduction

Questions as to the availability of appropriated funds to pay attorney's fees arise in many contexts. Attorney's fees awarded by courts are discussed in Chapter 12, this Manual. This Section deals with administrative payments.

Traditionally, the United States has followed what has come to be known as the "American Rule," that each party in litigation or administrative proceedings is personally responsible for his or her 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. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975). 4/

One 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., 37 Comp. Gen. 485, 487 (1958); 49 Comp. Gen. 44 (1969); 57 Comp. Gen. 554 (1978); B-189045, January 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, April 14, 1977. Similarly non-reimbursable were legal fees incurred incident to prosecuting a claim for damages for breach of an oral agreement. 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).

Correspondingly, attorney's fees incurred by a bidder for a Government contract in pursuing a bid protest with GAO are not compensable. 57 Comp. Gen. 125, 127 (1977); B-197174, August 25, 1980; B-192910, April 11, 1979.

4/ This Section reflects the law prior to enactment of the Equal Access to Justice Act, Public Law 96-481, title II. The Act, effective October 1, 1981, authorizes the awarding of attorney's fees and expenses in a number of administrative and judicial situations where it had not been previously authorized. The act was given an initial life of three years. Should it be made permanent, its impact will be included in a future revision of this Section.

Payments to attorneys also arise in a number of situations which are, strictly speaking, not applications of the American Rule, that is, which 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 Manual, 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 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, January 10, 1979. In another case, the Small Business Administration 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, April 26, 1977.

The situations most commonly arising in decisions of the Comptroller General are discussed in the remaining subsections of this Section.

(b) Hiring of Attorneys by Government Agencies

During the first century of the Republic, Government agencies who needed lawyers either as counsellors or litigators simply went out and 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, 41st Cong., 2d Sess., 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 the executive and military departments from employing attorneys "for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested." The agencies are required to refer such matters to the Justice Department. 5/ 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.

Normally, in view of the existence of the Justice Department and the agency's own staff attorneys, the need for a Federal agency to retain private counsel should rarely occur. In limited situations, the Comptroller General has held that the retention of private attorneys as experts or consultants under 5 U.S.C. § 3109 was authorized. For example, in B-192406, October 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 covered by 5 U.S.C. § 3106 nor otherwise 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, February 10, 1978. See also 61 Comp. Gen. ___ (B-202159, November 6, 1981); B-133381, July 22, 1977; B-141529, July 15, 1963.

5/ Many early decisions will be found dealing with Revised Statutes §§ 189 and 365. E.g., 5 Comp. Gen. 382 (1925); 6 Comp. Gen. 517 (1927). For the most part they may be disregarded as applying statutory provisions which have since became obsolete. However, decisions under R.S. §§ 189 and 365 remain valid to the extent they concern the elements of those statutes which survived into 5 U.S.C. § 3106. E.g., 32 Comp. Gen. 118 (1952).

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 salary limitations of 5 U.S.C. § 3109. 53 Comp. Gen. 702 (1974); B-180708, January 30, 1976. However, the authority is limited to services of the legal profession and does not embrace "counsel" in a broader sense. B-180708, July 22, 1975.

Another situation in which agency appropriations may be available, in limited situations, to retain or reimburse private counsel is to defend employees sued for actions taken in the performance of their official duties. This is discussed in the next subsection.

(c) 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 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). However, the 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 subsection 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 Department of Justice. 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.

The role of the Justice Department derives from a number of statutory provisions: 28 U.S.C. §§ 515-519, 543, and 547. These statutes establish the Justice Department as the Government's litigator, which for the most part means representation by Justice Department attorneys. To 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. The 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. 6/ This statutory scheme is designed to encourage employees to vigorously carry out their duties by assuring them of an adequate defense at no cost if they should be sued in the course of executing their responsibilities.

In addition, the Comptroller General has recognized that the statutes cited above authorize the Justice Department to retain private counsel, payable from Justice Department appropriations, if determined necessary and in the interest of the United States. E.g., B-22494, January 10, 1942. For example, the Justice Department will not provide representation if the employee is the target of a criminal investigation, 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 and 50.16. One type of suit to which these regulations apply is a civil action against an employee under section 7217 of the Internal Revenue Code for improper disclosure of tax returns. See 56 Comp. Gen. 615, 621-624 (1977).

The role and authority of the Justice Department in providing legal representation to employees, as outlined above, have been discussed in several opinions to Members of Congress. See B-130441, April 12, 1978; B-130441, May 8, 1978; B-150136/B-130441, May 19, 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). The importance of this step must be emphasized. 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.

6/ For cases where the Federal Tort Claims Act is the exclusive remedy (motor vehicle cases and certain medical malpractice cases), see 28 C.F.R. Part 15 and the discussion of the Federal Tort Claims Act, Chapter 11 (Part I), this Manual.

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 representation must first have been sought and must be appropriate but unavailable, and representation must be in the interest of the United States. The employee's personal interest in the outcome does not automatically preempt a legitimate Government interest. The two may exist side-by-side. The law in this area is relatively new and is still evolving.

One case, 53 Comp. Gen. 301 (1973), dealt with suits against Federal judges and other judicial officers. 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. The Comptroller General attached several conditions to the decision: (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.

The same case extended its holding to Federal public defenders appointed under the Criminal Justice Act who are sued for actions taken within the scope of their duties. Appropriations for the public defender service are available to defend the defenders if determined necessary and in the best interest of the United States, if the Justice Department declines representation, and if other public defenders are not available for that purpose. 53 Comp. Gen. at 306.

In 55 Comp. Gen. 408 (1975), the United States Attorney had agreed to defend a former Small Business Administration 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.

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 of the limits 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, an employee of the Internal Revenue Service 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 (discussed above). 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 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, although it is not clear from the decision how this authority justified the possession of seven guns and over 100,000 rounds of ammunition, which is what the FBI found. 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, August 12, 1976.

A related situation is where an employee incurs legal fees defending against a fine. In the section of this Chapter on Fines and Penalties, a distinction is drawn between an action which 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, February 27, 1979 (non-decision letter).

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 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.

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 could retain private counsel to represent two NCR staff members at a disciplinary proceeding where the agency determined that the employees had been acting within the scope of their authority. B-127945, April 5, 1979. See also B-192784, January 10, 1979. In another case, however, 58 Comp. Gen. 613 (1979), the Securities and Exchange Commission 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. 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.

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 (1976).

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, 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. Normally, the Comptroller General would decline to render a decision on a question which is 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.

Finally, the concept of using agency appropriations for legal fees when Justice Department representation is unavailable has arisen in one context that is unrelated to suits against Government employees. Under 25 U.S.C. § 175, the United States 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).

(d) Claims by Federal Employees

Discrimination proceedings

Title VII of the Civil Rights Act of 1964, made applicable to the Federal Government by the Equal Employment Opportunity 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 non-Federal prevailing parties. In addition, 42 U.S.C. § 2000e-16(b) directs the 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 in 1978.

Judicial awards of attorney's fees are covered in Chapter 12 of this Manual. The concept of administrative 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. Smith v. Califano, 446 F. Supp. 530 (D.D.C. 1978); Patton v. Andrus, 459 F. Supp. 1189 (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 towards the view expressed in the Noble decision. See B-167015, April 7, 1978. However, GAO reconsidered its position and subsequently announced that it would not object to the issuance of regulations by the Equal Employment Opportunity Commission to include the awarding of attorney's fees at the administrative level. B-167015, May 16, 1978; B-167015, September 12, 1978; B-193144, November 3, 1978 (all non-decision letters).

EEOC issued interim regulations on April 9, 1980. 45 Fed. Reg. 24130, 29 C.F.R. Part 1613. The regulations 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-195544, May 7, 1980 (non-decision letter).

It is important to note that GAO's approval was contingent upon the issuing of regulations by the agency authorized to enforce Title VII. Thus, as to administrative proceedings concluded before the regulations were issued, GAO

continued to hold that agencies lacked the authority to award attorney's fees. B-196019, April 23, 1980; B-195544, November 20, 1979 (non-decision letter).

GAO upheld the validity of the interim EEOC regulations in B-199291, June 19, 1981. However, a restriction appearing in recent legislative branch appropriation acts (the so-called "Bauman Amendment") bars the use of appropriations for providing legal representation to employees without specific statutory authority. Thus, the regulations will apply to a legislative branch agency only if that agency has a separate statutory basis. Id.

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. § 724a (Chapter 12, this Manual). B-199291, June 19, 1981.

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 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq. The EEOC has enforcement responsibility for Federal employment under these statutes as well as Title VII. The Comptroller General has held that the EEOC may 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). (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.)

Other employee claims

Prior to October 1978, there was no authority to award attorney's fees in connection with a claim for back pay under the Back Pay Act, 5 U.S.C. § 5596. GAO consistently denied claims for attorney's fees based on the general rule barring the payment of legal fees in the absence of statutory authority. Examples of cases in which GAO denied claims by Federal employees for attorney's fees are as follows:

--Appeal from separation due to reduction in force. B-156482, June 23, 1975, affirmed on reconsideration, B-156482, June 14, 1977.

--Improper removal for disciplinary reasons. B-183038, May 9, 1975.

--Reduction in grade and erroneous transfer of duty station. B-184200, April 13, 1976.

--Unfair labor practice proceeding. B-167461, August 9, 1978.

--Administrative grievance proceeding. 52 Comp. Gen. 859 (1973).

In October 1978, the Back Pay Act was amended by the Civil Service Reform Act of 1978. 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" 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. 5 U.S.C. § 5596(b), as amended by Pub. L. No. 95-454.

The Special Counsel of the Merit Systems Protection Board is not an "appropriate authority" with power to award attorney's fees under the Back Pay Act. 59 Comp. Gen. 107 (1979). The Special Counsel may recommend (not order) an award of attorney's fees as part of his recommendations for corrective action, but only if the corrective action is within the scope of the Back Pay Act. Id.

Employees claims outside the scope of the Back Pay Act remain subject to the general rule. 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, August 20, 1979.

--Employee obtained continuance in divorce proceedings. Continuance was necessitated by temporary duty assignment. B-197950, September 30, 1980.

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

--Claim for relocation expenses. B-186763, March 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, September 29, 1981. (Legal fees within customary range of charges are reimbursable. See cases cited in B-200207.)

For more detailed coverage of employee claims, see the Personnel Law Manuals.

(e) Criminal Justice Act

The Criminal Justice Act, 18 U.S.C. § 3006A, was originally enacted in 1964 and substantially amended in 1970. Reflecting a series of Supreme Court decisions on the right of a criminal defendant to counsel, the Act implements this right by establishing 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 Act. 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 Criminal Justice Act 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. 7/ Appropriations are made to the Judiciary to carry out the Act and payments are supervised by the Administrative Office of the United States Courts.

Types of actions covered

Originally, GAO had held that the Criminal Justice Act 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

7/ The Act also provides for certain services other than counsel. These are discussed in the section on Expenses of Litigation, Chapter 15, this Manual.

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, the 1970 amendments to the Criminal Justice Act. 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 v. Rhay. H.R. Rep. No. 91-1546, 91st Cong., 2d Sess. 7 (1970). The Comptroller General 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. 18 U.S.C. § 3006A(g). Subsequent legislation made appointment of counsel mandatory, and the Comptroller General held that appropriations under the Criminal Justice Act 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.

Under the 1970 amendments, representation may be provided, at the discretion of the court or magistrate, to an indigent prosecuting a writ of habeas corpus. 18 U.S.C. § 3006A(g). 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 Criminal Justice Act applied to prosecutions brought in the name of the United States in the District of Columbia Superior Court and Court of Appeals. (An earlier decision, 45 Comp. Gen. 785 (1966), had dealt with applicability under a prior D.C. court structure.) In 1974, Congress passed the District of Columbia Criminal Justice Act (Public Law 93-412) 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 Criminal Justice Act was amended to remove the District of Columbia courts from its coverage. 18 U.S.C. § 3006A(1).

Miscellaneous cases

When a court appoints an attorney under the Criminal Justice Act, the Government's contractual obligation, and hence the obligation of appropriations, occurs at the time of the appointment and 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).

An attorney appointed and paid under the Criminal Justice Act does not thereby enter into an employer-employee relationship with the United States for purposes of the dual compensation laws. 44 Comp. Gen. 605 (1965). (This decision pre-dated the 1970 amendments to the Criminal Justice Act 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 duty without loss of pay or charge to annual leave. 44 Comp. Gen. 643 (1965).

An attorney appointed under the Criminal Justice Act 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).

Finally, as noted previously in this Section, appropriations for the Federal public defender service are available to defend defenders appointed under the Criminal Justice Act who are sued for actions taken within the scope of their duties, provided that the Justice Department declines to provide representation, other public defenders are not available for that purpose, and the expenditure is administratively determined necessary and in the best interest of the United States. 53 Comp. Gen. 301, 306 (1973).

(f) 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 is 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 had frequent occasion to consider 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--

1. Intervenor participation is authorized, either expressly by statute or by necessary implication derived from a regulatory or licensing function;

2. The agency determines that the participation is reasonably necessary to a full and fair determination of the issues before it; and

3. 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. 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 1970's and is still evolving. In 1970, the Federal Trade Commission held that an indigent respondent in an FTC hearing was entitled to Government-furnished counsel. American Chinchilla Corp., 1970 Trade Reg. Rep. para. 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, supra, and answered "yes." B-92288, February 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) 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, supra, 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, February 19, 1976, 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:

1. Provision of funds directly to participants.

2. Modification of agency procedural rules so as to ease the financial burdens of public participation.

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

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

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

6. 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 advisory 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: B-180224, April 5, 1977; 59 Comp. Gen. 424 (1980).

--Federal Communications Commission: B-139703, September 22, 1976.

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

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

--Economic Regulatory Administration (a component of the Department of Energy): B-192213-O.M., August 29, 1978; letter report EMD-78-111, October 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-92288, February 19, 1976;

B-180224, May 10, 1976. Congress has acted in several instances, authorizing intervenor funding in some cases and prohibiting it in others.

Thus, the Federal Trade Commission was given specific authority to fund intervenor participation in 1975 by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(h). Under this legislation, payments for legal services may not exceed the costs actually incurred, even though the participant uses "house counsel" whose rate of pay is lower than prevailing rates. 57 Comp. Gen. 610 (1978).

Similarly, 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(d).

Restrictions in appropriation acts have prohibited intervenor funding programs for several agencies. For example, a provision in the Nuclear Regulatory Commission's 1981 appropriation prohibited the use of funds for the expenses of intervenors. The Comptoller General has held that this restriction would prohibit the NRC from adopting a "cost reduction program" of providing transcripts and other documents free to intervenors. B-200585, December 3, 1980. However, NRC can reduce the number of copies of documents required to be filed. Id. Also, NRC can decide to provide free transcripts to all parties, intervenors included, without violating the restriction. B-200585, May 11, 1981.

Appropriation act restrictions have also prohibited intervenor funding by the Economic Regulatory Administration and the Federal Energy Regulatory Commission. In addition, the conference committee on the 1980 appropriation for the National Highway Traffic Safety Administration and the Civil Aeronautics Board directed that no funds be allocated by these agencies for intervenor funding programs.

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 NCR 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 NCR's appropriation act. This concept is discussed in detail in Chapter 5, this Manual.

One court has disagreed with the GAO decisions. Greene County Planning Board v. Federal Power Commission, 559 F.2d 1227 (2d Cir. 1976), cert. denied, 434 U.S. 1086. 8/ 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 Commission 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 applied the Supreme Court's Alyeska decision and held that FPC lacked authority to reimburse the attorney's fees. 559 F.2d at 1238.

Subsequently, both GAO and the Justice Department's Office of Legal Counsel have taken the position that Greene County IV applied only to the former Federal Power Commission, and not to other Federal agencies or even to the agencies which succeeded to the FPC's responsibilities. 59 Comp. Gen. 228 (1980). 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

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

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 more recent decisions have 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 (1976). 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, February 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. § 529. 56 Comp. Gen. 111, supra; B-139703, September 22, 1976. 9/ 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. 59 Comp. Gen. 424 (1980) applied this concept to the program of the Environmental Protection Agency. (This aspect of the decision is further discussed in Chapter 13, Section A, this Manual.)

9/ Advance funding is discussed in detail in Chapter 4, this Manual

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, April 27, 1973 (non-decision 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, February 19, 1976.

A summary and discussion of intervenor funding through early 1981 may be found in a GAO report entitled "Review of Programs for Reimbursement for Public Participation in Federal Rulemaking Proceedings," PAD-81-30, March 4, 1981. See also "Payment of Intervenors' Expenses in Agency Regulatory Proceedings" by Rollee H. Efros, Cases in Accountability: The Work of the GAO, Erasmus H. Kloman ed. (Westview Press 1979), pp. 171-181.

(3) Compensation Restrictions

Previous editions of this Manual have traditionally included coverage of selected restrictions on the compensation of Federal employees. Although they are matters of personnel law, they were included largely to illustrate the point that they are also restrictions on the "purpose availability" of appropriations. For this edition, the editors have deleted much of the compensation material. A comprehensive coverage would needlessly duplicate material found in the Civilian and Military Personnel Law Manuals and a summary coverage would serve no useful purpose.

Two compensation-related topics have been retained--the restriction on employing aliens because it is a provision appearing in annual appropriation acts, and the statutes concerning forfeiture of retirement annuities and retired pay because they are not covered elsewhere.

(a) Employment of Aliens

For many years, various appropriation acts have included provisions restricting the Federal employment of aliens. 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 recent years, the prohibition has appeared as a general provision in the Treasury, Postal Service, and General Government Appropriation Act, applicable to funds contained "in this or any other act." See, for example, the 1980 provision, Pub. L. No. 96-74 (September 29, 1979), § 602, 93 Stat. 574. A recurring general provision in the Defense Department appropriation act exempts Defense Department personnel from the alien restriction. For example, the 1981 provision is found at Pub. L. No. 96-527 (December 15, 1980), § 704, 94 Stat. 3080 10/

10/ The 1976 edition of the United States Code included both of these provisions as 31 U.S.C. §§ 699b and 700 and several decisions use these citations. However, the provisions are most likely not permanent legislation (see Chapter 2, this Manual), as evidenced by their continued inclusion in annual appropriation acts, and as of December 1981, a draft recodification of Title 31 has deleted them for that reason.

The prohibition applies to all appropriated funds unless expressly provided otherwise. Therefore, it applies 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). (See Chapter 2, this Manual.) It also applies to working capital funds supported by appropriations. B-161976, August 10, 1967. 11/

There are a number of statutory exceptions to the restriction on compensating aliens. As noted, one significant exemption is for Defense Department personnel. See B-110831, August 4, 1952; B-188507, December 16, 1977. Others are 42 U.S.C. § 2473(b)(10) (National Aeronautics and Space Administration, permanent legislation); 2 U.S.C. § 169 (Library of Congress, derived from annual appropriation acts); and 22 U.S.C. § 2672 (limited permanent authority for State Department). Since appropriation act exceptions may appear, disappear, or vary from time to time, it is important to scrutinize the relevant appropriation act for any given year. Absent an applicable exception, the general prohibition will apply. For an illustration of the complexities that may arise when the provisions vary from year to year, see 57 Comp. Gen. 172 (1977). GAO has supported enactment of the general restriction as permanent legislation. B-130733, March 6, 1957.

In addition to the agency-wide exemptions noted above, the alien restriction itself contains a number of exceptions. Several of these are summarized below.

Declaration of intention exception. The prohibition does not apply to a person in the Federal service on the date of enactment of the appropriation act who is actually residing in the United States, is eligible for citizenship, and has filed a declaration of intention to become a citizen. The employee must have filed the declaration prior to the date of enactment. 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, April 1, 1959.

11/ 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 DOD exemption is irrelevant. The decision is cited here merely for the proposition noted in the text.

Specific country exceptions. The statute typically exempts nationals of certain specified countries. The countries specified in any given appropriation act change from time to time according to the political climate. The exception usually includes the Philippines and the Baltic countries. The term "Baltic countries," according to the Comptroller General, means Lithuania, Latvia, and Estonia. B-134230, November 18, 1957. Dual citizenship will not negate the exception as long as one of the countries is within the exception, even where the individual has entered the United States from the non-exempt country. B-194929, June 20, 1979.

Allied country exception. The prohibition does not apply to nationals of "countries allied with the United States in the current defense effort." GAO will not decide whether a country meets this test. The determination is the responsibility of the employing agency, perhaps with the assistance of the State Department. GAO will not question a determination based on reasonable grounds. 35 Comp. Gen. 216 (1955); B-151064, March 25, 1963; B-146142, June 22, 1961; B-139667, June 22, 1959. The reason for GAO's position is that "it is not the responsibility nor the proper province of the accounting officers to initially determine political facts." B-107288, February 14, 1952; B-107579, February 14, 1952.

GAO will, however, venture an assertion in the more obvious cases. Thus, Canada meets the test. B-188852, July 19, 1977; B-133877, October 16, 1957. So does Japan. B-113780, March 4, 1953. Russia was allied with the United States during World War II but no longer is. 35 Comp. Gen. 216 (1955). The Republic of China was allied with the United States during World War II. B-178882, May 7, 1974. The Republic of China (Taiwan) still is. B-161976, August 10, 1967. Romania probably is not. B-119760, April 27, 1954. Even in these cases, the determination, strictly speaking, is up to the employing agency.

Allegiance exception. The prohibition does not apply to a person who "owes allegiance to the United States." This means "absolute and permanent allegiance" as distinguished from "qualified and temporary allegiance." 17 Comp. Gen. 1047 (1938); B-119760, April 27, 1954. The exemption was apparently intended, based on its legislative history, to cover a very limited class--"Filipinos in the service of the United States on March 28, 1938." 17 Comp. Gen. 1047, supra.

Emergency exception. The prohibition 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.

An alien appointed in contravention of the statutory prohibition may not retain compensation already paid. 18 Comp. Gen. 815 (1939); 35 Comp. Gen. 216 (1955). (The statute expressly gives the United States the right to recover.) If there is no statutory bar--for example, if the employment would have qualified under the "allied country" exception but the agency failed to make the required determination--the alien may be paid as a "de facto employee." Earlier decisions distinguished between appointments "void ab initio" and those that are merely "voidable." E.g., 37 Comp. Gen. 483 (1958); 35 Comp. Gen. 216 supra; B-178882, August 29, 1973; B-188852, July 19, 1977. The distinction proved confusing and GAO has moved away from it. The current rule is stated in 58 Comp. Gen. 734 (1979). For further information on de facto employees and their specific entitlements, see the Civilian Personnel Law Manual.

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, December 16, 1977.

(b) 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 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 are: 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).

5 U.S.C. § 8312 was originally enacted in 1954 (68 Stat. 1142) and substantially amended in 1961 (75 Stat. 640). As will be noted below, many of the pre-1961 decisions deal with statutory language that was changed by the 1961 amendment. There have been very few decisions since 1961 and one of the purposes of this discussion is to aid the researcher in evaluating the current validity of the older cases.

Some general principles

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 which 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).

Types of offenses covered

Under the original (1954) version of 5 U.S.C. § 8312, forfeiture was not strictly limited to national security offenses. An employee could lose his 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." (Act of September 1, 1954, quoted in 35 Comp. Gen. 302, 303.) There were numerous

examples of forfeitures for such infractions as falsifying a travel voucher or using a Government-owned vehicle for personal purposes. See, e.g., 40 Comp. Gen. 176 (1960); 40 Comp. Gen. 364 (1960); 40 Comp. Gen. 487 (1961); 40 Comp. Gen. 635 (1961); 41 Comp. Gen. 62 (1961); 41 Comp. Gen. 114 (1961).

With several years of experience under the statute, Congress began to voice concern that it was being applied too expansively. The punishment was viewed as too severe for the offense, especially in cases where the offense occurred after many years of Government service. Accordingly, Congress amended the statute on September 26, 1961 (Pub. L. No. 87-299) 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). GAO supported the amendment, noting that the 1954 legislation had created inequities which were not intended or foreseen at the time of enactment. B-115505, April 25, 1961; B-115505, February 1, 1961.

Thus, decisions before September 26, 1961, are no longer applicable to the extent that they involve non-security offenses or the "authority, influence, power, or privileges" language which the 1961 amendment deleted. Numerous offenses which would have caused forfeiture before 1961 no longer do. See, e.g., B-155558, November 25, 1964 (false claim); B-155823, September 15, 1965 (conspiracy to embezzle Government funds). 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 Alger Hiss case

The event which, 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. 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.

Hiss applied for his pension in 1967 and the (then) Civil Service Commission denied the application based on 5 U.S.C. § 8312. (Since the offense for which Hiss had been convicted was related to national security, it was unaffected by the 1961 amendment.) Hiss 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), affirmed by B-115505, December 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. § 724a. The court case and decisions are summarized in B-115505, May 15, 1973. (Judgments against the United States and related interest are discussed further in Chapter 12, this Manual.) As a result of the Hiss case, other similarly situated individuals became entitled to retroactive annuities. Interest, however, was payable only to the named plaintiffs in the suit. See 52 Comp. Gen. 175, supra.

Uniform Code of Military Justice

The original 1954 enactment of 5 U.S.C. § 8312 did not expressly cover offenses under the Uniform Code of Military Justice, and this omission generated the major portion of GAO decisions up to the 1961 amendment.

Since the statute was to be strictly construed, the mere fact that a UCMJ offense was "similar" to one of the enumerated U.S. Code offenses was not, in and of itself, sufficient to produce a forfeiture. 35 Comp. Gen. 302 (1955). The test under the 1954 statute became this: A court-martial conviction under the UCMJ would produce a forfeiture if the offense was civil in nature and if it met the definition of "felony" in 18 U.S.C. § 1--punishable by death or confinement for more than 1 year. Whether an offense was "civil in nature" was determined by examining the United States Code or the District of Columbia Code to identify an analogous offense. The "one year" standard referred to the sentence imposable by law; the duration of the sentence actually imposed or served was immaterial. 35 Comp. Gen. 302, supra; 40 Comp. Gen. 601

(1961); B-144649, January 4, 1961; B-143495, August 10, 1960; B-140390, September 28, 1959; B-125744, July 30, 1959; B-127022, May 11, 1956.

Another line of decisions concerned the types of evidence which could be used in determining whether a given case constituted a felony under the laws of the United States. In 38 Comp. Gen. 310 (1958), the Comptroller General held that the determination should be based solely on the charges and specifications shown in the record. A subsequent string of cases discussed evidence permissible in applying the "authority, influence, power, or privileges" portion of the statute, often not discernible from the charges and specifications alone. 38 Comp. Gen. 817 (1959); 40 Comp. Gen. 45 (1960); 40 Comp. Gen. 364 (1960); 40 Comp. Gen. 635 (1961).

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 U.S. Code offenses, and if the "executed sentence" includes death, dishonorable discharge, or dismissal from the service. The statute incorporates the "charges and specifications" test of 38 Comp. Gen. 310, but since the "authority, influence, power, or privileges" language has been deleted, the decisions concerning that language are obsolete.

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 (see Chapter 10, this Manual) 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); or knowingly falsifying certain national security-related aspects of a Federal or District of Columbia employment application (5 U.S.C. § 8315).

(4) Entertainment and Recreation

(a) Introduction

When will the Government pay you to go to the Playboy Club or to attend a banquet with actress Suzanne Somers? This Section will tell you.

The concept to be explored in this Section is the rule that appropriated funds may not be used for entertainment except when specifically authorized by statute and also authorized or approved by proper administrative officers. E.g., 43 Comp. Gen. 305 (1963). The basis for the rule is that entertainment is essentially a personal expense even where it occurs in some business-related context. Except where specifically appropriated for, entertainment cannot normally be said to be necessary to carry out the purposes of an appropriation.

Application of the rule

As a general proposition, the rule applies to all Federal departments and agencies operating with appropriated funds. For example, it has been held applicable to the Alaska Railroad. B-124195-O.M., August 8, 1977.

The question in B-170938, October 30, 1972, was whether the entertainment prohibition applied to the revolving fund of the National Credit Union Administration. The fund is derived from fees collected from Federal credit unions and not direct appropriations from the Treasury. Nevertheless, the authority to retain and use the collections constitutes a continuing appropriation since, but for that authority, the fees would have to be deposited in the Treasury and Congress would have to make annual appropriations for the agency's expenses. (See Chapters 2 and 15, this Manual.) Therefore, the revolving fund could not be used for entertainment.

There are three situations in which the rule has not been applied. The first is certain Government corporations. For example, the Corporation for Public Broadcasting, since it was established as a private non-profit corporation and is not an agency or establishment of the United States Government (notwithstanding that it receives appropriations), could use its funds to hold a reception in the Cannon House Office Building. B-131935, July 16, 1975.

The rule has also been held not to apply to Government corporations which are classed as Government agencies but which have statutory authority to determine the character and

necessity of their expenditures. B-127949, May 18, 1956 (Saint Lawrence Seaway Development Corporation); B-35062, July 28, 1943.

The second exception is donated funds where the recipient agency has statutory authority to accept and retain the gift. In B-170938, October 30, 1972, cited above, while the National Credit Union Administration could not use its revolving fund for entertainment, it could use donated funds. The same result has been applied to the National Science Foundation. 46 Comp. Gen. 379 (1966); B-142538, February 8, 1961. However, in order for donated funds to be available for entertainment, it must be determined that the entertainment will further a valid function of the agency and that the function could not be accomplished as effectively from the Government's standpoint without the expenditure. Donated funds may not be used for entertainment which does not bear a legitimate relationship to authorized agency purposes. 61 Comp. Gen. ___ (B-206173, February 23, 1982). Also, the expenditure must not violate any restrictions imposed by the donor on the use of the funds. (Donated funds are discussed further in Chapter 5, this Manual.)

The third exception, infrequently applied, is for certain commissions with statutory authority to procure supplies, services, or property, and to make contracts, without regard to the laws and procedures applicable to Federal agencies, and to exercise those powers that are necessary to enable the commission to carry out the purposes for which it was established efficiently and in the public interest. B-138969, April 16, 1959 (Lincoln Sesquicentennial Commission); B-138925, April 15, 1959 (Civil War Centennial Commission); B-129102, October 2, 1956 (Woodrow Wilson Foundation).

What is entertainment?

The Comptroller General has not attempted a precise definition of the term "entertainment." In one decision, GAO noted that one court had defined the term as "a source or means of amusement, a diverting performance, especially a public performance, as a concert, drama, or the like." Another court said that entertainment "denotes that which serves for amusement and amusement is defined as a pleasurable occupation of the senses, or that which furnishes it, as dancing, sports, or music." 58 Comp. Gen. 202, 205 (1979), overruled on other grounds by 60 Comp. Gen. 303 (1981).

For purposes of this discussion, the term "entertainment," as used in decisions of the Comptroller General, includes: food and drink, either as formal meals or as snacks or refreshments;

receptions, banquets, and the like; music, live or recorded; live artistic performances; and recreational facilities. One other category is included which, even though not "entertainment" as such, is closely related to the entertainment cases: facilities for the welfare or morale of employees.

Earlier decisions from time to time had occasion to address the components of entertainment. Can it include liquor? Responding to an inquiry from the Navy, a Comptroller of the Treasury, obviously not a teetotaler, said: "Entertainments * * * without wines, liquors or cigars, would be like the play of Hamlet with the melancholy Dane entirely left out of the lines." 14 Comp. Dec. 344, 346 (1907). 12/

In a 1941 decision (B-20085, September 10, 1941), the Coordinator of Inter-American Affairs asked whether authorized entertainment could include such items as cocktail parties, banquets and dinners, theater attendance, and sightseeing parties. The Comptroller General, recognizing that an appropriation for entertainment conferred considerable discretion, replied, in effect, "all of the above."

That's entertainment.

(b) Food for Government Employees

It may be stated as a general rule that appropriated funds are not available to pay subsistence or to provide free food to Government employees at their official duty stations ("at headquarters"). 13/ In addition to the obvious reason that food is a personal expense and Government salaries are presumed adequate to enable employees to eat regularly,

12/ The Comptroller's comments should not be confused with the rule that alcoholic beverages are not reimbursable as subsistence expenses. B-164366, March 31, 1981; B-164366, August 16, 1968; B-157312, May 23, 1966. The exclusion applies even against a claim that consumption of alcohol is required by religious beliefs. B-202124, July 17, 1981.

13/ The entitlements of Government employees while on official travel or temporary duty are beyond the scope of this Manual and are covered in the Personnel Law Manuals. Brief mention should be made, however, of the rule that snacks and refreshments which are not part of a regular meal are not necessary subsistence expenses and hence not reimbursable. B-185826, May 28, 1976; B-167820, October 7, 1969.

furnishing free food might violate 5 U.S.C. § 5536, which prohibits an employee from receiving compensation in addition to the pay and allowances fixed by law. See 42 Comp. Gen. 149, 151 (1962); B-140912, November 24, 1959.

The "free food" rule applies to snacks and refreshments as well as meals. For example, in 47 Comp. Gen. 657 (1968), the Comptroller General held that Internal Revenue Service appropriations were not available to serve coffee to either employees or private individuals at meetings. Similarly prohibited was the purchase of coffeemakers and cups. Although serving coffee or refreshments at meetings may be desirable, it is not a "necessary expense" in the context of appropriations availability. See also B-159633, May 20, 1974.

Similarly, general operating appropriations may not be used to provide refreshments at recognition or award ceremonies. 43 Comp. Gen. 305 (1963); B-114827, October 2, 1974. There is a limited exception for small "samples" of ethnic foods provided in an ethnic awareness program as part of an agency's equal employment opportunity program, where they are clearly not designed to serve as meals or refreshments. B-199387, March 23, 1982.

The question of food for Government employees arises in many contexts and there are certain well-defined exceptions. The remainder of this subsection will discuss the rule and its exceptions in several of these contexts.

Working at official duty station under unusual conditions

The well-settled rule is that the Government may not furnish free food (the decisions sometimes get technical and use terms like "per diem" or "subsistence") to employees at their official duty station, even when they are working under unusual circumstances.

An early illustration is 16 Comp. Gen. 158 (1936), in which the expense of meals was denied to an Internal Revenue investigator who was required to maintain a 24-hour surveillance. The reason payment was denied is that the investigator would presumably have eaten (and incurred the expense of) three meals a day even if he had not been required to work the 24-hour shift.

Payment was also denied in 42 Comp. Gen. 149 (1962), where a postal official had bought carry-out restaurant food

for postal employees conducting an internal election who were required to remain on duty beyond regular working hours. 14/

Similarly, the general rule was applied in the following situations:

--Federal mediators required to conduct mediation sessions after regular hours. B-169235, April 6, 1970; B-141142, December 15, 1959.

--District of Columbia police officers involved in clean-up work after a fire in a municipal building. B-118638.104, February 5, 1979.

--Geological Survey inspectors at offshore oil rigs who had little alternative than to buy lunch from private caterers at excessive prices. B-194798, January 23, 1980.

Additional cases are: B-129004, September 6, 1956; B-185923, November 8, 1976; B-186090, November 8, 1976.

An exception was permitted in 53 Comp. Gen. 71 (1973). In that case, the unauthorized occupation of a building in which the Bureau of Indian Affairs was located necessitated the assembling of a cadre of General Services Administration special police, who spent the whole night there. 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 expenditure was incidental to the protection of Government property during an extreme emergency, and approved reimbursement. The decision emphasized, however, that it was an exception and that the rule still stands.

A similar exception was permitted in B-189003, July 5, 1977, where agents of the Federal Bureau of Investigation had been stranded in their office during a severe blizzard in Buffalo, New York. The area was in a state of emergency and GAO agreed with the agency's determination that the situation presented a danger to human life.

14/ This and several other cases in this subsection also involve the "voluntary creditor" rule. While the voluntary creditor aspect is not discussed here, it is covered in the section entitled "Voluntary Creditors" in Chapter 11 of this Manual.

The exception, however, is very limited. In B-185159, December 10, 1975, the cost of meals was denied to Treasury Department agents required to work over 24 hours investigating a bombing of Federal offices. The Comptroller General pointed out that dangerous conditions alone are not enough. Under the exception established in 53 Comp. Gen. 71, it is necessary to find that the situation involves imminent danger to human life or the destruction of Federal property. Also, in that case, the agents were only investigating a dangerous situation which had already occurred and there was no suggestion that any further bombings were imminent.

Naturally, statutory authority will overcome the prohibition. Thus, where the Veterans Administration had statutory authority to accept uncompensated services and to contract for related "necessary services," the VA could, upon an administrative determination of necessity, 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.

Government Employees Training Act

Under the Government Employees Training Act, an agency may reimburse an employee for necessary expenses incident to an authorized training program. 5 U.S.C. § 4109. The Comptroller General has held that the Government can provide meals under this authority if the agency determines that the providing of meals is necessary to achieve the objectives of the training program. 39 Comp. Gen. 119 (1959); 48 Comp. Gen. 185 (1968); B-193955, September 14, 1979. The Government may also furnish meals to non-Government speakers as an expense of conducting the training. 48 Comp. Gen. 185, supra.

In 50 Comp. Gen. 610 (1971), the Training Act was held to authorize the procurement of catering services for a Department of Agriculture training conference where Government facilities were deemed inadequate in view of the nature of the program.

Further information on the Government Employees Training Act may be found in the Civilian Personnel Law Manual.

Attendance at meetings and conferences

Attendance at agency-sponsored meetings and conferences will generally be subject to the prohibition on furnishing free food to employees at their official duty stations. Thus, the

cost of meals and coffee breaks could not be provided for Government officials attending a one-day conference on implementation of the Speedy Trial Act. B-188078, May 5, 1977. Similarly, meals could not be provided at a conference of field examiners of the National Credit Union Administration. B-180806, August 21, 1974. Use of appropriated funds was prohibited for coffee breaks at a management seminar, B-159633, May 20, 1974; meals served during "working sessions" at Department of Labor business meetings, B-168774, January 23, 1970; and meals at monthly luncheon meetings for officials of law enforcement agencies, B-198882, March 25, 1981. See also 47 Comp. Gen. 657 (1968), supra.

In B-137999, December 16, 1958, the commissioners of the Outdoor Recreation Resources Review Commission had statutory authority to be reimbursed for actual subsistence expenses. This was held to include the cost of lunches during meetings at a Washington hotel. However, the cost of lunches for staff members of the Commission could not be paid.

The fact that an agency characterizes its meeting as "training" is not controlling. In B-168774, September 2, 1970, 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 Government Employees Training Act. Therefore, the cost of meals could not be paid. See also B-140912, November 24, 1959.

Calling the cost of meals a "registration fee" (see below) will also not avoid the prohibition. In a 1975 case, the cost of meals was disallowed for Army employees at an Army-sponsored "Operations and Maintenance Seminar." The charge had been termed a registration fee but covered only luncheons, dinner, and coffee breaks. B-182527, February 12, 1975.

In B-187150, October 14, 1976, 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. The conference could not be reasonably characterized as training and did not qualify as an allowable administrative cost under the program regulations.

Employees may be authorized to attend a meeting or conference sponsored by a non-Government organization if the meeting or conference constitutes authorized training or

relates to official business. Three statutory provisions are relevant here. 5 U.S.C. § 5946 prohibits the use of appropriated funds to pay the expenses of an individual's attendance "at meetings or conventions of members of a society or association" except under specific statutory authority or unless authorized by 5 U.S.C. § 4109 or 5 U.S.C. § 4110. 5 U.S.C. § 4109, discussed above, permits payment for meals if determined necessary to achieve the objectives of an authorized training program under the Government Employees Training Act. 5 U.S.C. § 4110 authorizes payment of expenses of attendance at meetings which are concerned with official agency functions. (Technically, § 4110 was also enacted as part of the Government Employees Training Act. However, it is not limited to meetings at which employees are actually trained as long as the necessary connection with official agency functions exists.) The Government may pay for meals in certain situations.

The attendee will commonly be charged a fee, usually but not necessarily called a registration fee. If a single fee is charged covering both attendance and meals and no separate charge is made for meals, the Government may pay the full fee, assuming of course that funds are otherwise available for the cost of attendance. 38 Comp. Gen. 134 (1958); B-66978, August 25, 1947.

If a separate charge is made for meals, the Government may pay for the meals if there is a showing that (1) the meals are incidental to the meeting, (2) attendance of the employee at the meals is necessary to his full participation in the business of the conference, and (3) 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 conference. B-160579, April 26, 1978; B-166560, February 3, 1970. Absent such a showing, the Government may not pay for the meals. B-154912, August 26, 1964; B-152924, December 18, 1963; B-95413, June 7, 1950; B-88258, September 19, 1949.

Questions may also arise in situations where no registration fee is charged. In 1980, the President's Committee on Employment of the Handicapped held its annual meeting in the Washington Hilton Hotel. The affair was to last for three days and included a luncheon and two banquets. (Actress Suzanne Somers was Mistress of Ceremonies at one of the banquets.) There was no registration fee for the meeting but there were charges for the meals. GAO's Equal Employment

Opportunity Office planned to send three employees to the meeting and asked whether the agency could pick up the tab for the meals.

The three employees were to make a presentation at the meeting and there was no question that attendance was authorized under 5 U.S.C. § 4110. Also, if a registration fee were involved, the prior decisions noted above would have answered the question. The Comptroller General reviewed the precedents such as B-160579, April 26, 1978, and B-166560, February 3, 1970, supra, and took the logical step of applying them to the situation at hand. Thus, GAO could pay for the meals if administrative determinations were made that the meals were incidental to the meeting, attendance at the meals was necessary for full participation at the meeting, and that the employees would miss essential formal discussions, lectures, or speeches concerning the purpose of the meeting if they took their meals elsewhere. B-198471, May 1, 1980. 15/

Naturally, if the meeting or conference does not have the necessary connection with official agency business, the cost of meals may not be paid. Thus, a registration fee consisting primarily of the cost of a luncheon was disallowed for three Community Services Administration employees attending an executive board meeting of the Combined Federal Campaign. B-195045, February 8, 1980. Similarly, an employee of the Department of Housing and Urban Development could not be reimbursed for meals incident to meetings of a local business association. B-166560, May 27, 1969.

In a more recent decision, the Internal Revenue Service bought tickets for several of its agents to attend the Fourth Annual Awards and Scholarship Dinner of the National Association of Black Accountants. The purposes of attending the banquet were to establish contacts for recruitment purposes and to demonstrate the commitment of the IRS to its equal opportunity program. However, attendance could not be authorized under either 5 U.S.C. § 4109 or 5 U.S.C. § 4110, and the expenditure was therefore prohibited by 5 U.S.C. § 5946. B-202028, May 14, 1981.

15/ This is a relatively rare instance of the Comptroller General's issuing a formal decision to a GAO requester. Although it doesn't happen often, it will be done when the situation warrants it.

Cafeterias and lunch facilities

The Government has no general responsibility to provide luncheon facilities for its employees. 10 Comp. Gen. 140 (1930). 16/ 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-169141, November 17, 1970; B-169141, March 23, 1970.

The purchase of equipment may also be authorized in certain circumstances. In B-173149, August 10, 1971, GAO approved the purchase of a set of stainless steel cooking utensils for use by air traffic controllers to prepare food at a flight service station. There were no other readily accessible eating facilities and the employees were required to remain at their post of duty for a full 8-hour shift. See also B-180272, July 23, 1974 (purchase of a sink and refrigerator to provide lunch facilities for the Occupational Safety and Health Review Commission); B-204214, January 8, 1982 (temporarily providing paper napkins in new Government cafeteria).

(c) Entertainment for Government Employees Other Than Food

There have been very few cases in this area, probably because there are few situations in which entertainment for Government employees could conceivably be authorized.

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

16/ By way of contrast, it has long been conceded that drinking water is a necessity. See 21 Comp. Dec. 739 (1915) and 22 Comp. Dec. 31 (1915).

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, February 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 justification was that 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, February 3, 1970. As noted, this case would seem to have little precedent value except for the Artistic Director at Wolf Trap.

One area that has generated a few decisions, and a change in GAO's position, has been equal employment opportunity special emphasis programs. The issue first arose in 58 Comp. Gen. 202 (1979). In that 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. The program consisted of such items as a lecture and demonstration of South American folk music, a concert, a slide presentation, and an exhibit of Hispanic art and ceramics. The decision concluded that, while the Bureau's Spanish-Speaking Program was a legitimate component of the agency's overall 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, August 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." 60 Comp. Gen. at 306.

Further, the lunches for the guest speakers could be paid under 5 U.S.C. § 5703 if they were in fact away from their homes or regular places of business. The prior inconsistent decisions--58 Comp. Gen. 202, B-194433, and B-199387--were overruled.

It should be emphasized that the prior decisions were overruled only to the extent inconsistent with the new holding. Two specific elements of 58 Comp. Gen. 202 were not involved in the 1981 decision and remain valid. First, use of appropriated funds to serve refreshments remains improper except under specific statutory authority. 58 Comp. Gen. at 206. See also subsection (b) of this Section. Second, 58 Comp. Gen. 202 found the purchase of commercial insurance on art objects improper. Id., at 207. This portion also remains valid. See section entitled "Insurance," this Chapter.

The decision at 60 Comp. Gen. 303 was expanded in B-199387, March 23, 1982, 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. In the particular program being considered, 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.

(d) Recreational and Welfare Facilities for Government Personnel

The rule for recreational facilities was established in early decisions: appropriations are not available unless the expenditure is authorized by express statutory provision or by necessary implication. Thus, in 18 Comp. Gen. 147 (1938), 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. Similarly, in 27 Comp. Gen. 679 (1948), 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. It follows that appropriated funds may not be used to underwrite travel to sports or recreational events since this is not the performance of public business. E.g., 42 Comp. Gen. 233 (1962).

Other decisions applying the general rule are A-55035, May 19, 1934 (billiard tables for Tennessee Valley Authority employees); B-37344, October 14, 1943 (footballs and basketballs for employees in Forest Service camps); and B-46169, May 5, 1945 (rental of motion picture by Bonneville Power Administration). In the latter decision, the Comptroller General pointed out that the Administrator's authority to make such expenditures as he "may find necessary" does not mean any thing he may approve, regardless of its nature, but the expenditures must bear a direct relationship to the purposes to be accomplished under the particular legislation.

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, February 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, November 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 the question was whether that authority extended to employees' families as well.

--Use of an appropriation of the Federal Aviation Administration 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. The alternative would have been to extend the length of the cruises to permit more frequent docking. 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, September 16, 1976.

In recent decades, the role of certain "employee welfare" activities in employee morale and productivity has been increasingly recognized. Accordingly, the rule has undergone some liberalization even in non-remote locations. While the general rule expressed in 18 Comp. Gen. 147 and 27 Comp. Gen. 679 remains as a bar to indiscriminate expenditures, an agency now has reasonable discretion to spend its money for employee welfare purposes if the expenditure can be said to enhance employee morale and to be a significant factor in hiring and retention. The test remains one of necessity, but the standard is less stringent than in other areas. Determinations must be made on a case-by-case basis.

One example is the provision of day care facilities for the children of employees. Some agencies now have statutory authority to provide day care facilities. For example, legislation authorized the (then) Department of Health, Education, and Welfare to donate space for day care centers. In 57 Comp. Gen. 357 (1978), the Comptroller General held that the use of the term "donate" gave the agency 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.

Lack of specific statutory authority will not necessarily be a bar. GAO considered the establishment of day care facilities in its own building in B-39772-O.M., July 30, 1976. The conclusion was that the Comptroller General could allocate space in the GAO Building for a day care center if he found it "necessary" in recruiting or retaining staff or maintaining employee morale. Appropriations could also be used to renovate the space and buy equipment. In addition, GAO could assume part or all of the rent payable to the General Services Administration for the space. The memorandum cautioned, however, that GAO should make appropriate disclosure to Congress if it chose to take such action.

A further example is the subsidization of employee cafeterias (subsection (b), this Section). Still another example is parking facilities. As noted in the section entitled "Personal Expenses and Furnishings," this Chapter, parking incident to ordinary commuting is a personal expense and the Government may not be required to provide parking facilities for its employees. However, an agency may provide parking facilities if it determines that the lack of parking facilities will significantly impair the operating efficiency of the agency and will be detrimental to the hiring and retention of personnel. Unless an agency has independent statutory authority, it must procure parking accommodations through the General Services Administration under the Federal Property and Administrative Services Act. See 49 Comp. Gen. 476 (1979); B-162021, July 6, 1977; B-168946, February 26, 1970; B-155372-O.M., November 6, 1964. If the agency has independent statutory or delegated authority to procure space and facilities and has made the requisite morale and efficiency determinations, it may provide for employee parking in a collective bargaining agreement. See 55 Comp. Gen. 1197 (1976).

In 51 Comp. Gen. 797 (1972), the Bureau of the Public Debt, Treasury Department, asked if it could use its "salaries and expenses" appropriation to provide programmed "incentive music" ("Muzak") for its employees. The system had been installed by a previous tenant and the speakers were located in central work areas rather than in private offices. The Bureau pointed out that private concerns had found that such music enhanced employee morale by "creating a pleasantly stimulating and efficient atmosphere during the workday" and helped to minimize employee boredom. GAO concurred, accepting the Bureau's justification that the expenditure would improve employee morale and increase productivity. A prior decision to the contrary (B-86148, November 8, 1950) was overruled.

(e) Entertainment of Non-Government Personnel

Just as the entertainment of Government personnel is generally unauthorized, the entertainment of non-Government personnel is equally impermissible. A number of decisions establish the rule that appropriated funds are not available for the entertainment of non-Government personnel except under specific statutory authority.

Two of the most frequently cited decisions for this proposition are 5 Comp. Gen. 455 (1925) and 26 Comp. Gen. 281 (1946). In 5 Comp. Gen. 455, expenditures by two Army officers for entertaining officials of foreign governments while making arrangements for an around-the-world flight were disallowed. In 26 Comp. Gen. 281, appropriations were held unavailable for dinners and luncheons for "distinguished guests" given by a commissioner of the Philippine War Damage Commission. Other early decisions on point are: 5 Comp. Gen. 1018 (1926); A-10221, October 8, 1925; and B-85555, June 6, 1949. A limited exception was recognized in B-22307, December 23, 1941, to permit entertainment of officials of foreign governments incident to the gathering of intelligence for national security.

In 43 Comp. Gen. 305 (1963), 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. Naturally, the situation would be permissible under specific statutory authority. B-152331, November 19, 1975.

Several recent decisions illustrate the continued application of the rule and some of the exceptions permitted by statute. In 57 Comp. Gen. 806 (1978), the Comptroller General held that 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 analogized to the cases prohibiting the purchase of food from appropriated funds for employees working under unusual conditions (subsection (b), this Section). The decision noted that statutory authority existed to pay actual subsistence expenses for jurors under sequestration, not an issue in the case at hand. The relevant appropriation language was subsequently amended to provide for refreshments.

In a 1979 decision, appropriations of the Equal Employment Opportunity Commission were found not available to host a

reception for Hispanic leaders in conjunction with a planning conference. B-193661, January 19, 1979. The case fell squarely with the general rule. So did B-205292, June 2, 1982, involving a Fourth of July fireworks display by a Navy station, justified as a community relations measure. Fireworks are not necessary to the operation and maintenance of the Navy.

The propriety of using appropriated funds to furnish luncheons to public school officials in conjunction with Marine Corps recruiting programs was considered in B-162642, August 9, 1976. A statute authorized reimbursement of necessary expenses incurred by recruiters, and applicable regulations permitted the reimbursement to include small amounts spent for occasional lunches, snacks, or non-alcoholic beverages. GAO, however, did not consider a planned luncheon involving a formal presentation with a guest speaker as within the intended scope of the statute or regulations. Since the statute and regulations were broadly worded, payment in that case was authorized. The decision cautioned, however, against incurring similar expenses in the future unless the regulations were first revised to provide adequate guidelines and limitations.

No discussion of entertainment would be complete without B-182357, December 9, 1975. 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. 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 12 senior foreign naval officers being trained in the United States. 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."

(f) Reception and Representation Funds

Throughout this discussion, the decisions have pointed out that the various prohibitions apply only in the absence of specific statutory authority. Congress recognizes that many agencies need some funds for items that otherwise would be prohibited as entertainment. For example, the State Department would find it difficult to conduct its overseas operations if it could not spend any money entertaining foreign officials. Thus, Congress sometimes provides amounts for official entertainment.

The appropriation may specify that it will be available for "entertainment." See, e.g., B-20085, September 10, 1941. More commonly, however, the term used in the appropriation is "official reception and representation expenses." That is the technical "appropriations language" for entertainment.

Many of the items considered in preceding portions of this Section would be entirely proper under a "reception and representation" appropriation. Thus, while the Veterans Administration could not use its general appropriations to provide refreshments at an awards ceremony for volunteers--43 Comp. Gen. 305 (1963), supra,--it could use its "official reception and representation" appropriation. Similarly, the Federal Home Loan Bank Board could use its reception and representation appropriation--but not other funds--to furnish refreshments at a career service award ceremony. B-114827, October 2, 1974, supra.

In B-122515, February 23, 1955, the Comptroller General held that a "representation allowance" contained in an appropriation could be used to purchase printed invitation cards and envelopes in connection with an official function at an overseas mission. In 42 Comp. Gen. 19 (1962), however, a similar appropriation to the Foreign Agricultural Service was not available for printed invitations because an executive order provided that the Foreign Agricultural Service was to be governed by State Department regulations, and the applicable State Department regulations prohibited the use of representation allowances for printing cards.

One limitation on the use of representation funds must be noted. The usual appropriation language is "official reception and representation." 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. ___ (B-206173, February 23, 1982).

(5) Fines and Penalties

As a general proposition, no authority exists for the Federal Government to use appropriated funds to pay fines or penalties incurred as a result of its activities or those of its employees.

In the most common situation, a fine is assessed against an individual employee for some action he took in the course of performing official duties. The cases frequently involve traffic violations. The rule is that appropriated funds are not available to reimburse the amount of the fine. The theory is that, while an employee may have certain discretion as to precisely how 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.

The earliest case stating the rule is B-58378, July 31, 1946. 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."

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

The first published decision stating the rule, and the case most often cited, is 31 Comp. Gen. 246 (1952). 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, supra, the Comptroller General held that the employee could not be reimbursed from appropriated funds for the amount of the fine. 17/

17/ For other cases involving motor vehicle violations, see 57 Comp. Gen. 270 (1978); B-147420, April 18, 1968; B-168096-O.M., August 31, 1976; B-173783.188, March 24, 1976 (non-decision letter); B-147420, July 27, 1977 (non-decision letter).

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, November 18, 1971. While at first glance this might seem like a harsh and unfair result, it in fact was not. In that case, the employee was ticketed for driving at 85 mph. The speedometer at the time read a mere 73 mph. 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.

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 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 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 (Section B, this Chapter). 18/

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.

18/ The decision further held that a contempt fine, even though imposed by court order, is not a judgment against the United States and may not be paid from the permanent judgment appropriation, 31 U.S.C. § 724a. See Chapter 12, this Manual.

Applying these concepts, the Comptroller General held in B-205438, November 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, October 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 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.

Reading all of these cases together, it seems fair to state that the mere fact of compliance with instructions will not by itself be sufficient to authorize reimbursement. There must be some legitimate Government interest to protect. Thus, it would not be sufficient to instruct an employee to refuse to testify where the purpose is to avoid embarrassment or to avoid the disclosure of Government wrongdoing. Similarly, it would follow that the prohibition against reimbursement of traffic fines could not be circumvented merely because some supervisor instructed a subordinate to park illegally.

The two lines of cases were discussed in the specific context of traffic violations in B-107081, January 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.

Another situation in which a fine was held reimbursable is illustrated in 57 Comp. Gen. 476 (1978). Forest Service employees had loaded logs on a truck to transport them from Virginia to West Virginia. In Virginia, the driver was fined for improper loading (overweight on rear axle). The employees

had loaded the logs in a forest and there was no way for them to to have checked the weight. The fine did not result from any negligent or intentional act on the part of the driver. Under these circumstances, the Comptroller General found that the fine was not for any personal wrongdoing by the employee but was, in effect, a citation against the United States. Therefore, Forest Service appropriations were available to reimburse the fine. This situation must be distinguished from the case of an overweight fine levied against a commercial carrier, which is not reimbursable. 35 Comp. Gen. 317 (1955).

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 not 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).

The cases discussed so far have all involved fines levied against individual employees. Questions may also arise over the liability of a Federal agency for a fine or civil penalty. The question is essentially one of sovereign immunity. In order for a Federal agency to be liable for a fine or penalty, there must be an express statutory waiver of sovereign immunity.

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, 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. § 724a. 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). See also Chapter 12, this Manual.

What about a penalty assessed by one Federal agency against another? In B-161457, May 9, 1978, the Comptroller General held that, absent a statute specifically so providing, an agency's appropriations are not available to pay penalties assessed by the Internal Revenue Service for late filing or underpayment of employment taxes. The reason is that this would constitute a use of the funds for a purpose other than that for which they were appropriated.

Cross-references

Several conceptually related topics are discussed elsewhere in this Manual. See discussion on judgments against individual employees, Chapter 12; section on Attorney's Fees, this Chapter; subsection on parking taxes in section entitled "State and Local Taxes," this Chapter; discussion on late payment charges in section on Interest, Chapter 11 (Part I); section on Interagency Claims, Chapter 11 (Part I).

(6) Firefighting and Other Municipal Services

(a) Firefighting Services: Availability of Appropriations

A frequent subject of inquiry has been the authority of the Federal Government to voluntarily contract, or to pay involuntary assessments, for firefighting services rendered by local governments to Federal property and buildings. The general rule is: If the political subdivision rendering the service is required by law to extinguish fires within its boundaries, then the United States cannot make additional payments in any form to underwrite that legal responsibility. The earliest published decision containing a detailed discussion of the rule and its rationale is 24 Comp. Gen. 599 (1945).

The rule proceeds from the premise that firefighting is a governmental rather than a proprietary or business function. Where a local firefighting organization (city or county fire department, fire protection district, etc.) is required by local law 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 non-Federal property within that territorial area. A charge to appropriated funds under these circumstances would amount to a tax or a payment in lieu of taxes and would, absent specific statutory authority, violate the Government's Constitutional immunity from taxation. (The subject of State and local taxes is covered in detail later in this Chapter.) It follows that the Government may not contract for firefighting services which it would be legally entitled to receive in any event, 19/ nor may it reimburse a political subdivision for the additional costs incurred in fighting a Federal fire. 20/ See 53 Comp. Gen. 410 (1973) and cases cited therein. In addition to the taxation problem, use of appropriated funds for this purpose would violate 31 U.S.C. § 628. 32 Comp. Gen. 91 (1952).

Limited reimbursement authority now exists by virtue of the Federal Fire Prevention and Control Act of 1974, discussed later in this Section. The present discussion concerns the availability of appropriations apart from that limited authority.

19/ In addition to the cases cited and discussed in the text, see B-105602, December 17, 1951; B-126228, January 6, 1956; B-125617, April 11, 1956; B-129013, September 20, 1956; B-131932, March 13, 1958; B-40387-O.M., June 24, 1966.

20/ In addition to the cases cited and discussed in the text, see B-147731, January 22, 1962; B-153911, December 6, 1968; B-167709, September 9, 1969.

In applying the rule, it is irrelevant that a city cannot regulate building and fire codes for structures on a military establishment within the city limits. 24 Comp. Gen. 599 (1945). Also, the rule applies equally when the fire protection is provided by a volunteer fire department performing the mandatory governmental function for a political subdivision. The fact that the firefighters are unpaid does not affect the local government unit's legal duty to render the service. 26 Comp. Gen. 382 (1946); B-47142, April 3, 1970.

In 53 Comp. Gen. 410 (1973), GAO denied a claim by the St. Louis Community Fire Protection District and several surrounding fire districts and departments for equipment losses and supplemental payroll expenses incurred in fighting a massive fire at the St. Louis Federal Records Center. The St. Louis CFPD could not be reimbursed because the Records Center was within its territorial responsibility. The surrounding fire districts were also under a duty to respond to the alarm because they had entered into mutual aid agreements with the St. Louis CFPD which had the effect of extending their own areas of responsibility.

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 held, 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, the Congress enacted legislation specifically authorizing reciprocal agreements for mutual aid. 42 U.S.C. §§ 1856-1856d. However, 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-126228, January 6, 1956; B-40387-O.M., June 24, 1966.

Neither may the Government pay a "service charge" for fire protection provided by a municipality with respect to Federal property within the city limits, at least where the assessment for fire protection is normally included in the city's property tax. In 49 Comp. Gen. 284 (1969), the city of New London, Connecticut, sought to charge the Government on a direct cost-related basis for fire protection afforded the United States Coast Guard Academy. Fire protection was included in the city's real estate tax and the "service

charge" was to apply only to tax-exempt property. In view of the city's duty to provide fire protection to the Academy, the Comptroller General found the proposed charge to be an unconstitutional tax on the Government. See also B-160936, March 13, 1967. However, 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. B-123294, May 2, 1955.

In B-168024, December 13, 1973, a city was required to provide fire protection to all property within its boundaries, but was given the option under State law of financing the fire protection by service charges rather than from general tax funds. In these circumstances, it was held that the United States could pay a valid service charge, although the charge in that particular case was held to be a tax and therefore invalid because it was based on the value of the property rather than the quantum of services provided. The decision contains a useful discussion of the distinction between a service charge and a tax. (More information about service charges against the Government may be found in the section entitled "State and Local Taxes," infra, this Chapter.)

Because the rule is predicated on the existence of State laws requiring political subdivisions to provide firefighting services, it would not apply in instances where there was no entitlement to service. 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. It was further noted that there was no violation of the prohibition on accepting voluntary services found in subsection (b) of the Antideficiency Act, 31 U.S.C. § 665(b) (discussed fully in Chapter 5, this Manual). Similarly, a contractual agreement for fire protection with the nearest fire district may be proper where the Federal property in question is not served by any 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, February 8, 1968; B-123294, May 2, 1955. However, there is no authority to pay for fire services rendered without a pre-existing legal obligation if such services were necessary to protect adjoining State or privately-owned property as to which such a legal duty existed. 30 Comp. Gen. 376 (1951).

A variation occurred in B-116333-O.M., October 15, 1953, in which it was held permissible to reimburse a private fire-fighting enterprise for repair and maintenance service rendered to firefighting apparatus on a Government-owned and operated housing facility, irrespective of the duty of the municipality.

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, September 9, 1969; B-147731, December 28, 1961; B-6400, August 28, 1940. 21/ 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, September 20, 1956; B-126228, January 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 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-192641, May 2, 1979 (non-decision letter).

21/ 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 (Chapter 11, this Manual) and is therefore not cognizable under that Act. California v. United States, 307 F.2d 941 (9th Cir. 1962), cert. denied, 372 U.S. 941; Oregon v. United States, 308 F.2d 568 (9th Cir. 1962), cert. denied, 372 U.S. 941; B-163089, October 19, 1970.

The most recent decision in this area 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, discussed above. 60 Comp. Gen. 637 (1981).

(b) Federal Fire Prevention and Control Act of 1974

In light of the huge losses suffered by local fire districts in the 1973 St. Louis Records Center fire (see 53 Comp. Gen. 410, supra), the need for some legislative action became apparent. The result was section 11 of the Federal Fire Prevention and Control Act of 1974, 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). 22/ 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, 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, April 13, 1978. (This decision is also discussed in Chapter 2, Section F(1), this Manual.) Disputes under section 11 may be adjudicated in the Court of Claims. FEMA has issued implementing regulations at 44 C.F.R. Part 151.

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

22/ The function was transferred to FEMA from the Commerce Department by Reorganization Plan No. 3 of 1978.

use its own appropriations apart from 15 U.S.C. § 2210. 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 "from any appropriations which may be available or which may be made available for the purpose." Although no decision has been rendered on this point, it would seem that the existing body of decisions is relevant in determining the extent to which an agency's operating appropriations "may be available" to make this reimbursement.

(c) Other Municipal Services

The principles involved in the firefighting cases are relevant to other municipal services as well.

The closest analogy is police protection. Like fire protection, police protection is a mandatory governmental function. Thus 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, October 27, 1977. However, the United States may pay on a quantum meruit basis for police services over and above the ordinary level, where the city is not required to provide such extraordinary services and where the same charge would be imposed on non-Federal users in like circumstances. Examples are: Extra police for special events such as football games at the Coast Guard Academy (49 Comp. Gen. 284, 287, supra); special police details at Bicentennial ceremonies (B-187733, supra).

Similarly, the Comptroller General held that the Army could not use its appropriations to install a traffic light on a municipal highway in Alexandria, Virginia. 36 Comp. Gen. 286 (1956). GAO followed this ruling in 51 Comp. Gen. 135 (1971), holding that the Veterans Administration could not share the cost of installing a traffic light on a public highway at the entrance to a VA hospital. However, a different situation was presented in 55 Comp. Gen. 1437 (1976). There, a State highway bisected an Army installation and the Army wanted to install a traffic light to regulate traffic at the intersection of the State highway and a road on the Army facility. Local authorities had agreed to repair and maintain the light if the Army would purchase and install it. Since the light would be located on Federal property and would be for the primary benefit of the Federal facility, even though it would regulate traffic on the State highway as well, GAO distinguished the prior cases and concluded that the Army could use its appropriations for the proposed expenditure.

The same principles have been applied to emergency ambulance services required to be furnished by a municipality. 49 Comp. Gen. 284, supra. However, contracts with State or local governments or private entities for ambulance services have been held permissible where there was no requirement for the political subdivision involved to provide ambulance services without direct charge. 51 Comp. Gen. 444 (1972), modifying B-172945, June 22, 1971; B-198032, June 3, 1981.

Another example is the maintenance of public highways. See B-199205, April 27, 1981.

A charge for services rendered by a State or local government to the United States is to be distinguished from a tax; the former may be paid while the latter may not. E.g., 20 Comp. Gen. 748 (1941). While this distinction does not apply to mandatory governmental functions such as police and fire protection, it has frequently been cited in connection with such things as water and sewer services. As a general proposition, a charge for water and/or sewer services is a permissible service charge rather than a tax if it is based on the quantum of direct services actually furnished. See 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); 29 Comp. Gen. 120 (1949) (sewer service charge held payable on quantum meruit basis); 31 Comp. Gen. 405 (1952) (assessment for water/sewer services levied on city-wide basis rather than quantum of service rendered held a tax). See also 49 Comp. Gen. 284 (1969); B-168024, December 13, 1973; B-105117, March 16, 1953.

A reasonable charge based on the quantum of direct services actually furnished need not be considered a tax even though the services in question are provided to the taxpayers of the political subdivision without a direct charge, provided of course that the political subdivision is not required by law to furnish the service without direct charge. Such a charge may be paid if it is applied equally to all tax-exempt property, but not if it applies only to Federal tax-exempt property. 50 Comp. Gen. 343 (1970).

A sewer service charge which is otherwise proper may be paid in advance if required by local law, notwithstanding 31 U.S.C. § 529. The Government's liability would also include late payment penalties to the extent required by local law. 39 Comp. Gen. 285 (1959). (See Chapter 4, this Manual, for detailed discussion of advance payments.)

For additional related discussion, see "State and Local Taxes," infra, this Chapter.

(7) Gifts 23/

Appropriated funds may not be used for personal gifts, unless, of course, there is specific statutory authority. 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 Christmas 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 Christmas 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.

As previously discussed, in order to determine when appropriated funds may be used for a particular purpose, the appropriation act in question must be examined to see if the proposed expenditure is either specifically appropriated for or is necessary to carry out the appropriation. If either of these factors exist, then the expenditure may be made. Obviously if the expenditure is specifically appropriated for, there is no impediment to its being made. The cases presented to GAO usually arise because the expenditure is not specifically appropriated for and reasonable doubt exists as to its actual necessity.

The general rule is that appropriated funds may be used for objects not specifically set forth in an appropriation act only if there is a direct connection between the expenditure and the purpose for which the appropriation was made and the expenditure is essential to carrying out such purposes. 27 Comp. Gen. 679, 681 (1948); 55 Comp. Gen. 346, 347 (1975). These requirements are not easily met. Note that, in making the analysis, it makes no difference whether the "gift items" are given to Federal employees or to others. The connection is either there or it is not.

In 53 Comp. Gen. 770 (1974), a certifying officer for the Small Business Administration asked GAO to rule on the propriety of an expenditure for decorative ashtrays which were

23/ This Section should be read in conjunction with the Section entitled "Personal Expenses and Furnishings," infra, this Chapter. The concepts and cases are closely related and the editors have been somewhat arbitrary in allocating the subject matter.

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 compelling 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.

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

This line of reasoning was also used in 57 Comp. Gen. 385 (1978). There it was held that novelty plastic garbage cans containing candy in the shape of solid waste which were distributed by the Environmental Protection Agency at an exposition to attendees of the exposition were personal gifts. The agency's argument that the candy was used to attract people to its exhibit on the Resource Conservation and Recovery Act and therefore to promote solid waste management was not sufficient to justify the expenditure.

In B-195247, August 29, 1979, the Comptroller General held that an expenditure of appropriated funds for the cost of jackets and sweaters as Christmas gifts to corpsmen at a Job Corps Center with the intent of increasing morale and enhancing program support was unauthorized. It was determined that these were not a necessary and proper use of appropriated funds and therefore were personal gifts.

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

--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, February 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, October 22, 1979. (Other cases dealing with photographs are covered in the "Personal Expenses" section of this Chapter.)

--"Sun Day" buttons procured by the General Services Administration and given out to members of the public to show GSA's support of certain energy policies. B-192423, August 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, June 12, 1963; B-151668, December 5, 1963 (same case).

As a number of the preceding cases point out (e.g., B-151668, December 5, 1963), while the agency's administrative determination of necessity will be given considerable weight, it is not controlling.

Some expenditures which resemble personal gifts have been deemed authorized expenditures because they are necessary to carry out the purposes of the agency's appropriation. For example, in B-193769, January 24, 1979, it was held that 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.

Contests: entry fees

The Comptroller General has held that payment of an entry fee to enter agency publications in a contest sponsored by a private organization is improper and cannot be justified as a necessary expense, at least where the prize is a monetary award to be given to the editors of the winning publications. B-164467, June 14, 1968.

However, payment of a contest entry fee may be permissible where the prize is awarded to the agency and not to the individuals and where there is sufficient justification that the expense will further the objects of the appropriation. B-172556, December 29, 1971. The Comptroller General pointed out in that decision that whether appropriated funds may be used to enter a contest will depend on the nature of the contest, the nature of the prizes and to whom they are awarded, and the sufficiency of the administrative justification.

Thus, the Bureau of Mines (Interior Department) 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. B-164467, August 9, 1971.

Contests: Government-sponsored

In an early case, 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 ruled, however, that the proposed expenditure was unauthorized because the prizes were not related to the reasonable value of the services of the successful contestants and because the appropriation contemplated that the design and development work would be performed by Navy personnel. 5 Comp. Gen. 640 (1926).

While 5 Comp. Gen. 640 may be said to express the general rule, later decisions have permitted agencies to in effect sponsor contests and competitions where artistic design was

involved. Thus, in A-13559, April 5, 1926, 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."

This decision was followed in 9 Comp. Gen. 63 (1929), holding that the Marine Corps could offer a set sum of $1,000 for an acceptable original design for a service medal. The Comptroller General stated:

> "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 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. at 65.

The concept of A-13559 was followed and applied in several later decisions. See A-35929, April 3, 1931 (ornamental sculptured granite columns for the Arlington Memorial Bridge); A-37686, August 1, 1931 (monument at Harrodsburg, Kentucky, as first permanent settlement west of the Allegheny Mountains); 14 Comp. Gen. 852 (1935) (bronze tablets and memorials for Boulder Dam); 18 Comp. Gen. 862 (1939) (plaster models for Thomas Jefferson Memorial); 19 Comp. Gen. 287, 288 (1939) (design of advertising literature for savings bonds).

Thus, a prize competition is generally unauthorized. 5 Comp. Gen. 640, supra. However, the procedure in A-13559 and its progeny is permissible where artistic features are the major consideration and the amount awarded is related to the reasonable cost of producing the design.

A different type of contest issue was involved in B-158831, June 8, 1966. In that case, prizes were awarded to enrollees at a Job Corps Conservation Center in a contest to suggest a name for the Center newspaper. GAO held the expenditure 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.

Awards 24/

A number of early decisions established the proposition that, absent specific statutory authority, appropriations 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. The prohibition was applied in 5 Comp. Gen. 344 (1925) (medals for winners of athletic events) and 15 Comp. Gen. 278 (1935) (annual trophies for Naval Reserve bases for efficiency). In 10 Comp. Gen. 453 (1931), the Comptroller General held that a general appropriation could be used to design and procure medals of honor for air mail flyers where the awarding of the medals had been authorized in virtually concurrent legislation. The general appropriation was viewed as available to carry out the specifically-expressed intent of Congress and the express authorization obviated any need for a specific line-item appropriation.

Applying the principles of the above decisions, the Comptroller General held in 17 Comp. Gen. 674 (1938) that an appropriation one of whose purposes was "accident prevention" was available to purchase medals and insignia (but not to make monetary awards) to recognize mail truck drivers with safe driving records. There was sufficient discretion under the appropriation to determine the forms "accident prevention" should take.

The rule was restated in 45 Comp. Gen. 199 (1965) and viewed as prohibiting the purchase of a plaque to present to a State to recognize 50 years of cooperation and achievement in forestry programs. While the voucher in that case was paid because the plaque had already been presented, the decision made it clear that payment was for that instance only and that congressional authority should be sought if similar awards were considered desirable in the future.

24/ The decisions sometimes use the terms "award" and "reward" interchangeably. The editors have tried to confine "reward" to cases involving lost or stolen property and the furnishing of information, and these are treated in a separate section of this Chapter.

Limited authority now exists to use appropriations for awards by virtue of the Government Employees Incentive Awards Act, originally enacted in 1946 and now found at 5 U.S.C. §§ 4501-4507. The Act authorizes an agency to pay a cash award to an employee who "by his 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 paperwork" or performs a special act or service in the public interest related to his official employment. The agency may also incur "necessary expenses" in connection with an incentive award. Awards and related expenses under the Act are paid from appropriations available to the activity or activities benefitted. The Office of Personnel Management is authorized to prescribe implementing regulations.

The Government Employees Incentive Awards Act applies to civilian agencies and civilian employees of the various armed services. The Defense Department has very similar authority for military personnel. 10 U.S.C. § 1124.

GAO has issued a number of decisions interpreting the Government Employees Incentive Awards Act. Thus, where an award is based on a suggestion resulting in monetary savings, the savings must be to Government rather than non-Government funds. 36 Comp. Gen. 822 (1957). Applying this principle, GAO found that 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).

An interesting situation occurred in B-192334, September 28, 1978. There, 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.

As noted, the Act authorizes an agency to incur "necessary expenses" incident to its awards program. Thus, an agency may pay travel and miscellaneous expenses to bring recipients to Washington to participate in award ceremonies. These expenses

are not chargeable against the statutory award ceiling. 32 Comp. Gen. 134 (1952). Generally, travel and miscellaneous expenses of the members of a recipient's family may not be paid as "necessary expenses." 54 Comp. Gen. 1054 (1975). There are, however, two exceptions. Travel and miscellaneous expenses may be paid to a surviving spouse to receive an award on behalf of a deceased recipient. B-111642, May 31, 1957. Also, where a recipient is handicapped and cannot travel unattended, the travel and miscellaneous expenses of an attendant may be paid and the attendant may be a family member. 55 Comp. Gen. 800 (1976).

The Act does not authorize "necessary expenses" incident to the receipt of an award from a non-Federal organization. 40 Comp. Gen. 706 (1961). However, in limited situations where an award from a non-Federal organization is closely related to the recipient's official duties, it may be possible to pay certain related expenses on other grounds. See 55 Comp. Gen. 1332 (1976).

In a 1969 case, the Comptroller General held permissible, under the "necessary expense" language of the Act, the payment by the National Aeronautics and Space Administration, upon the written request of the White House, of part of the cost of a banquet at which the President gave the Medal of Freedom to the Apollo 11 astronauts. B-167835, November 18, 1969.

Awards under the Act may take forms other than cash. Thus, in 55 Comp. Gen. 346 (1975), the Comptroller General held that 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. However, the Act does not authorize similar awards to other than present or former employees; such awards would be personal gifts and therefore improper. Similarly, the awarding of desk medallions as honorary awards by the Naval Sea Systems Command was approved in B-184306, August 27, 1980.

The Act does not authorize cash awards based merely on length of service or upon retirement. However, honorary non-cash 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).

The making of an award--and therefore the refusal to make an award--under the Government Employees Incentive Awards Act is discretionary. Therefore, while a labor relations arbitrator

may order an agency to prepare and submit an award recommendation, he cannot order the agency to make the award. 56 Comp. Gen. 57 (1976).

In B-202039, April 3, 1981, affirmed upon reconsideration, B-202039, May 7, 1982, two employees filed a claim where their agency had given them a cash award several years after implementing their suggestion. They claimed interest on the award, lost imputed investment earnings, an inflation adjustment, and compensation for higher income taxes paid as a result of the delay. The claim was denied. In the May 1982 decision, GAO pointed out that an agency's own regulations can have the effect of limiting the discretion it would otherwise have under the statute. See also Griffin v. United States, 215 Ct. Cl. 710 (1978). Thus, agency regulations can commit the agency to making an award if it adopts a suggestion. However, this does not create an entitlement to interest. (Interest is discussed in detail in Chapter 11, this Manual.)

Finally, the Government Employees Incentive Awards Act is limited to Government employees. Since no similar authority exists for persons other than Government employees, an award may not be made to a non-Government employee who submits a suggestion resulting in savings to the Government. B-160419, July 28, 1967.

(8) Guard Services: The Anti-Pinkerton Act

On July 6, 1892, a riot occurred in Homestead, Pennsylvania, 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 Monongahela River, the strikers sighted them and began firing on them. The strikers were heavily armed even to the extent of having a cannon on the river bank. The violence escalated to the point that 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 and congressional attention.

The then-common practice of employing armed Pinkerton guards as strike-breakers 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, 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."

Evolution of the law prior to 57 Comp. Gen. 524

Although the Anti-Pinkerton Act was never the subject of any judicial decisions until the late 1970's, it was the subject of numerous decisions of the Comptroller General and his predecessor, the Comptroller of the Treasury. Several principles evolved through the decisions.

(1) 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, February 23, 1926.

(2) 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. 26 Comp. Gen. 303 (1946); 51 Comp. Gen. 494 (1971).

(3) 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 (1946). 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 set-aside program since the contract is a prime contract vis-a-vis SBA even though it may be a subcontract vis-a-vis the actual employing agency. 55 Comp. Gen. 1472 (1976).

(4) 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. 26 Comp. Gen. 303 (1946); 38 Comp. Gen. 881 (1959); B-32894, March 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.

(5) In determining whether a given firm is a detective agency, GAO will consider 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.

(6) 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." 41 Comp. Gen. 819 (1962); 44 Comp. Gen. 564 (1965); B-167723, September 12, 1969.

(7) 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, March 17, 1975; B-176307, March 21, 1973; B-177137, February 12, 1973.

(8) 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-156424, July 22, 1965; B-161770, November 21, 1967; B-160538, November 15, 1967.

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 (1976), affirmed on reconsideration, 56 Comp. Gen. 225 (1977). 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, October 14, 1976, affirmed on reconsideration, B-186347/B-185495, March 7, 1977.

57 Comp. Gen. 524 and 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, rehearing denied, 435 U.S. 918. The issue in that case was whether the Act applied to a credit reporting company. The Comptroller General, in B-139965, January 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." 557 F.2d at 463.

In a June 1978 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 did not mean a company which provided guard or protective services. 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, the Comptroller General had stated that he favored 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 no longer exists. 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 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 vs. investigative" distinction. 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." If a given organization were found to offer quasi-military armed forces for hire--an event which is viewed as extremely 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 eight 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.

(9) 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. Also, the Government frequently pays for insurance indirectly through contracts, grants, and leases. A comprehensive treatment may be found in a report of the Comptroller General entitled "Survey of the Application of the Government's Policy on Self-Insurance," B-168106, June 14, 1972.

However, the Government is essentially a self-insurer in certain important areas, primarily 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 thus: 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 rule and its evolution are summarized in B-158766, February 3, 1977, a response to an inquiry from a member of the Senate.

The rationale for the rule is aptly summarized in the following two passages from early decisions:

> "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 "self-insurance rule" dates back to the 19th Century and has been stated and applied in numerous decisions of the Comptroller General and his predecessor, 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 which 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. (See Chapter 5, this Manual.) 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--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." Id., 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 "It 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 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). (Indemnification agreements present problems beyond the self-insurance aspect and are discussed further in Chapter 6, this Manual.) 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.

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 (1940). 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 (Chapter 11, this Manual), the issue has become largely moot. However, questions still arise concerning the operation of motor vehicles, and these are discussed later in this Section.

Another type of insurance which may not be paid for from appropriated funds is flight insurance. If a Federal employee travelling by air on official business wishes to buy flight insurance, it is considered a personal expense and not reimbursable. 40 Comp. Gen. 11 (1960); 47 Comp. Gen. 319 (1967). Similarly non-reimbursable is trip cancellation insurance. 58 Comp. Gen. 710 (1979).

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. What the statement means is that the rule is derived from the policy considerations summarized above rather than from statute; that is, there is no enactment of Congress that says "Thou shalt not buy insurance from appropriated funds." Nevertheless, the self-insurance rule is a matter of law in the sense that to violate it is to make an improper expenditure. The significance of the distinction is that, because the rule has evolved through administrative decisions, it is not an absolute. There are exceptions. Thus, while general guidelines exist, it is accurate to say that the self-insurance rule has been implemented largely on a case-by-case basis.

(b) Exceptions to the Rule

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. 14 Comp. Dec. 836, 839 (1908); 19 Comp. Gen. 798, 800 (1940). 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). Such a recommendation would of course be purely advisory in nature.

Since the self-insurance rule originated in policy considerations rather than by statute, there have also been non-statutory exceptions. The standards for exception were summarized in B-151876, April 24, 1964, as follows:

1. Where the economy sought by self-insurance would be defeated;

2. Where sound business practice indicates that a savings can be effected; or

3. Where services or benefits not otherwise available can be obtained by purchasing insurance.

Two World War II 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, October 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.

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). 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. 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 (Chapter 5, this Manual). See B-115398.01, April 19, 1977 (non-decision letter).

Since nonappropriated fund activities are by definition not financed from public funds (Chapter 15, this Manual), 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 was within the discretion of the Department of Defense to establish the rule by regulation for its nonappropriated fund activities. B-137896, December 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 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, January 19, 1982.

For additional exceptions, see 59 Comp. Gen. 369 (1980) and B-197583, January 19, 1981, discussed in Chapter 6 of this Manual in the section entitled "Agreements to Indemnify."

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, 298 (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.

Another entity treated as a corporation for certain purposes, although technically not one, is the Federal Home Loan Bank Board. The issue in a 1976 decision was whether the Board could purchase insurance to cover risk of loss on its new office building. The Comptroller General concluded that the rationale for the self-insurance rule did not apply inasmuch as losses could be borne by the Federal Home Loan Bank System through the Board's mechanism of making assessments against its member banks. Therefore, and in view of the prior decisions at 21 Comp. Gen. 928 and 23 Comp. Dec. 297, the Board could purchase the insurance upon a determination that it was in the best interest of the Government to do so. 55 Comp. Gen. 1321 (1976).

(c) Specific Areas of Concern

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 workmen's compensation insurance. The premiums are part of the contractors'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. 391 (1956); 35 Comp. Gen. 393 (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.

Agreements to indemnify are a related topic and are discussed in detail in Chapter 6, this Manual.

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 (Chapter 11, this Manual) 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 cases.

A 1966 decision, 45 Comp. Gen. 542, involved Internal Revenue Service 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.

In B-127343, December 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 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 the driver training was a necessary part of a given patient's medical rehabilitation, and that the insurance coverage was essential 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 nonavailability 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 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.

Collision damage waiver insurance on commercial rental vehicles is discussed in the section entitled "Damage to Commercial Rental Vehicles" in Chapter 11, this Manual.

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), affirmed upon reconsideration, 23 Comp. Dec. 297 (1916). A limited exception, based on sound business practice, had been recognized for the shipment of Government money or securities through the mails. 21 Comp. Dec. 308 (1914).

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. 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).

The Government Losses in Shipment Act and relevant decisions are discussed in more detail in Chapter 11, this Manual.

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. § 1201, 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 in which the United States is the insured. 56 Comp. Gen. 788, 790 (1977).

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 the statute specifies this. 31 U.S.C. § 1201(b). This principle has been noted several times in connection with the liability of accountable officers and the cases are cited in Chapter 10, Section B, this Manual.

In 56 Comp. Gen. 788 (1977), the Comptroller General held that, by virtue of 31 U.S.C. § 1201, 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. § 1201. 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. § 1201 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).

(10) Lobbying and Related Matters

A public opinion poll taken in 1949 found that 45 percent of the persons polled did not know what a "lobbyist" was. 25/ That poll must have been taken on a remote desert island. Certainly anyone who lives or works in Washington knows. Lobbying--attempting to influence legislators--is nothing new. The term itself derives from a much less sophisticated era when advocates of a particular measure would lie in wait in the corridors or "lobby" of the Capitol Building, there to collar passing members of Congress.

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 "grass roots" 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." 26/

25/ House Select Committee on Lobbying Activities, Report and Recommendations on Federal Lobbying Act, H.R. Rep. No. 3239, 81st Cong., 2d Sess. 57 (1951).

26/ General Interim Report of the House Select Committee on Lobbying Activities, H.R. Rep. No. 3138, 81st Cong., 2d Sess. 1 (1950).

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 Manual is on the use of appropriated funds, coverage is limited to lobbying by Government officials and does not include lobbying by private organizations.

(a) Pending Legislation: "Publicity and Propaganda"

Restrictions on lobbying by Government officials to support or oppose pending legislation are of two types--criminal provisions and restrictions in appropriation acts.

Criminal statutes

Criminal sanctions are provided by 18 U.S.C. § 1913, originally enacted in 1919:

> "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, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member, or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business."

The statute goes on to provide penalties for violation: a $500 fine or a year in jail or both, plus removal from Federal employment.

Since 18 U.S.C. § 1913 is a criminal statute, its enforcement is the responsibility of the Justice Department and the courts. Therefore, GAO will not render an opinion as to whether a given action constitutes a violation. The

extent of GAO's involvement with section 1913 is to determine whether appropriated funds were used in a given instance and to refer matters to the Justice Department in appropriate cases. B-164497(5), March 10, 1977; B-192658, September 1, 1978. See also Chapter 1, this Manual. 27/ Generally, GAO will refer matters to the Justice Department if asked to do so by a Member of Congress or where available information provides reasonable cause to suspect that a violation may have occurred. B-145883, April 27, 1962.

As a general proposition, the Justice Department views section 1913 as applying primarily to indirect or "grass roots" lobbying, an essentially similar interpretation to that GAO has given to the appropriation act restrictions discussed below. See B-164497(5), supra; B-192658, supra.

In National Ass'n for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973), the court denied a motion to dismiss a complaint by private organizations which sought an injunction against the Department of Labor and an organization of State unemployment offices. Finding that "mere criminal liability is inadequate to insure the Congressionally intended effectiveness" of section 1913, the court concluded "it is clear that plaintiffs may base their [civil] cause of action on the criminal statute." 356 F. Supp. at 1404. The court emphasized that it was not deciding the issue of whether section 1913 had been violated. Since a violation of section 1913 is by definition an improper use of appropriated funds, such a violation could form the basis of a GAO exception or disallowance. However, GAO can take no action unless the Justice Department or the courts first determine that there has been a violation. B-164497(5), March 10, 1977.

In another case, American Public Gas Ass'n v. Federal Energy Administration, 408 F. Supp. 640 (D.D.C. 1976), the plaintiffs sought to enjoin further publication and distribution of a Government pamphlet entitled "The Natural Gas

27/ A few earlier 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 improper payment); B-76695, June 8, 1948. While GAO might well reach the same results today on other grounds, it would not express an opinion on the criminal statute.

Story," biased in favor of natural gas price deregulation. The court found that the intent of the Federal Energy Administration was to influence Congress at least in part, and that this would constitute a violation of 18 U.S.C. § 1913 for injunctive purposes. However, noting that the pamphlet was "somewhat less than authoritative" and that it nowhere mentioned that deregulation legislation was or would soon be pending in Congress, the court further found that "it simply is not of the type likely to induce persons to contact their congressmen" and dismissed the case. 408 F. Supp. at 642.

One other statute with penal sanctions deserves brief mention--the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270. Enacted in 1946, it requires the registration of certain persons and organizations engaged in lobbying as defined in the Act. Its constitutionality was upheld in United States v. Harriss, 347 U.S. 612 (1954). While this statute encompasses direct lobbying, it does not apply to the legislative activities of Government agencies. B-164497(5), March 10, 1977; B-129874, August 15, 1978.

Appropriation act restrictions

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 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." 28/

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 Committes's final report with some fiscal year 1952 appropriations, and has continued ever since.

The provision the Comptroller General has had the most frequent occasion to apply is the so-called "publicity and propaganda" provision. See, for example, section 607(a) of the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74 (September 29, 1979), 93 Stat. 559, 575:

> "No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

This is a direct restriction on the use of public funds. By virtue of the words "this or any other Act," it applies to all Government agencies, not just to those receiving funds under the act in which it appears. Also, it expressly applies to Government corporations, even those which do not receive direct appropriations. B-114823, December 23, 1974 (Export-Import Bank, a wholly-owned Government corporation not receiving direct appropriations); B-164497(5), March 10, 1977 (United States Railway Association, a mixed-ownership Government corporation which does receive direct appropriations). The statute does not, however, define the terms "publicity" or "propaganda."

28/ H.R. Rep. No. 3239, supra, note (25), at page 36.

In construing and applying this provision, the Comptroller General must 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. 29/

If a given policy or activity is affected by pending or proposed legislation, any discussion of that policy or activity by officials will 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 the statute which 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.

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); Arrington v. Taylor, 380 F. Supp. 1348, 1364 (M.D.N.C. 1974).

Yet on the other hand, the statute has to mean something. As the court said in National Ass'n for Community Development v. Hodgson, supra, in reference to 18 U.S.C. § 1913, "Obviously, Congress intended to remedy some problem or further some cause, otherwise they would not have bothered enacting the statute." 356 F. Supp. at 1403. As long as the law exists, there has to be a point beyond which Government lobbying violates it. Testifying before the Select Committee on March 30, 1950, former Assistant Comptroller General Frank Weitzel made the following remarks:

29/ H.R. Rep. No. 3138, supra, note (26), at page 53.

"[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 * * *." 30/

In evaluating whether a given action violates the anti-lobbying provision, GAO will rely heavily on the agency's administrative justification. In other words, the agency gets the benefit of any legitimate doubt. GAO will override the agency's determination only where it is clear that the action was designed to influence Congress in certain precise ways. Before discussing what those precise ways are, a few threshold issues must be noted:

1. 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 violated the statute had it been financed in any way with appropriated funds).

2. The alleged lobbying must be in connection with pending legislation. Of course this would include appropriation acts. Unlike 18 U.S.C. § 1913, which prohibits certain actions even before a bill is introduced, the "publicity and propaganda" provision requires "pending legislation."

30/ The Role of Lobbying in Representative Self-Government, Hearings before the House Select Committee on Lobbying Activities, 81st Cong., 2d Sess., pt. 1, page 158 (1950).

3. The legislation must be pending before the United States Congress, not a State legislature. For example, once Congress sent the Equal Rights Amendment to the States for approval, it was no longer "pending before Congress." Therefore, GAO held that lobbying for passage of the ERA at the State level did not violate the "publicity and propaganda" statute. B-193545, January 25, 1979; B-193545, March 13, 1979. 31/

Once these threshold questions are resolved--i.e., it is determined that the action involves the use of public funds in connection with legislation pending before Congress (or a State legislature if specified in an applicable appropriation act) -- the next question is what specific kinds of action will violate the statute.

The Comptroller General has construed the "publicity and propaganda" statute as applying to indirect or "grass roots" lobbying and not to direct contact with Members of Congress. 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. Another activity that will violate the statute is using appropriated funds to furnish administrative support or assistance to known private lobbying groups where no legal entitlement to that support exists. These concepts are illustrated in the cases summarized below.

The extent to which GAO will investigate an alleged lobbying violation depends in large measure on the amount of money involved. As a minimum, GAO will review materials submitted to it and will solicit the written justification of the agency in any case. The extent to which GAO will investigate beyond that depends on the potential amounts involved balanced against the likelihood of uncovering impropriety. See B-142983, September 18, 1962.

31/ In addition to the provision discussed in the text, an agency must scrutinize its own appropriation act for other applicable restrictions. Thus, the District of Columbia Appropriation Act for 1980 included a "publicity and propaganda" provision applicable to legislation pending before any State legislature as well as Congress. Pub. L. No. 96-93 (October 30, 1979), § 219, 93 Stat. 713, 719.

Cases involving "grass roots" lobbying violations

A bill was introducted 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 which 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 "publicity and propaganda" statute. B-178448, April 30, 1973.

Administration budget battles with Congress produced another violation in B-178648, September 21, 1973. This case involved pre-recorded news releases provided to radio stations by executive branch agencies. GAO reviewed over 1,000 of these releases and while most were proper, nevertheless found several that violated the law. Examples of the violations are as follows:

(1) "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."

(2) "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:

(3) "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 "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.

(4) "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.

A clear 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 which environmentalists opposed. The article went on to name the California representatives on the House committee that was considering the bill and exhorted readers to "Contact your representatives and make sure they are aware of your feelings concerning this important legislation." As with some of the violations in B-178648, supra, 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 an agency has a duty to insure that its appropriations are not used to violate a statutory prohibition. See also B-202975, November 3, 1981, discussed later in this Section.

It is not necessary for a statement to explicitly refer to the particular piece of pending legislation. Thus, a lobbying campaign using appropriated funds urging the public to write to Congressmen to support a strong merchant marine at a time when cargo preference legislation is pending violates the law. B-192746-O.M., March 7, 1979.

Cases where no violation was found

As indicated above, GAO has consistently taken the position that the anti-lobbying statute does not prohibit direct communication, solicited or unsolicited, between agency officials and Members of Congress. This is true even where the contact is an obvious attempt to influence legislation. Thus, GAO concluded that the "publicity and propaganda" statute was not violated in the following cases:

--Assistant Secretary of Commerce sent a Census Bureau position paper to Members of Congress explaining the Bureau's opposition to a particular piece of pending legislation. B-200250, November 18, 1980.

--Director of the Office of Management and Budget sent a letter to all Members of the House of Representatives urging opposition to a disapproval resolution on a Presidential Reorganization Plan. B-192658, September 1, 1978.

--Entertainment in the form of dinners for Members of Congress given by United States Railway Association officials. B-164497(5), March 10, 1977.

--Personal visits to Capitol Hill by Export-Import Bank officials during floor debate on authorizing legislation, at request of congressional proponents of the legislation. B-114823, December 23, 1974.

--Cruises with Members of Congress on Presidential yacht, paid for from entertainment appropriation. B-164786, November 4, 1969.

--Unsolicited letter to Members of Congress from agency head urging support for continuation of agency programs. B-145883, October 10, 1967. See also B-93353, September 28, 1962 (telegram sent by Secretary of Health, Education, and Welfare to all Members of Congress).

Also as indicated above, an agency will not violate the anti-lobbying statute by disseminating material to the public which is essentially expository in nature. Even if the material is promotional, there is no violation as long as it is not clearly designed to induce members of the public to contact their elected representatives. Again, several cases will illustrate.

For example, the Department of Transportation set up displays on U.S. Capitol grounds of passenger cars equipped with passive restraint systems (airbags). DOT 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 mandatory enforcement of the airbag standard. While, considering the timing and location of the displays, one would have to be pretty stupid not to see this as an obvious lobbying ploy, there was nevertheless no evidence that DOT urged members of the public to contact their Congressmen. Thus, since it was not illegal for DOT to advocate the use of airbags or to communicate with Congress directly, there was no violation. B-139052, April 29, 1980. The apparent intent alone is not enough; it must be translated into action.

Similarly, the statute was not violated by the following actions:

--Various trips by the District of Columbia Police Chief during which he made speeches supporting the Administration's law enforcement policy. B-118638, August 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, December 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, January 26, 1972.

--A series of White House Regional Conferences designed to seek the views of State and local officials and interested private citizens on existing Federal programs. B-147578, November 8, 1962.

See also B-150038, November 2, 1962 (Department of Agriculture press release); B-148206, March 20, 1962 (radio and television announcements by Commerce Department supporting foreign trade legislation).

Generally speaking, funds appropriated to carry out a particular program would not be available for political purposes, i.e., for a propaganda effort designed to aid a political party or candidate. See B-147578, November 8, 1962. If for no other reason, such an expenditure would be improper as a use

of funds for other than their intended purpose in violation of 31 U.S.C. § 628. However, the "publicity and propaganda" statute does not provide adequate guidelines to distinguish between legitimate and purely political activities and is therefore applicable to "political" activities only to the extent that the activities would otherwise constitute a violation. See B-130961, October 26, 1972.

Apart from considerations of whether any particular law has been violated, GAO has taken the position that the Government should not disseminate misleading information. On occasion, the Comptroller General has characterized publications as "propaganda" and attacked them from an audit perspective.

In 1976, the former Energy Research and Development Administration 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. The pamphlet had a strong pro-nuclear bias and urged the reader to "Let your voice be heard." On the legal side, the pamphlet did not violate the anti-lobbying statute because, as noted above, the statute does not apply to lobbying at the State level. B-130961-O.M., September 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 report entitled "Evaluation of the Publication and Distribution of 'Shedding Light on Facts About Nuclear Energy'," EMD-76-12, September 30, 1976.

In a later report, GAO reviewed a number of publications related to the Clinch River Breeder Reactor 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. While GAO was thus powerless to recommend termination of the offending publications, it nevertheless 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 insure that such publications include a prominently-displayed disclaimer statement making it clear that the material is not Government-approved. GAO report entitled "Problems with Publications Related to the Clinch River Breeder Reactor Project," EMD-77-74, January 6, 1978.

Providing assistance to private lobbying groups

The second type of activity that will violate the "publicity and propaganda" statute--providing assistance to private lobbying groups--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 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 and the General Counsel advised against certain elements of the plan, including the two items mentioned.

Since, pursuant to the General Counsel's advice, the more egregious elements of the plan were not carried out, the Comptroller General concluded that no laws were violated. However, the Comptroller pointed out that the "publicity and propaganda" 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, lobbists 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, September 11, 1978.

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 anti-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., March 7, 1979, and GAO report entitled "The Maritime Administration and the National Maritime Council--Was Their Relationship Appropriate," CED-79-91, May 18, 1979.

In B-133332, March 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 benefit itself since, under the Smithsonian's traveling exhibit program, administrative costs are paid by the host organization. The problem arose in that the Tallgrass Prairie Foundation shared a large part of its membership with a lobbying organization known as "Save the Tallgrass Prairie, Inc." (There is no cause that does not have its lobbyists.) 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 benefit, and since any lobbying by "Save the Tallgrass" or by the exhibit's creator could not be imputed to the Foundation nor to the Smithsonian, GAO concluded that the Smithsonian had not used its appropriations for any improper indirect lobbying.

Other appropriation act provisions

Over the years, many variations of the "publicity and propaganda" provision have appeared in various appropriation acts and some appropriation acts have no lobbying provision. Thus, to determine the permissible scope of its activities, an agency must examine not only its own appropriation act for specifically applicable provisions, if any, but all other appropriation acts as well since they may include provisions applicable to "this or any other act."

At a minimum, an agency will be subject to any provision containing the "this or any other act" language. The most common of these provisions and the one generating most of the GAO decisions has been the "publicity and propaganda" provision discussed in detail above. In addition, however, the

agency's own appropriation act may include a more restrictive provision. Thus, since there are variations, an agency must be careful in applying the cases since they may deal with different statutory language. For example, the cases holding that the "publicity and propaganda" provision applies only to lobbying before the United States Congress would be of little help to an agency whose appropriation act contains a provision expressly applicable to lobbying at the State level.

Another example is the following provision:

> "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, in accordance with the Act of June 25, 1948 (18 U.S.C. § 1913)."

This one appeared in the 1979 Interior Department appropriation act (Public Law 95-465, § 304) and the Comptroller General construed it in 59 Comp. Gen. 115 (1979). Reviewing the provision's legislative history and applying basic principles of statutory construction, the Comptroller General concluded that section 304 must be read as covering certain activities which would have been permissible under the standard "publicity and propaganda" provision, otherwise there would have been no purpose in enacting section 304. In the cited decision, GAO found section 304 violated by a mass mailing by the National Endowment for the Arts of an information package supporting the Livable Cities Program. Although the literature did not directly exhort readers to write their Congressmen, 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. GAO pointed out that a good faith effort to respond to a direct inquiry would not violate section 304 as long as the agency did not gratuitiously offer its views about the merits of the pending legislation.

This provision, as the more standard "publicity and propaganda" provision, applies to appeals to the public rather than direct communication with legislators. See report entitled "Alleged Unauthorized Use of Appropriated Moneys by Interior Employees," CED-80-128, August 13, 1980.

Lobbying with grant funds

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 Manual, 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 Chapter 13, this Manual, for further discussion of this concept.)

In some instances, Congress has dealt with the problem by legislation. One 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 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. For a general discussion of these provisions, see B-129874-O.M., October 30, 1978. See also B-202569, April 27, 1981.

Three 1981 cases illustrate the applcation 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, March 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 these circumstances, GAO reviewed the legislative history and concluded that the exception did not permit "grass roots" lobbying either by the Corporation itself or by its grantees.

In the third case, the Managing Attorney of a Legal Services Corporation 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 "grass roots" lobbying. B-202787, December 29, 1981.

In addition to the Corporation's enabling legislation, appropriation acts providing funds for the Corporation have included a version of the "publicity and propaganda" restriction, known as the "Moorhead Amendment," which prohibits 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 Moorhead Amendment makes it clear that the exception for the proper representation of eligible clients does not extend to grass roots lobbying. See B-163762, November 24, 1980; 60 Comp. Gen. 423 (1981), supra.

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 contained a variety of the "publicity and propaganda" 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 exceeded its authority, the Comptroller General recommended that CSA rescind its ruling. This is a relatively infrequent example of the inclusion in a decision of a formal recommendation under section 236 of the Legislative Reorganization Act of 1970 (see Chapter 2, this Manual).

The question becomes more difficult when applicable appropriation act restrictions do not expressly cover grantees. Until late in 1981, whether the "publicity and propaganda" provision 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 the "publicity and propaganda" provisions and was decided under 18 U.S.C. § 1913. While, as noted above, GAO would no longer directly express an opinion on the criminal statute, 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 and propaganda" statute was therefore "questionable". There is no indication, however, that the 1948 case was considered. B-158371, November 11, 1977 (non-decision 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, August 15, 1978.

In two of the Legal Services Corporation cases discussed above, the Comptroller General viewed the Moorhead Amendment as applicable to grantee expenditures. 60 Comp. Gen. 423 (1981); B-163762, November 24, 1980. However, in view of the explicit LSC enabling legislation, the Moorhead Amendment was not the sole basis for the LSC decisions and its legislative history clearly established that it was intended to apply to grantee expenditures. See B-163762, supra.

In B-128938, July 12, 1976, previously discussed, GAO said that the agency has a responsibility to insure 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. It is also possible to infer this result from National Association for Community Development v. Hodgson, supra, in that the court, while expressly declining to rule on the merits, denied the defendants' motion to dismiss, and the defendants were the Department of Labor and one of its grantees.

Finally, in B-202975, November 3, 1981, the Comptroller General resolved the uncertainty, applied the concept of B-128938, supra, 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 and propaganda] restriction."

The case involved the Los Angeles Downtown People Mover Authority, a grantee of the Urban Mass Transportation Administration, Department of Transportation. Fearing that its funding was in jeopardy under the Reagan Administration, 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.

Government Employees Training Act

A restriction on the use of appropriated funds in connection with lobbying, although not by Government officials, is contained in the Government Employees Training Act. The law prohibits the training of Government employees (and hence the expenditure of appropriated funds to support such training) "by, in, or through a non-Government facility a substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." 5 U.S.C. § 4107(b)(1).

As of late 1981, there have been no Comptroller General decisions applying this provision. However, the statute contains a similarly-worded restriction on subversive activities--5 U.S.C. § 4107(a)(1)--and decisions under that restriction are relevant in construing the identical language in the lobbying restriction. Thus, the term "non-Government facility" applies to individuals contracting with or employed by the Government to provide training as well as to organizations. 38 Comp. Gen. 857 (1959). However, where an organization is conducting the training, the term does not apply to individual employees of that organization where there is no contractual relationship between those employees and either the Government or the Government employees receiving the training. Id. See also B-182398, October 24, 1979 (non-decision letter). A test of whether an organization violates the subversive activities prohibition is to determine if it is included in the Attorney General's subversive organization list. See 38 Comp. Gen. 857, supra; 51 Comp. Gen. 199 (1971). An analog for the lobbying restriction would be to determine if the organization has registered under the Federal Regulation of Lobbying Act, discussed above.

(b) Self-aggrandizement

Another common variety of the "publicity and propaganda" provision, one that does not mention pending legislation, is this one:

> "No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress."

See, for example, section 601 of the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-68 (September 24, 1979), 93 Stat. 416, 435.

The Comptroller General first had occasion to construe this provision in 31 Comp. Gen 311 (1952). The National Labor Relations Board asked whether the activities of its Division of Information amounted to a violation. Reviewing the statute's 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-177704, February 7, 1973. It is geared at activities whose obvious purpose is "self-aggrandizement" or "puffery."

GAO's approach to the "anti-puffery" statute is basically the same as its approach to the "pending legislation" provision. The statute does not provide adequate guidelines to distinguish the legitimate from the proscribed. Thus, without further clarification from Congress or the courts, GAO is reluctant to find a violation where the agency can provide a reasonable justification for its activities.

In a 1973 case, B-178528, July 27, 1973, 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. 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 "anti-puffery" law. In any event, the use of appropriated funds was limited to the cost of one piece of paper and the time it took the Ambassador to think about it and sign his name.

GAO did find a violation in B-136762, August 18, 1958. The Deputy Assistant Secretary of Defense for Military Assistance Programs attended a meeting of the Aircraft Industries Association and made a speech "clearly designed to enlist the aid of the Aircraft Industries Association in publicizing and selling the Mutual Security program to the American public through the various media available to the Association." Reviewing the text of the speech, GAO found that it went far beyond any legitimate purpose of informing the public and that it violated the "anti-puffery" statute. However, the officer had been authorized to attend the meeting as related to the performance of official duty and would have been entitled to per diem for the full day even if he had not made the speech. Therefore, since the Government incurred no additional expense by virtue of the speech, GAO declined to seek recovery either from the officer himself or from the accountable officers who had made the payment.

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 multi-media 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, December 3, 1975.

There are, however, limits to legitimate promotion and an agency may exceed its authority even without reference to the "anti-puffery" statute. This is illustrated in a case that pre-dated the statute. Shortly after enactment of title I of the National Housing Act, which authorized a loan insurance program administered by the Federal Housing Administration, the FHA undertook a promotional campaign to drum up business by encouraging homeowners to make repairs or improvements to their property, which would create a demand for loans which FHA could then insure. GAO recognized that FHA could disseminate authentic information on available benefits or related procedures, but held that FHA could not use its funds to create the demand. The purpose of the Housing Act was to meet whatever demand might already exist or might be created by private interests, not a demand generated by an advertising campaign paid for from FHA appropriations. 14 Comp. Gen. 638 (1935).

(c) Advertising and the Employment of Publicity Experts

Even the casual viewer of commercial television will note that the Government is heavily "into" advertising. Turn on one channel and "Smokey Bear" is pleading with you not to ignite the national forests. Flip to another channel and a feathered character named "Woodsy Owl" admonishes against pollution. 32/ Try still another and someone may be telling you to observe the national speed limit or join a carpool or collect postage stamps or write for information on metric conversion. A brief description of some of the methods the Government uses to advertise may be found in a GAO report entitled "Federal Energy Administration's Contract with the Advertising Council, Inc., for a Public Relations Campaign on the Need to Save Energy," PSAD-77-151, August 31, 1977.

Whether an agency's appropriations are available for advertising, like any other expenditure, depends on the agency's statutory authority. As noted previously, some agencies have express promotional authority. For example, the Department of Energy may promote energy conservation. See B-139965, April 16, 1979 (non-decision letter) and PSAD-77-151, supra. Similarly, the United States Postal Service has statutory authority to advertise its philatelic services to encourage stamp collecting. B-114874.30, March 3, 1976 (non-decision letter).

32/ Should anyone have any doubt, both of these characters are recognized (and protected) by act of Congress. See 31 U.S.C. § 488b-3. Mess with Smokey or Woodsy and you can go to jail. 18 U.S.C. §§ 711 and 711a.

An agency may be authorized to disseminate information but not to promote. If so, its advertising must be tailored accordingly. An example here is the United States Metric Board, which may provide information, assistance, and coordination for voluntary conversion to metrics but may not advocate metric conversion. See GAO report entitled "Getting A Better Understanding of the Metric System--Implications If Adopted by the United States," CED-78-128, October 20, 1978, and letters B-140399, May 29, 1979, and B-140399, June 19, 1979.

Just how far an agency can go with its advertising depends not only on its own statutory authority but also on general restrictions on the use of public funds such as the various "publicity and propaganda" statutes previously discussed.

A related statute, originally enacted in 1913, is 5 U.S.C. § 3107:

> "Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose."

GAO has had little occasion to interpret or apply 5 U.S.C. § 3107 and, from the earliest cases, has consistently noted certain difficulties in enforcing the statute. In GAO's first substantive discussion of 5 U.S.C. § 3107, the Comptroller General stated "In its present form, the statute is ineffective." A-61553, May 10, 1935. The early cases 33/ identified three problem areas, summarized in B-181254, February 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:

33/ There is no mention of the 1913 statute before the 1930's. A small group of cases then arose. In addition to A-61553, cited in the text, see A-57297, September 11, 1934; A-82332, December 15, 1936; A-93988, April 19, 1938; B-26689, May 4, 1943. Another stretch of silence followed and the statute did not arise again until B-181254, February 28, 1975, discussed in the text.

"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." 34/

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 assigned job. Some thought was given in the 1930's and early 1940's to amending the statute to cure this problem, but the legislation was not enacted. See B-181254, February 28, 1975; B-26689, May 4, 1943; A-82332, December 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.

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, December 15, 1936; B-181254, February 28, 1975. In this sense, 5 U.S.C. § 3107 is closely related to the "anti-puffery" statute discussed above, although the focus of the two statutes is different in that, to violate 5 U.S.C. § 3107, the activity must be performed by a "publicity expert."

In the only two cases in the 1970's to discuss 5 U.S.C. § 3107, GAO considered a mass media campaign by the Federal Energy Administration, 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

34/ Hearings, supra, note (30), at page 156.

no basis on which to assess a violation of 5 U.S.C. § 3107. B-181254, February 28, 1975; B-139965, April 16, 1979 (non-decision letter). In both cases GAO stressed its view that the statute is not intended to interfere with the dissemination of information which an agency is required or authorized by statute to disseminate, or with promotional activities authorized by law.

(11) Membership Fees

(a) 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).

The rule that has evolved under 5 U.S.C. § 5946, illustrated in the decisions discussed below, 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 activities of the agency, and this is not affected by any incidental benefits that may accrue to individual employees.

In 24 Comp. Gen. 814 (1945), the Veterans Administration 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. 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 membership. VA could not, of course, pay for the individual memberships.

Similarly, GAO advised the Environmental Protection Agency 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 essential to carry out the purposes of its appropriation. 53 Comp. Gen. 429 (1973).

In another 1973 decision, the Comptroller General held that the Department of Justice could not reimburse an electronics engineer employed by the Bureau of Narcotics and

Dangerous Drugs for membership in the Institute of Electrical and Electronic Engineers. The Department had argued that the Government benefitted 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 administratively determined to be necessary. 52 Comp. Gen. 495 (1973).

GAO followed and applied these decisions in B-205768, March 2, 1982, holding that the Federal Mediation and Conciliation Service could purchase an agency membership in the Association of Labor Related Agencies upon making the appropriate administrative determinations, but could not pay for an individual membership for its Deputy Director.

In another recent 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.

Citing 31 Comp. Gen. 398 and 33 Comp. Gen. 126, the Comptroller General held in 57 Comp. Gen. 526 (1978), that the Department of Housing and Urban Development could purchase, in the name of the Department, air travel club memberships to obtain discount air fares to Hawaii. Similarly, the General Services Administration could join a shippers association to obtain the benefit of volume transportation rates. B-159783, May 4, 1972.

The acquisition of needed publications for the agency is sufficient benefit to justify purchase of an agency membership. 20 Comp. Gen. 497 (1941) (membership of Naval Academy in American Council on Education); A-30185, February 5, 1930 (membership of Phoenix Indian School in National Education Association). See also 33 Comp. Gen. 126, supra. Compare 52 Comp. Gen. 495, supra, 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 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 Veterans Administration (then 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 appropriations language was subsequently changed and the membership was approved in A-38236, March 30, 1932.)

Several of the decisions have pointed out that an agency may accept a gratuitous membership without violating the Anti-deficiency Act. 31 Comp. Gen. 398, 399 (1952); 24 Comp. Gen. 814, 815 (1945); A-38236, March 30, 1932. (See Chapter 5, this Manual.)

The evolution of the statutory law in this area produced a somewhat anomalous result in some of the early cases. 5 U.S.C. § 5946 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 vs. 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, February 5, 1930. Two provisions of the Government Employees Training Act now permit attendance at meetings in certain situations. 5 U.S.C. § 4109 permits attendance at meetings if necessary to an authorized training program and 5 U.S.C. § 4110 permits attendance if the organization is concerned with the functions or activities for which an agency's appropriation was made. Thus, 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. 35/

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. ___ (B-201052, December 23, 1981), holding that the Defense Department could pay the licensing fees of Methods Time Measurement (whatever that is) 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" (see "Attorneys" below) 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.

35/ Different aspects of these statutes are discussed elsewhere in this Chapter. See "Attendance at Meetings" and "Entertainment and Recreation (Food for Government employees)."

(b) Attorneys

A number of cases have dealt with the expenses of admission to the bar and related items for attorneys employed by the Government.

The question first came up in 22 Comp. Gen. 460 (1942), when the Federal Trade Commission asked if it could reimburse one if its attorneys the fee he paid to be admitted to the bar of the Tenth Circuit Court of Appeals. The attorney had paid the fee in order to make an appearance to represent the agency in a suit filed against it. The Comptroller General said no, because the fee was a personal expense incident to the attorney's qualifying himself to perform his official duties. The decision stated the rule as follows:

> "It has been the consistent holding of the accounting officers of the United States that an officer or employee of the Government has upon his own shoulders the duty of qualifying himself for the performance of his official duties and that if a personal license is necessary to render him competent therefor, he must procure it at his own expense." Id., at 461.

Thus, the basis for the decision in 22 Comp. Gen. 460 was the rule that an employee must bear the expenses of qualifying himself to perform his official duties. For additional cases on this rule, see 3 Comp. Gen. 663 (1924) (license to operate a gasoline pump); 6 Comp. Gen. 432 (1926) (license to operate a motor vehicle); 31 Comp. Gen. 81 (1951) (license to operate motion picture projection equipment); 46 Comp. Gen. 695 (1967) (license to practice medicine); B-186512, January 17, 1977 (license for pesticide applicators). See also "State and Local Taxes," this Chapter.

In 1967, the National Labor Relations Board asked GAO to reconsider the rule in a fact situation similar to that in 22 Comp. Gen. 460. GAO reviewed the basis for the prior decision in light of the Government Employees Training Act, but found no reason to change it. Pointing out 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," the Comptroller General again held that the bar admission fee was personal to the attorney and could not be paid from appropriated funds. 47 Comp. Gen. 116 (1967).

The same result was reached in B-161952, June 12, 1978, again to the National Labor Relations Board. The fact that an attorney might require admission to several courts rather than just one in the performance of official duties was found immaterial and GAO rejected the suggestion that the court admission would be of very limited value to the attorney after leaving the Government.

Questions have also arisen over the requirement for a Government attorney to remain a member in good standing of the bar of some State or the District of Columbia. In a jurisdiction with a "unified" or "integrated" bar, the attorney must pay an annual fee to remain a member in good standing, and membership in the State's bar association goes along with the fee. (Some States require annual fees to remain on the active rolls but do not include bar association membership.) In B-171667, March 2, 1971, the annual fee for an Internal Revenue Service attorney to remain in good standing in the California bar, an integrated bar jurisdiction, was held not reimbursable from appropriated funds. The fee remains a matter of personal qualification and the principle is the same whether applied to an isolated fee or to dues or fees charged on a recurring basis. 5 U.S.C. § 5946 was cited as an additional reason. GAO reached the same result in 51 Comp. Gen. 701 (1972), concerning a Patent Office attorney's membership in the unified bar of the District of Columbia, and again in B-204215, December 28, 1981, concerning the membership of an Internal Revenue Service estate tax attorney in the New Jersey bar.

Another case applying the prohibition is B-187525, October 15, 1976. The decision further pointed out that an agency may not pay the costs incurred by one of its attorneys in taking a bar examination since the examination is part of the employee's personal qualification process. See also 55 Comp. Gen. 759 (1976) concerning examinations in general.

In 61 Comp. Gen. ___ (B-204021, April 16, 1982), GAO held that the Merit Systems Protection Board could not pay the bar membership fees of its appeals officers. It made no difference that the requirement for appeals officers to be bar-admitted attorneys was a new one the Board had imposed on incumbent employees. In addition, the Board could not pay law school tuition or bar review course fees. (The decision distinguished B-187525, supra, which had permitted bar review course fees in a very limited situation.)

(12) Personal Expenses and Furnishings

Items which are classified as personal expenses or personal furnishings may not be purchased with appropriated funds without specific statutory authority. The theory is simply that there are certain things an employee is expected to provide for himself. For example, a lawyer could not expect the Government to pay for his suits of clothing merely because he wears them to work every day in conformity with social dress patterns. Nor could an employee with weak eyesight demand that the Government pay for his eyeglasses merely because he is expected to read from time to time in the course of his employment. Another personal expense everyone is familiar with is commuting. The employee is expected to be at work; how he chooses to get there is entirely his own business.

The rule on personal expenses and furnishing was stated as follows in 3 Comp. Gen. 433 (1924):

> "[P]ersonal furnishings are not authorized to be purchased under appropriations in the absence of specific provision therefor contained in such appropriations or other acts, if such furnishings are for the personal convenience, comfort, or protection of such employees, or are such as to be reasonably required as a part of the usual and necessary equipment for the work on which they are engaged or for which they are employed."

This decision is still cited frequently and the rule is applied in many contexts. Of course, over the years, exceptions have evolved, both statutory and non-statutory. The remainder of this Section explores several categories of personal expenses. (Many of the cases in this Section are conceptually related to those in the Section on "Gifts," supra, this Chapter.)

(a) Wearing 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." 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, it has always been recognized that there are certain out-of-the-ordinary items, required by the nature of the job, that 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."

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., 2 Comp. Gen. 258 (1922) (coats and gloves for Government drivers); 5 Comp. Gen. 318 (1925) (rubber boots and coats for custodial employees in a flood-prone area). But there were limited exceptions. Thus, caps and gowns for staff workers at Saint Elizabeths 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). 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).

There are now three statutory provisions which permit the purchase of items of apparel from appropriated funds in certain circumstances.

The first is 5 U.S.C. § 7903, enacted 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]."

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 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 B-193104, January 9, 1979; 32 Comp Gen. 229 (1952). 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 which the employee must furnish. B-193104, January 9, 1979; B-122484, February 15, 1955. Similarly unauthorized are coveralls for mechanics. B-123223, June 22, 1955. 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.

Items other than wearing apparel may be furnished under 5 U.S.C. § 7903 if the tests set forth above have been met. See, e.g., 28 Comp. Gen. 236 (1948) (mosquito repellent for certain Forest Service employees).

Continuing the old rule, however, the Comptroller General held that 5 U.S.C. § 7903 does not consititute general authority for the purchase of uniforms. 32 Comp. Gen. 229 (1952).

Congress addressed the uniform problem with the second statutory provision under consideration, 5 U.S.C. § 5901, the so-called Federal Employees Uniform Act. This provision authorizes annual appropriations to each agency to provide a uniform allowance of up to $125 to each employee required to wear a uniform by statute or regulation. The agency may pay a cash allowance or may furnish the uniform.

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

In order for a uniform allowance to be payable under 5 U.S.C. § 5901, wearing of a uniform must be required by statute or regulation. Where not required by statute, the agency head must determine that a particular group of employees is required to wear uniforms. The determination cannot be made on an ad hoc or situational basis (unless, of course, the regulations are amended). 45 Comp. Gen. 133 (1965); 57 Comp. Gen 379, 383 (1978). An example of an item that could properly be required under 5 U.S.C. § 5901 (and therefore paid for) 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, September 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.)

In 48 Comp. Gen. 678 (1969), a National Park Service employee was given a uniform allowance but, in less than a year, was promoted to a higher position which 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 exeed the statutory annual ceiling of $125. To hold otherwise would have been inconsistent with the statutory purpose.

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).

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 above. The decision held that the items were justifiable on either basis.)

--Protective footwear for Drug Enforcement Administration agents assigned to temporary duty in jungle environments. The footwear remains the property of the Unted States and must be disposed of in accordance with the Federal Property Management Regulations. B-187507, December 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, December 20, 1978.

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, supra.

Thus, there are three statutes under which purchase of wearing apparel may be authorized--5 U.S.C. § 7903 (special clothing for hazardous occupations), 5 U.S.C. § 5901 (uniform allowances), and OSHA (protective clothing). If none of these applies, then the rule of 3 Comp. Gen. 433 continues to govern.

In a 1955 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. 45 Comp. Gen. 272 (1965).

A different situation was presented in 48 Comp. Gen. 48 (1968), in which it was held that the Secret Service could pay the rental charges on formal dress attire required to be used by special agents when attending formal functions incident to their furnishing protective services to persons whom they are assigned to protect. In this situation, the purpose of the formal attire in not merely to be "socially acceptable," but is necessary for security purposes, to make the agents less readily identifiable as such.

(b) Medical Care and Treatment

Two concepts are covered here--the provision of medical care for Government employees and the purchase of health-related items. Both have traditionally been considered personal expenses.

The rule for medical care is that, except for illness directly resulting from the nature of the employment, medical care and treatment are personal to the employee and payment may not be made from appropriated funds unless provided for in a contract of employment or by statute or valid regulation. 57 Comp. Gen. 62, 63 (1977); 53 Comp. Gen. 230 (1973). The case most frequently cited for this rule is 22 Comp. Gen. 32 (1942), which contains citations to many of the earlier decisions.

Exceptions have been recognized where a particular item could be justified as being primarily for the benefit of the Government rather that the employees. The exceptions involve primarily physical examinations and innoculation. Thus, in 22 Comp. Gen. 32, supra, 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 Comptroller General noted that instances of arsenic poisoning "might have a depressing effect

on the morale of fellow workers" and might make it more difficult to find qualified people to do the work. (Remember this was 1942.) 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.

Other cases involving exceptions are: 30 Comp. Gen. 387 (1951) (physical examinations of Department of Agriculture employees engaged in testing repellants and insecticides for use by the armed forces); 41 Comp. Gen. 387 (1961) (desensitization treatment for a Department of Agriculture horticulturist with a known history of severe reaction to bee and wasp stings); 41 Comp. Gen. 531 (1962) (annual physical examinations for Saint Lawrence Seaway Development Corporation employees engaged in strenuous physical work, often under severe winter conditions); B-108693, April 8, 1952 (X-rays for Weather Bureau personnel being assigned to Alaska, presumably necessitated by a high incidence of tuberculosis among Eskimos).

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.

Under 5 U.S.C. § 7901, the Comptroller General advised the Veterans Administration that it could, upon an administrative determination of necessity, provide pre-employment examinations without charge to the applicant. 30 Comp. Gen. 493 (1951). Similarly, an agency, upon determining that it will be in the Government's interest to do so, may provide immunization against specific diseases without charge to employees. 47 Comp. Gen. 54 (1967).

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 not the actual treatment and rehabilitation. Actual treatment and rehabilitation remain the employee's responsibility.

Medical treatment not within the scope of 5 U.S.C. § 7901 remains subject to the general rule expressed in 22 Comp. Gen. 32. 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, November 14, 1966. (This is the kind of expense that can be covered by employee health insurance plans.) In another case, GAO rejected the contention that medical expenses are automatically "necessary expenses," and concluded that Internal Revenue Service appropriations were not available to reimburse the State Department for medical services provided to IRS overseas employees and their dependents under the Foreign Service Act of 1946. 53 Comp. Gen. 230 (1973). The decision noted that several other agencies had received specific statutory authority to participate in the program.

In B-198804, December 31, 1980, GAO refused to expand the holding in 57 Comp. Gen. 62, supra, 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.

The purchase of health-related items, while conceptually related to the above rule, is also an application of the "personal expense" rule set forth in 3 Comp. Gen. 433, cited at the beginning of this Section, that personal equipment needed to qualify an employee to perform the regular duties of his position may not be paid from appropriated funds. The rule is illustrated in B-187246, June 15, 1977. There, a Community Services Administration employee's doctor had placed him under certain restrictions because of a back injury. Specifically, he was to use a "sacro-ease positioner" for his office chair and could drive cars only with a minimum 116-inch wheel base, bucket seats, and full power. While the equipment may have been necessary for that particular individual to perform his duties, it was not essential to the transaction of official business from the Government's standpoint. Therefore, the items could not be provided from appropriated funds.

In B-166411, September 3, 1975, an employee who, as a result of a back injury, needed a bedboard while travelling could not be reimbursed beyond the normal per diem. The bedboard was a personal expense. Similarly, gratuities for wheelchair services while travelling were held non-reimbursable in B-151701, July 3, 1963.

Just as in the case of wearing apparel (subsection (a), this Section), the test in 3 Comp. Gen. 433 may provide the basis for exceptions for certain health-related items. For example, in 45 Comp. Gen. 215 (1965), GAO told the Interior Department that it could provide special prescription filter spectacles and clinical eye examinations necessary to obtain the proper prescription for Geological Survey employees operating stereoscopic map plotting instruments. While it was possible to operate the equipment without the special glasses, their use would achieve better manpower utilization in that employees who did not use them frequently lost the required visual skills before reaching the normal retirement age. Also, the special glasses would be of no personal use to the employees except during working hours and would remain the property of the Government.

Another exception occurred in 23 Comp. Gen. 831 (1944). There, GAO approved the rental of an amplifying device to be attached to an official telephone for use by an employee with a hearing handicap. The device was seen as a means of obtaining the best results from available personnel. The precedent value of this decision is somewhat speculative. On the one hand, the device would not become the property of the individual. Yet on the other hand, the decision seems to have been based largely on the difficulty of hiring "qualified" employees in view of the wartime draft situation. (Whether consideration was given to hiring women is not mentioned.)

Generally, however, exceptions stem from some statutory basis. Thus, in 56 Comp. Gen. 398 (1977), the Comptroller General approved the purchase of a motorized wheelchair for use by a Social Security Administration employee. The decision emphasized that a wheelchair is normally 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.

In B-188710, September 23, 1977, training funds were held available to procure the taping and brailling of training materials and to provide related services such as interpreters for the deaf and readers for the blind. The decision pointed out that these items would be personal expenses if used in connection with regular duties in that each employee is presumptively qualified to perform the official duties. However, in view of the policy in the Rehabilitation Act of 1973 of providing equal

opportunity for handicapped employees, the expenditures were held proper in the limited context of training under the Government Employees Training Act. (For non-training situations, the employment of reading assistants for blind employees and interpreting assistants for deaf employees is now covered by 5 U.S.C. § 3102.)

Health-related items may also be authorized under 5 U.S.C. § 7903 (subsection (a), this section). Thus, prescription ground safety glasses may be purchased for employees engaged in hazardous duties. The Government can also pay the cost of related eye refraction examinations, but only where the employee involved has not previously worn glasses or where it is administratively determined that his present prescription is inadequate. The glasses become and remain the property of the Government. 42 Comp. Gen. 626 (1963); 51 Comp. Gen. 775 (1972).

(c) Photographs

General rule: The cost of photographs of individual Government employees is a personal expense not chargeable to appropriated funds in the absence of specific statutory authority. 31 Comp. Gen. 452 (1952). Thus, the dissemination to the press of photographs of a new agency official upon his appointment was held to be an improper expenditure in B-111336, September 16, 1952.

The rule is intended to prevent the use of public funds for the personal publicity of a particular individual. Exceptions have accordingly been recognized where there is adequate justification that the expenditure is necessary to accomplish some purpose for which the appropriation was made. For example, the distribution of photographs of an area director of the Equal Employment Opportunity Commission was held permissible in 47 Comp. Gen. 321 (1967) where the purpose was to increase cooperation with EEOC by publicizing its activities and functions. The decision further pointed out that the expense was chargeable to the fiscal year in which the photographs were taken.

Another acceptable justification is illustrated in B-123613, June 1, 1955, involving photographs of the Under Secretary of the Interior. One of the Under Secretary's functions is to represent the Secretary in various parts of the country. The photographs were obtained in order to respond to requests by organizations in preparing programs or by the press, in connection with this official travel. Similar justifications were found sufficient in B-114344, May 19, 1953, and B-47547, February 15, 1945.

Photographs for use on identification cards or badges are permissible when administratively determined necessary to protect Government property or for security reasons. 2 Comp. Gen. 429 (1923); 20 Comp. Gen. 447 (1941); 20 Comp. Gen. 566 (1941); 23 Comp. Gen. 494 (1944).

At one time, travel regulations did not provide for the reimbursement of passport photographs, and they were held to be non-reimbursable personal expenses unless and until the regulations should be amended. 9 Comp. Gen. 311 (1930). The regulations have since been amended and passport photographs are now reimbursable. See 52 Comp. Gen. 177 (1972).

While earlier decisions state the rule in terms of photographs of individual employees, it applies to other photographs as well. The expense will be permitted where it clearly constitutes a means of effecting a proper agency function and disallowed where adequate justification does not exist.

For example, distribution of photographs of a department store display was viewed as a proper means of carrying out a statutory function of encouraging public cooperation toward economic stabilization. B-113464, January 29, 1953. Similar types of justification were found sufficient in B-15278, May 15, 1942; B-113026, January 19, 1953; B-175434, April 11, 1972.

However, inadequate justification was found in B-149493, December 28, 1977, in which a group photograph of interagency participants in a training symposium, sent free to participants, was held a personal expense rather than a necessary expense. Similarly, 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 were disallowed as a personal gift in B-195896, October 22, 1979.

(d) 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. 36/ Questions occasionally arise when the item to be procured is decorative rather than utilitarian.

36/ For a related topic, see "Stationery and Supplies," Chapter 8, this Manual.

The availability of appropriations for certain decorative items has long been recognized. In 7 Comp. Dec. 1 (1900), 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.

The Comptroller followed this decision in 9 Comp. Dec. 807 (1903), holding that Treasury appropriations were available to buy portraits as furniture for the Ellis Island immigration station if administratively determined "necessary for the public service."

Citing both of these decisions, the Comptroller General held in B-178225, April 11, 1973, 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.

A "solid walnut desk mount attached to a name plate" was approved in B-121909, December 9, 1954, since it served utilitarian purposes.

Purchase of decorative items for Federal buildings is now covered in the Federal Property Management Regulations. 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. Thus, presumably, GAO could decide to decorate each office with a framed glossy of the Comptroller General, but could not substitute a display of Playboy centerfolds at the request of some employee.

The regulation was discussed and the rule restated in 60 Comp. Gen. 580 (1981). Decorative items may be purchased as long as they are not "personal convenience" items and as long as they are permanent rather than seasonal (see subsection (f), this Section). 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.

As noted, one type of permissible decorative items is plants. A restriction in a 1980 appropriation act prohibited the use of funds for plant maintenance contracts. The Comptroller General construed this provision to apply to office

space to which particular Federal employees were actually assigned. The provision's legislative history suggested that it was not intended to apply to outdoor plants or to plants in common areas which were not the assigned work space of any particular employee or group of employees. 59 Comp. Gen. 428 (1980).

(e) Business or Calling Cards

Business cards or calling cards are commonly used in the commercial world. (The terms are used syonymously here even though there may be technical distinctions.) As far as the Government is concerned, they are inherently personal in nature. Therefore, they are considered a personal expense and not payable from appropriated funds without specific statutory authority.

The rule is long-standing and has been applied in a number of decisions. In 20 Comp. Dec. 248 (1913), the Comptroller of the Treasury considered the argument that has been presented in every case--that the cards are used for official business purposes. Be that as it may, business or calling cards are more a matter of personal convenience than necessity. Therefore, the Comptroller advised the State Department that their cost is a personal expense and not chargeable to public funds. The decision also pointed out a practical basis for the rule: If the cards were permitted for certain officials, it would be impossible to draw a fair and enforceable line.

The rule was reiterated in 41 Comp. Gen 529 (1962), in which the purchase of business cards from appropriated funds was held improper for Department of Agriculture officials at overseas posts.

In a more recent case, the Comptroller General applied the prohibition to deny reimbursement to an employee of the National Highway Traffic Safety Administration who had purchased business cards at his own expense. B-195036, July 11, 1979.

For other cases holding business cards to be personal expenses, see: 10 Comp. Dec. 506 (1904); 12 Comp. Dec. 661 (1906); 12 Comp. Gen. 565 (1933); B-131611, May 24, 1957; B-131611, February 15, 1968.

A variation occurred in B-173239, June 15, 1978. The Board for International Broadcasting wanted to use what it termed "transmittal slips" to accompany the distribution of its annual report. 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 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 illegal.

For the application of these rules to Members of Congress, see B-198419, July 8, 1980, and B-198419, November 25, 1980.

(f) Seasonal Greeting Cards and Decorations

The rule with respect to seasonal greeting cards is this: Their cost is a personal expense to be borne by the officer who ordered and sent them, and may not be charged to public funds.

In a 1957 case, 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. The Comptroller General ruled, however, 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 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.

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.

In 47 Comp. Gen. 314, supra, it was also held 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.

The rule prohibiting the use of public funds for Christmas cards is also found in 7 Comp. Gen. 481 (1928) and B-115132, June 17, 1953.

Christmas decorations (trees, lights, ornaments, etc.) are also not a proper charge to appropriated funds. 52 Comp. Gen. 504 (1973); B-163764, February 25, 1977 (non-decision letter). In 52 Comp. Gen. 504, a Customs Service certifying officer sought a decision on the propriety of paying vouchers

for artificial Christmas trees and related lights and decorations. The Comptroller General held that the expenditure could not be viewed as a "necessary expense" in that it had no direct connection with, nor was it essential to carry out, the purposes of the Customs Service's appropriation. The Comptroller further noted that seasonal decorations are significantly different from ordinary office furnishings designed for permanent use. (See subsection (d), this Section.)

While all of the cases cited in this subsection deal with Christmas items, the rule would presumably apply equally to other holiday or seasonal cards and decorations.

(g) Traditional Ceremonies

Expenditures which 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, in B-158831, June 8, 1966, the cost of flowers used as centerpieces at a dedication ceremony was held to be a proper expenditure.

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). In the cited decision, however, the voucher could not be paid because there was no evidence as to who authorized the work, where the shovel originated, the subsequent use to be made of the shovel, and why there was a year's delay between the ceremony and the engraving.

Expenses necessarily incident to a groundbreaking or cornerstone ceremony are chargeable to the appropriation for the construction of the building. A-88307, August 21, 1937; (recording of presidential speech and group photograph at cornerstone ceremony); B-11884, August 26, 1940 (cost of printing programs and invitations to cornerstone ceremony); B-158831, supra; B-107165-O.M., April 3, 1952.

In 56 Comp. Gen. 81 (1976), the rationale of the above cases was extended to Armed Forces change of command ceremonies. The decision held that the cost of printing invitations to a change of command ceremony for a Coast Guard vessel could be paid from the Coast Guard's appropriations for operating expenses. In view of the traditional role of change of command

ceremonies in the military, the Comptroller General concluded that the invitations were not inherently personal. The case was therefore distinguishable from the decisions prohibiting the use of public funds for business cards and greeting cards (subsections (e) and (f), this Section).

The "traditional ceremony" concept has also been applied to a vessel "christening" ceremony at a Navy Yard. A-74436, May 19, 1936.

(h) Miscellaneous Personal Expenses

Several "personal expense" matters are dealt with elsewhere in this Manual. See, for example, the sections on entertainment and membership fees in this Chapter. Apart from those topics specifically covered elsewhere, the preceding portions of this Section cover most of the "personal expense" problems one is likely to encounter. However, the theory is occasionally relevant in other less frequently encountered situations. The rationale in the previously-cited decisions 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 Govenment. 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, September 25, 1978. (Had the Government contracted directly with the lodge, the result might have been different. See section entitled "Cancelled Hotel Reservations," Chapter 11, this Manual.)

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 own luggage. In this case, however, the members of the Team travelled an average of 26 weeks a year. The Comptroller General applied the test set forth in 3 Comp. Gen. 433, 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, February 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.

Finally, as noted in the introductory paragraph of this Section, a personal expense shared by most Government employees is commuting to and from work. 16 Comp. Gen. 64 (1936); 27 Comp. Gen. 1 (1947). Along with commuting goes parking and it is clear that parking incident to ordinary commuting is a personal expense. 43 Comp. Gen. 131 (1963); B-162021, July 6, 1977. Both of these cases stand for the proposition that the Government may not be required to provide parking facilities for its employees. However, an agency may provide employee parking facilities in certain circumstances. See subsection entitled "Recreational and Welfare Facilities for Government Personnel" in the Section on Entertainment and Recreation, supra, this Chapter. Also, parking incident to official travel is reimbursable. 5 U.S.C. § 5704. When parking facilities rented by an employee are used for both personal and official business, the employee may be reimbursed for the official business portion. See 47 Comp. Gen. 219 (1967) and 51 Comp. Gen. 79 (1971).

(13) Rewards

This Section discusses when appropriated funds may be used to offer and pay rewards. 37/ As a general proposition, statutory authority is needed. 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.

(a) Rewards to Informers

One group of decisions deals with rewards for the furnishing of information regarding violations of civil and criminal laws. The rule is that, if the 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 a "necessary expense" theory. 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 explicit statutory authority is needed. Since the distinction is difficult to administer as a practical matter, statutory authority has been granted in many situations.

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."

37/ The decisions sometimes use the terms "reward" and "award" interchangeably. In an attempt to clarify the terminology, the editors have limited the term "reward" to cases involving missing persons or property or the furnishing of information. The term "award" has been used for expenditures in the nature of incentive or recognition. Awards are dealt with in a separate subsection in the section on "Gifts," this Chapter. Although the reward/award distinction is not always sharp, it has been drawn in this Manual as a logical way to present the material.

While the reward in that particular case was permitted, the decision announced that specific legislative authority would be required in the future.

The rule announced in 8 Comp. Gen. 613 was applied the following year when the Secretary of Commerce wanted to use a general appropriation to offer rewards for information leading to the apprehension and conviction of persons committing acts of vandalism against lighthouses and other navigation aids. The Comptroller General held that the rewards were merely helpful rather than essential to carrying out the appropriation, and could not be offered absent specific statutory authority. 9 Comp. Gen. 309 (1930). See also 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. It receives appropriations for expenses necessary for "forest protection and utilization." Under this authority, the Comptroller General held that 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, April 29, 1971. See also 5 Comp. Dec. 118 (1898). The ruling was extended in B-172259, August 2, 1972, to cover "endorsements" (the "endorsement" by an informant of an undercover agent to help him gain acceptance with the suspects).

The rule was also applied in B-106230, November 30, 1951, 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. 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.

Payments to informers: Internal Revenue Service

One reward to informers everyone is familiar with is the reward offered by the Internal Revenue Service for the detection of tax cheats. While the pertinent Internal Revenue Code provision does not use the term "reward," it authorizes 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. Where information leads to an actual recovery of back taxes or penalties, IRS may pay the informer a reward based on a percentage of the amount recovered. GAO approved this scheme as within the statutory authority in 3 Comp. Gen. 499 (1924). The amount of the reward is discretionary (up to a 10 percent maximum set by regulation) and is not subject to review by GAO. B-131689, June 7, 1957; B-10761, June 29, 1940; B-5768, September 16, 1939; A-96942, August 23, 1938. The same statute has been held to authorize rewards for information on violations where no tax or fine is collected. 24 Comp. Dec. 430 (1918).

The IRS reward program is further discussed in B-137762.32, July 11, 1977. The issue in that case was whether IRS could contract with an attorney representing an unnamed informant (i.e., a "partially disclosed principal"). The decision discussed the general prohibition against contracting with a partially disclosed principal, but noted that the reasons for the rule in the ordinary procurement context did not apply to the IRS reward situation. The capacity of the informant to perform was irrelevant since payment would be made only if and when the information turned out to be useful. Thus, the proposed agreement was approved. See also B-117628, January 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 B-137762.32 was when an obligation has to be recorded under 31 U.S.C. § 200 (Chapter 6, this Manual). 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.

The Internal Revenue Service may also make "support and maintenance" payments to informers under its general investigation and enforcement authority. In B-183922, August 5, 1975, 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. However, IRS could make the payments if administratively determined to be necessary after the informer had been disenrolled from the Justice Department's program.

Payments to informers: Customs Service

The Customs Service also has statutory authority to pay rewards. Under 19 U.S.C. § 1619, a person who detects and seizes any vessel, vehicle, 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 of 25 percent of the amount recovered, not to exceed $50,000 in any case. This reward is in the nature of compensation for services rendered rather than a personal gratuity. 5 Comp. Gen. 665 (1926). There are numerous other early decisions dealing with this provision. See e.g., 16 Comp. Gen. 1051 (1937) and 17 Comp. Gen. 690 (1938).

Liquidated damages assessed under customs bonds are "recoveries" for purposes of 19 U.S.C. § 1619. 34 Comp. Gen. 70 (1954). Moneys received by customs officers as bribes, however, are not "recoveries" for purposes of the reward. 11 Comp. Gen. 486 (1932).

As originally enacted, the statute authorized a reward only if the recovery was made under the "customs laws." Thus, a reward could not be paid where a forfeited vessel was sold under the navigation laws. 7 Comp. Gen. 337 (1927). The statute was amended in 1935 to permit the reward for recoveries under the "customs laws or the navigation laws." However, the rationale of 7 Comp. Gen. 337 remains valid. Thus, in 32 Comp. Gen. 405 (1953), 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. Similarly, 19 U.S.C. § 1619 does not authorize payment of a reward based on the recovery of fines, penalties, or forfeited bail bonds under the Comprehensive Drug Abuse Prevention and Control Act of 1970. 53 Comp. Gen. 693 (1974). (A provision of the Drug Abuse Act does, however, authorize rewards by the Attorney General.)

The 1935 amendment to 19 U.S.C. § 1619 also authorized rewards if the item forfeited was destroyed or "delivered to any governmental agency for official use" rather than sold. The reward in that case is based on 25 percent of the appraised value, not to exceed $50,000. Under this provision, seized merchandise donated to State governmental agencies under General Services Administration regulations qualifies for the reward since the statutory language is not limited to Federal agencies. B-146223, November 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, February 2, 1962.

Payments to informers: Other statutory provisions

Statutory authority for rewards for the furnishing of information exists in several other situations. See, for example: 16 U.S.C. § 668 (information on capturing, buying or selling of bald eagles); 16 U.S.C. § 1540(d) (violations of Endangered Species Act); 16 U.S.C. § 2409 (Antarctic Conservation Act of 1978); 18 U.S.C. § 1751(g) (information concerning Presidential assassinations or attempted assassinations); 18 U.S.C. § 3056 (rewards by the Secret Service); 21 U.S.C. § 886 (information on violations of laws administered by Drug Enforcement Administration); 39 U.S.C. § 404(a)(8) (information on violations of postal laws); 50 U.S.C. § 47a (information concerning illegal introduction, manufacture, acquisition, or export of special nuclear material or atomic weapons).

(b) Missing Government Employees

The only decisions that exist on rewards for locating missing Government employees concern military deserters. No decision has been found discussing whether a reward could be offered for the apprehension of a military deserter in the absence of statutory authority, although one early case stated that "There is no reward for the apprehension or delivery of a deserter by operation of law." 20 Comp. Dec. 767 (1914).

The reason the issue has not been discussed is probably that the authority has existed by statute for a long time. A provision in the annual Defense Department appropriation acts authorizes payment of expenses of the apprehension and delivery of deserters, including a small reward. See 10 U.S.C. § 807 note. The provision was apparently common as far back as 1914 when the Comptroller of the Treasury noted that "There is now, has heretofore been, and in all probability will be hereafter" an appropriation available for rewards in this context. 20 Comp. Dec. 767, supra. The Coast Guard has permanent authority to offer rewards for the apprehension of deserters. 14 U.S.C. § 644.

Thus, the decisions that do exist concern mainly questions of interpretation under 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 civil officer. 6 Comp. Gen. 479 (1927).

The appropriation provision 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, for example, 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., January 4, 1962.

Three early decisions permitted payment of expenses incurred in apprehending a deserter in excess of the appropriation act limitation where the deserter was also wanted for other criminal offenses (such as forgery or embezzlement). 11 Comp. Dec. 124 (1904); 16 Comp. Dec. 132 (1909); B-3591, May 27, 1939. The excess payment in each of these cases was authorized from the Army's appropriation for "contingent expenses." A "contingent expense" appropriation is available for incidental, casual, and unforeseen expenses not otherwise provided for which are determined to be necessary. See 24 Comp. Gen. 536 (1945); 5 Comp. Dec. 151, 152 (1898). 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), discussed below.

(c) 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., February 12, 1954.

Some agencies have statutory authority to offer rewards for the recovery of lost or missing property. See, for example, 10 U.S.C. § 7209 (Navy); 14 U.S.C. § 643 (Coast Guard).

It seems clear that an agency needs some statutory basis to offer a reward for the recovery of lost property. While the degree of explicitness required has not been definitively addressed, the rules appear to be the same as in the case of rewards for information discussed above.

Two early decisions permitted the use of military "contingent expense" appropriations. In 6 Comp. Gen. 774 (1927), GAO told the Army that it could offer a reward from its contingent expense appropriation for the recovery of stolen platinum. In B-33518, April 23, 1943, prior to the enactment of 10 U.S.C. § 7209, the Navy wanted to use a general appropriation to offer rewards for locating lost aircraft. The Comptroller

General advised that 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.

In 41 Comp. Gen. 410 (1961), the Treasury Department asked if the Coast Guard had any general authority beyond 14 U.S.C. § 643 to make reasonable payments to persons who found lost property. The Comptroller General replied that he knew of none. Based on these decisions, it appears that a general appropriation is not available to offer or pay rewards for the recovery of lost property.

In B-79173, October 18, 1948, the Civil Aeronautics Administration had an appropriation for the temporary relief of distressed persons. The question presented was whether the appropriation was available to pay a reward to someone who had found a lost airplane 4 months after it disappeared. The Comptroller General said no, because the passengers could all be presumed dead after 4 months, but expressly declined 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 information cases--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 in the information cases, the point is that "necessary" and "helpful" relate not to the importance of the object itself but to carrying out the purposes of the particular appropriation.

Stolen property was involved in 53 Comp. Gen. 707 (1974). 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. The instance was reported to be the first known successful recovery of a stolen large piece of American equipment in Thailand. Based on 6 Comp. Gen. 774, supra, 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.

However, apart from that particular appropriation, the decision held that there was no authority for the reward. This part of the decision was based on 8 Comp. Gen. 613, supra, once again implying that the rules in the information cases would apply to missing property as well.

(d) Contractual Basis

The basis of the right to a reward is contractual; that is, there must be an offer and an acceptance. The rationale is that "no person by his voluntary act can constitute himself a creditor of the Government." 20 Comp. Dec. 767, 769 (1914). (See "Voluntary Creditors," Chapter 11, this Manual.)

Where a reward is based on the "necessary expense" theory rather than on explicit statutory authority, the decisions hold that there must be an offer of reward before a reward can be claimed. Performance of the service constitutes the acceptance. See, e.g., 3 Comp. Gen. 734 (1924); 26 Comp. Gen. 605 (1947).

The offer may be in the form of a "standing offer" promulgated by regulation. See, e.g., B-131689, June 7, 1957, in which a Treasury Decision constituted the offer for an IRS reward. It is also possible for an offer to be implied from practice or course of conduct. For example, a reward was held payable to an informer under the prohibition laws without a specific offer in 4 Comp. Gen. 255 (1924). The informer was a member of a "gang of whiskey thieves" and the Comptroller General noted that "Under 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. Both of these concepts were combined in A-23019, May 24, 1928, involving a reward for finding a lost Navy torpedo. 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 payment can be made. 41 Comp. Gen. 410 (1961) (involving 14 U.S.C. § 643); 20 Comp. Dec. 767 (1914) (apprehension of a deserter). On the other hand, presumably, if a statute provided for a reward as a matter of entitlement, the reasons for requiring an offer would be less compelling.

As to whether the claimant must have knowledge of the offer, the decisions are not entirely consistent. Cases involving the apprehension of deserters have held 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, in 26 Comp. Gen. 605 (1947), 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. This ruling was followed in 41 Comp. Gen. 410 (1961), holding that the Coast Guard could not pay a reward under 14 U.S.C. § 643 to one who had no knowledge of the published offer. See also A-35247, April 1, 1931 (escaped prisoner). The latter group of decisions purports to be based on the "great weight of authority." 26 Comp. Gen. at 606.

(e) Reward Payments to Estates

Reward payments for information furnished to the Government are in the nature of compensation for services rendered rather than personal gratuities, and 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. The issue was discussed in 5 Comp. Gen. 665 (1926), in which 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. See also 2 Comp. Dec. 514 (1896) (customs); B-131689, June 7, 1957 (internal revenue); B-129886-O.M., December 28, 1956 (internal revenue).

In contrast, an award for an employee suggestion (see "Gifts," this Chapter) is a personal gratuity, lapses at the death of the employee and does not become part of his estate. 24 Comp. Gen. 673 (1945). In the cited decision, the employee died before the agency had approved payment, but the Comptroller General indicated that the result would be the same even if all necessary steps preliminary to payment had been taken prior to the employee's death. Under the Government Employees Incentive Awards Act (5 U.S.C. § 4505) and the corresponding statute for military personnel (10 U.S.C. § 1124), the department or agency has discretion to pay an award notwithstanding the death of the employee or member if the suggestion was made during the period of employment or active duty. The difference is that if the agency chooses not to exercise that discretion, the employee's estate has no claim.

(f) Rewards to Government Employees

A reward may not be paid to a Government employee for services rendered within the scope of his official duties. For example, in 4 Comp. Gen. 687 (1925), a Deputy United States

Marshal claimed a reward for apprehending a military deserter. The Comptroller General held that the reward could not be paid since the Marshal had been acting in his official capacity rather than his personal capacity. See also 7 Comp. Gen. 307 (1927); A-17808, March 30, 1927; A-35247, April 1, 1931.

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 held 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, March 2, 1927.

The prohibition against an employee's receiving a reward for services performed in the course of his official duties applies as well to rewards offered by non-Government sources. The principle is illustrated in 49 Comp. Gen. 819 (1970). An Air Force Major, flying a low-level training mission in the Republic of Colombia, spotted a cargo plane unloading in a suspicious location. 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 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 Constitution (Art. I, sec. 8, cl. 9) against the acceptance by a Government officer or employee of gifts or emoluments from a foreign government without the consent of Congress.

(14) State and Local Taxes

It has long been held that the doctrine of sovereign immunity and the Supremacy Clause of the Constitution (Art. VI, cl. 2) combined to prohibit the States from taxing the Federal Government or its activities. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). This early interpretation was aimed essentially at the preservation of the Federal system: Chief Justice Marshall wrote in McCulloch that "the power to tax is the power to destroy." 17 U.S. at 431. Since that time, however, both Federal activities and State taxing schemes have grown in complexity and sophistication, and today there are some limited exceptions to the rule that the Federal Government can pay no tax.

State taxation problems center on two distinct types of taxing schemes: Taxes linked to business transactions involving the Federal Government, typically sales and use taxes, and property-oriented taxes linked to ownership or use of various types of real and personal property located within the geographical boundaries of a State. Each of these tax types is discussed here.

(a) Tax on Business Transactions to Which the Federal Government is a Party

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 on where the legal incidence of the tax falls. This concept was first enunciated by the Supreme Court in Alabama v. King and Boozer, 314 U.S. 1 (1941). There, 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 tax. The Supreme Court made the 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 to the Government, and the constitutionally impermissible burden which occurs 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 tax is a tax on the seller and one which he alone is obligated to pay, the Government may reimburse the seller for his total cost including tax. But if the buyer is in any way legally responsible for the payment of the tax, the Federal Government as a buyer cannot be held responsible for such payment.

This rule--that the Government may pay a valid "vendor tax" even if it ends up bearing the ultimate economic burden, but is constitutionally immune from a "vendee tax"--has been recognized and applied in numerous decisions of the Comptroller General. E.g., 21 Comp. Gen. 733 (1942); 21 Comp. Gen. 1119 (1942); 23 Comp. Gen. 957 (1944); 24 Comp. Gen. 150 (1944); 46 Comp. Gen. 363 (1966). Where a State tax applies to rentals as well as purchases, the rule will apply to rentals also. See 49 Comp. Gen. 204 (1969); B-168593, January 13, 1971; B-170899, November 16, 1970.

Two points must be emphasized at the outset. First, there are many dozens of cases in this area and it is impossible to treat them all here. The cases included have been selected to illustrate the more important principles and the kinds of problems that arise. Second, mention of a particular State in the following discussion is designed primarily to illustrate a type of tax and is not presented as a definitive statement of the law of that State. State laws and their judicial interpretations may change from time to time. Thus, while a cited decision may still reflect the law of that State, there is no guarantee of this and other decisions involving that State may exist which are not cited.

In determining whether the legal incidence of a particular tax is on the vendor or the vendee, GAO will follow judicial precedent where available. If there are no Federal judicial decisions on point, the determination of the highest court of the State in question will be controlling. 21 Comp. Gen. 843 (1942); B-172025, March 30, 1971.

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, under the Vermont tax on gasoline distributors which is required by law to be passed along to dealers and which dealers in turn are required to collect from consumers, the consumer is legally obligated to pay the tax. This tax collection mechanism constitutes a vendee tax, and where the Government is the vendee, it is constitutionally immune. Subsequently, the Comptroller General advised a certifying officer that, based on 57 Comp. Gen. 59, he could not properly certify vouchers covering the Vermont fuel tax. B-190293, September 22, 1978.

A similar result flowed from the California state gasoline tax, which the dealer was required to collect from a consumer "insofar as possible." 55 Comp. Gen. 1358 (1976). That

finding was predicated in part on the Supreme Court's determination in Diamond National Corp. v. State Board of Equalization, 425 U.S. 268 (1976), that the California sales tax, which had an identically worded requirement, was imposed on the vendee. In 55 Comp. Gen. 1358, GAO also considered gasoline taxes in three other states. Pennsylvania's tax was an excise tax on dealer-users (meaning retail service station 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 Government could pay, as a part of the purchase price, the amount of tax on the retailer who was required by statute to assume that tax as a cost of doing business.

The New Mexico gasoline tax 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. 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 Government was authorized to pay the full retail price including whatever amount was attributable to the tax.

In the State of Washington, a tax on distributors of gasoline was found to be a vendor tax and the United States was therefore required to pay whatever amount would be added to the purchase price of gasoline to represent that tax. 28 Comp. Gen. 706 (1949). The State tax statute, however, provided for a refund to the Federal Government for gas pumped into vehicles the Government owned and operated. No exemption existed for Government-rented commercial vehicles in the State statute and the Comptroller General held therefore that the tax for rented cars was properly payable. B-154266, June 25, 1964.

In a similar State exemption situation, 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).

Even if a tax is a valid vendor tax, if it is applied discriminatorily to the United States and not to other buyers, it may not be paid. In B-156561, June 22, 1965, GAO recommended referral to the Department of Justice of the Mississippi gasoline tax. Mississippi taxed gasoline sold to both the Federal Government and local municipal governments. However, it refunded the amount of tax paid by municipal governments and did not do the same for the Federal purchaser. This was found to be improper.

Thus the immunity of the United States from taxation depends on whether the Government is itself being taxed, in which case the seller of goods is merely a collection agent for the State. Similarly, an agency relationship between the United States and a contractor whereby the contractor is acting solely as the Government's purchasing agent and title to goods purchased never vests in the contractor, creates a situation where constitutional immunity from tax can be invoked. See Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954); B-177215, November 30, 1972.

A type of vendor tax which the Federal Government must nearly always pay is a business privilege or gross receipts tax. An example of this kind of tax is the Illinois Retailers Occupational Tax discussed in 42 Comp. Gen. 517 (1963), 43 Comp. Gen. 721 (1964), and B-162452, October 6, 1967. This is a personal tax on domestic and foreign concerns for the privilege of doing business in the State. It is commonly measured as a percentage of gross receipts. Similar taxes have been held to be payable in the States of New Mexico (B-147615, December 14, 1961), Arizona (27 Comp. Gen. 767 (1948); B-167150, February 17, 1970), and Hawaii (37 Comp. Gen. 772 (1958); 49 Comp. Gen. 204 (1969)). A "business privilege" tax on motor fuel sellers imposed by Kansas City, Missouri, was held payable in 32 Comp. Gen. 423 (1953).

Frequently business privilege taxes are imposed on public utilities. When this is done by law and the utility company is permitted to treat the tax as an operating expense and incorporate the amount of tax into its basic billing rate, a constitutionally-permissible vendor tax is created. B-148667, May 15, 1962; B-144504, June 9, 1967. This is true even where the pass-through is required by a State utility regulatory body, as long as the tax itself, based on the statute that established it, qualifies as a "vendor tax." 61 Comp. Gen. ___ (B-204517, February 22, 1982). Where the business privilege tax is a valid vendor tax, it can be paid even if it is attributed to tax and separately stated on the utility bill. 32 Comp. Gen. 577 (1953); B-144504, June 30, 1970. 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, December 31, 1969. 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, April 7, 1967.

The Government's obligation to pay any tax is also dependent upon its contractual agreement with the seller. 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. This means that the Government cannot be required to pay any additional amount for tax. B-162667, December 19, 1967; B-134347, March 1, 1966. This applies even to taxes which are first imposed while the contract is in existence. B-160129, December 7, 1966. In such circumstances it is not relevant that the tax involved has been found to be a valid vendor tax from which the United States is not immune; there can be no liability unless the contract agrees to reimburse taxes. 23 Comp. Gen. 957 (1944); 45 Comp. Gen. 192 (1965); B-148311-O.M., April 20, 1962.

Other contract language, of course, may dictate different results. A contract for the "actual costs" would justify the reimbursement to the contractor of back taxes and interest assessed against him when a court found that the contractor was not exempt on a constitutional basis. B-147316-O.M., January 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 and Boozer, cited above. 35 Comp. Gen. 378 (1955). Likewise, a contract to pay 50 percent of any new tax imposed by a State would include a business privilege tax assessed against a corporate contractor. B-152325, December 12, 1963.

A contractor may be entitled to equitable relief in certain very 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. B-169959, August 3, 1970. The legal concept underlying such a result is unjust enrichment and it is important to keep in mind that such equitable relief depends on the existence of a mutual mistake of law. B-180071, February 25, 1974.

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)).

Throughout the preceding discussion, the Government has been the buyer. Tax problems may also arise where the Government is the seller, although there have been few decisions in this area. In one case, the Texas use tax statute required sellers to obtain a permit, collect the tax, and remit collections to the State Comptroller. The Comptroller General held that the State could not impose these requirements on the disposal of surplus Federal property by the General Services Administration under the Federal Property and Administrative Services Act of 1949. 41 Comp. Gen. 668 (1962). The theory is that a State may not infringe on the right of the Federal Government to conduct its official activities free from State control or regulation. 41 Comp. Gen. 668 cites several other decisions in which this principle has been applied in various contexts.

(b) Property-related Taxes

Federal land located within State borders is also exempt from State property taxes on the same constitutional theory discussed above. United States v. Allegheny County, 322 U.S. 174 (1944). For loss of income due to the presence of large Federal holdings of real property within a particular district or State, the Congress may compensate local taxing authorities by means of payments in lieu of taxes. These payments are generally described in B-149803, May 15, 1972. The rationale is that Congress chooses specifically to compensate a local taxing authority for the hardship which the exemption of Federal lands from property tax works on the local government's activities. The authority of the General Accounting Office in this matter does not extend to evaluating either the utility of or necessity for such payments. Payments may also be made pursuant to specific legislation setting up a new Federal enclave. See B-145801, September 20, 1961.

Just as States are barred from levying general property taxes against Federal property, they are likewise prevented from making assessments against Federal land for local improvements. Such assessments are typically made for paving or repairing streets or sidewalks, installing sewers, and similar local governmental services. The decisions have uniformly held that an assessment for local improvements is an involuntary exaction and as such constitutes a tax which the United States

may not be required to pay. E.g., 27 Comp. Gen. 20 (1947); 18 Comp. Gen. 562 (1938); B-184146, August 20, 1975; B-160936, March 13, 1967; B-155274, October 7, 1964; B-150207, November 8, 1962. Any assessment which is related to a fixed dollar amount multiplied by the number of front feet of the Government's property, or computed on a square footage basis, is not payable on the grounds that it is a tax. E.g., B-159084, May 11, 1966; B-168287, February 12, 1970; B-178517-O.M., April 22, 1974.

It makes no difference whether the land on which the improvements are to be made is Federally-owned or State-owned. B-157435, October 6, 1965. See also 32 Comp. Gen. 296 (1952). Also, the determination of whether a particular assessment can be paid does not depend on the taxing authority's characterization of the payment. Thus, payment has been denied where the assessment was termed a "benefit assessment" (B-168287, November 9, 1970), a "systems development charge" (B-183094, May 27, 1975), or an "invoice for services" (49 Comp. Gen. 72, infra). Regardless of the designation, if the charge is computed on a footage basis or in the same manner as the taxes levied against other property owners, it cannot be paid.

However, even though an assessment may not be paid as such, the Comptroller General has recognized that the 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. 18 Comp. Gen. 562 (1938); 49 Comp. Gen. 72 (1969); B-168287, November 9, 1970.

In order to be paid on a quantum meruit basis, the claimant must show how it arrived at the amount claimed. An unsupported statement that the sum represents the fair and reasonable value of the services rendered is not sufficient. Although the claim need not be presented on a "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, November 27, 1972; B-168287-O.M., March 29, 1971; B-168287-O.M., July 28, 1972. 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., July 28, 1972. In any event, the quantum meruit payment cannot exceed the amount of the statutory assessment. B-168287-O.M., May 15, 1973.

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, November 27, 1972. However, in B-179618, November 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.

The principle that a State or municipality may be paid on a quantum meruit basis for services actually rendered is another way of saying that a "service charge" for services rendered is not a tax. E.g., 49 Comp. Gen. 72 (1969). However, this has no relevance to services which the governmental unit is required by law to provide. Further elaboration is contained in the section entitled "Firefighting and Other Municipal Services," supra, this Chapter.

Where a local government finances major improvements, such as sewers, by means of issuing revenue bonds, and levies a surcharge on its service charge to liquidate the bonded indebtedness, a Federal user of the sewer service under a contractual obligation to pay the service charge may also pay the surcharge. 42 Comp. Gen. 653 (1963). However, GAO has questioned the payment of bond interest where that interest was attributable to the municipality's share of initial construction costs. B-180221-O.M., March 19, 1974.

(c) Taxes Paid by Federal Employees

Another way in which the Federal Government sometimes pays a State or local tax is by way of reimbursements to a Federal employee who incurred the tax during the performance of official business or other activities which would qualify him for reimbursement. For example, a member of the Armed Services was entitled to reimbursement under a Government-supported health insurance plan for the full amount of a doctor's bill, including the amount which was attributable to New Mexico gross receipts tax, a valid vendor tax discussed above. B-130520, November 30, 1970. See also 36 Comp. Gen. 681 (1957) (State gasoline tax); B-203151, September 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 taxes

Questions here arise in two contexts--parking meter fees and municipal taxes on parking in parking lots or garages.

The rule for parking meters on public streets is: Unless and until there is a contrary judicial determination, appropriated funds may be used to reimburse a Federal employee for street parking meter fees incurred while driving a Government-owned vehicle on official business, except (1) where the fee would impose an impermissible burden on the performance of a Federal function, or (2) where the particular fee has been held by a court to be a tax or a revenue raising measure (as opposed to a traffic regulation device). 46 Comp. Gen. 624 (1967). 38/

To the extent a parking meter fee may be held to be a tax under the above rule, it can be imposed neither against the Government nor against the employee-driver as the Government's agent. 41 Comp. Gen. 328 (1961). However, even where the fee is a tax, if the car is unmarked and being used in investigative work, the fee can be reimbursed as a necessary cost of the investigation. 38 Comp. Gen. 258 (1958).

The two preceding paragraphs apply to Government-owned vehicles. If the employee is using a privately-owned vehicle on official business, necessarily-incurred street parking meter fees may be reimbursed under 5 U.S.C. § 5704. 41 Comp. Gen. 328 (1961).

Parking meter fees in a municipally owned off-street parking lot are not viewed as taxes for purposes of the rule stated in 46 Comp. Gen. 624. These fees may therefore be reimbursed whether the employee is driving a Government-owned or privately-owned vehicle. 44 Comp. Gen. 578 (1965).

A local tax on parking in a parking lot or garage cannot be imposed on a Government-owned vehicle on official business. 51 Comp. Gen. 367 (1971). However, if the amount of the tax is so small that a tax exemption certificate will not be issued (see Title 7 of the GAO Policy and Procedures Manual), the employee may be reimbursed notwithstanding the Government's immunity. 52 Comp. Gen. 83 (1972). The rationale is that the administrative cost of asserting the immunity by using the certificate would be prohibitive for such small amounts.

38/ 46 Comp. Gen. 624 overruled several earlier decisions and modified several others. The text attempts to reflect those elements of the modified decisions which remain valid.

As with the parking meter fees, an employee using a privately-owned vehicle on official business may be reimbursed under 5 U.S.C. § 5704 for local taxes levied on parking in lots or garages. 51 Comp. Gen. 367 (1971).

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.

Use of privately-owned vehicles on official business may generate other tax-related problems. Thus, an employee required to use his privately-owned vehicle while on temporary duty in Colorado was charged a car license fee by the State. This fee was reimbursable to the employee as part of his travel expenses under the Joint Travel Regulations. B-153688, September 7, 1966 (non-decision letter).

Hotel and meal taxes

A frequent occurrence is the addition of a tax to the price of lodging secured by Government employees travelling on official business. When a Federal employee rents a room directly from the proprietor, he becomes personally liable for the amount of the rental, including tax. The Government is not a party to the transaction and the tax is therefore not a tax on the Government. Accordingly, the employee must pay the tax and cannot assert the Government's immunity from local taxes. The fact that the Government may reimburse the full rental price as part of the employee's travel expenses does not transform the tax into a tax on the Government. 55 Comp. Gen. 1278 (1976); B-172621-O.M., August 10, 1976. If local law exempts Federal employees from the tax, the employees should use tax exemption certificates to claim the exemption. See B-172621, April 4, 1973 (non-decision letter).

However, if the Government rents the rooms directly, that is, if there is a direct contractual relationship between the United States and a hotel or motel for the rental of rooms to Federal employees or others, the Government is entitled to assert its immunity from local taxes. 55 Comp. Gen. 1278 (1976).

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. B-167150, April 3, 1972. On the theory that the contract defines the limits of liability, however, a meal ticket good for the purchase of food up to a maximum dollar amount may include amounts attributable to a valid vendor tax up to the specified dollar limit. In the event the dollar limit were exceeded, however, the remainder of the expense would be personal, including the extra amounts for tax. 41 Comp. Gen. 719 (1962).

(d) Refund and Recovery of Tax Improperly Paid

The General Accounting Office has a duty under 31 U.S.C. § 71 to settle and adjust claims by and against the United States. 39/ Under this authority, GAO may direct the setoff of improperly paid taxes against other moneys payable to a State. B-100300, March 12, 1965; B-150228, August 5, 1973. 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, August 6, 1964; B-154113, June 24, 1964; B-150228, August 5, 1963.

In some instances, setoff against advances under a Federal grant program may be improper. Setoff against grant funds is discussed in Chapter 13, Section H, this Manual.

Some States provide for refunds of certain taxes paid by the United States. In evaluating these refund provisions, it is important to determine whether the tax subject to refund is a vendor tax or a vendee tax. If the tax is a vendor tax, the United States is not constitutionally immune from payment. Thus, any right to a refund is purely a creature of State law and the United States must comply with any conditions and limitations imposed by State law. B-100300, June 28, 1965. The fact that State law may permit refunds to the United States as the ultimate bearer of the tax in certain situations does not transfer the legal incidence of the tax to the vendee. B-152995, January 30, 1964. See also 27 Comp. Gen. 179 (1947).

39/ GAO's claims settlement function is discussed fully in Chapter 11, this Manual.

If, however, the tax is a vendee tax, the Government's right to a refund is based on the Constitution and is wholly independent of State law. Therefore, in claiming a refund in this situation, the United States is not bound by restrictions in State law, such as State statutes of limitations. B-100300, June 28, 1965; B-154778, August 6, 1964.

If a refund mechanism is available, this would be 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 Government will be adequately protected, GAO may agree to defer setoff pending the filing of a formal claim with the appropriate State agency. B-151095, January 2, 1964. However, if the State refuses a refund to which the United States is entitled, setoff is again the proper remedy. B-162005, April 8, 1968; 39 Comp. Gen. 816 (1960).

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, collection action should proceed against the State rather than by setoff against the vendor. 42 Comp. Gen. 179 (1962).

Agreements to pay disputed tax

In the course of resolving problems over the liability of the United States to pay a particular tax, the Government has entered into various arrangements with States 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 the tax was ultimately determined to be unconstitutional. B-170899, November 16, 1970. See also 50 Comp. Gen. 343 (1970).

(e) Other Principles

Funds paid over to a grantee under a Federal grant program may be used to pay a nondiscriminatory State sales tax on purchases made with grant funds. 37 Comp. Gen. 85 (1957). The same

result would apply to purchases by a contractor under a contract with a grantee financed from Federal grant funds. B-177215, November 30, 1972. The reason is that the funds, once paid over to the grantee, lose their identity as Federal funds and are no longer subject to restrictions on the direct expenditure of appropriations. (See Chapter 13, this Manual, for further elaboration on this principle.) Appropriations for National Guard operations, however, are not grants to the States and the Government's immunity from taxation therefore applies. 42 Comp. Gen. 631 (1963).

Similarly, 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, January 27, 1982 (non-decision letter).

In 46 Comp. Gen. 363 (1966), the Comptroller General considered a program under which the United States was to share the cost of materials and services procured by farmers to carry out a conservation program. The Department of Agriculture had proposed a procedure whereby the United States would make its cost-sharing payments directly to the vendors. Since the materials purchased would not become the property of the United States, the procedure was viewed as essentially a "credit device" provided to the farmers, and the Comptroller General concluded that the payments could include State sales taxes.

Where evidence of tax-exempt status is required, the evidence is normally in the form of a "tax exemption certificate." This is a printed form (Standard Form 1094) and is usually processed individually. Procedures for the use of tax exemption certificates are prescribed by the General Services Administration. Under Title 7 of the GAO Policy and Procedures Manual, tax exemption certificates should not be used where the amount of the tax is less than $10. The reason is that the cost of processing the certificates would not justify their use for the smaller amounts. See B-128043, May 22, 1975 (non-decision letter); B-114365-O.M., August 16, 1976. Therefore, taxes of less than $10 should be paid regardless of the Government's entitlement to immunity, at least where a tax exemption certificate would otherwise be required to take advantage of the immunity. The use of blanket exemption certificates and multiple exemption certificates is discussed in 41 Comp. Gen. 560 (1962).

Finally, the taxes covered in this Section have been those which arise most frequently in decisions of the Comptroller General. There are many other types of State and local taxes

which may affect Federal employees or otherwise involve the use of appropriated funds. Some of them are:

1. State and local income taxes. By statute, for the District of Columbia and any other State, city, or county which 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.

2. Possessory interest taxes. This is essentially a type of property tax. An example is the California tax on "possessory interests" in improvements on tax-exempt land. The Supreme Court upheld the validity of the tax in a suit brought by Federal employees required to live in housing owned by the Forest Service. The Court found that the tax was nondiscriminatory and that its legal incidence fell upon the employees and not the United States. United States v. County of Fresno, 429 U.S. 452 (1977). See also B-191232, June 20, 1978. Where the Government provides quarters for employees and collects rent under 5 U.S.C. § 5911, the rental rate may be adjusted to discount an applicable possessory interest tax, but the adjustment must be approved by the Office of Management and Budget and may not be retroactive. B-194420, October 15, 1981.

3. Occupational license fees. These are fees imposed by a State, usually on members of a particular occupation or profession, such as doctors, as a prerequisite to being able to practice in that State. Federal employees may or may not be exempted. Apart from the question of a State's authority to impose such fees on Federal employees performing Federal functions, even if the fee is valid, it is considered a personal expense and not reimbursable from appropriated funds. 49 Comp. Gen. 450 (1970); 46 Comp. Gen. 695 (1967); 31 Comp. Gen. 81 (1951). The same principle applies to licenses to operate motor vehicles. 21 Comp. Gen. 769, 772 (1942); 6 Comp. Gen. 432 (1926). For a related discussion, see the subsection on Attorneys in the section entitled "Membership Fees," Chapter 3, this Manual.

(15) Telephone Services

(a) Telephone Service to Private Residences

31 U.S.C. § 679 provides:

> "Except as otherwise provided by law, no money appropriated by any Act shall be expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone service from private residences or private apartments, except for long-distance telephone tolls required strictly for the public business, and so shown by vouchers duly sworn to and approved by the head of the department, division, bureau, or office in which the official using such telephone or incurring the expense of such tolls shall be employed * * *."

The omitted portion exempts residences leased or owned by the United States Government in foreign countries for use of the Foreign Service.

The statute was originally enacted in 1912. Its purpose, quite simply, was to prevent the use of public funds for private telephone service for Government officials. An early unpublished decision of the Comptroller of the Treasury pointed out that the statute--

> "grew out of the fact that a large number of public officers here in the District of Columbia had installed in their private residences telephones at Government expense under the guise of their use for public purposes, when in truth the Government had provided them with sufficient telephones in their public offices to transact all the public business."

Unpublished decision of November 12, 1912, 63 MS Comp. Dec. 575, quoted in 19 Comp. Dec. 350, 352 (1912) and in 53 Comp. Gen. 195, 197 (1973).

For the most part, the statute has been strictly applied. The earlier decisions said with such frequency that the words became virtually automatic 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). Thus, except for long-distance calls properly certified as necessary, charges for residential

telephones (installation, connection, monthly equipment rental, and basic service charges) may not be paid from appropriated funds.

Funds to which the statute applies

The statute is a direct restriction on the use of "money appropriated by any Act." 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). Similarly, the authority to retain rentals from certain defense housing projects and to use the funds for maintenance of the housing units makes them appropriated funds and therefore subject to 31 U.S.C. § 679. 21 Comp. Gen. 239 (1941).

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 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. § 679. 4 Comp. Gen. at 20. The same point was made in 35 Comp. Gen. 615, 618, supra, and in B-130288, February 27, 1957.

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.

The statute applies to "any private residence or private apartment." It makes no difference that the residence is Government-owned or on public land. 19 Comp. Dec. 198 (1912); 7 Comp. Gen. 651 (1928); 35 Comp. Gen. 28 (1955). It therefore fully applies to permanent residential quarters on a military installation. 21 Comp. Gen. 997 (1942); B-61938, September 8, 1950; A-99355, January 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.

An early decision stated that "private" means set apart for the exclusive personal use of any one person or family. 19 Comp. Dec. 198, 199 (1912). Following this approach, 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 (1955), 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.

Application of the general rule

As noted above, 31 U.S.C. § 679 is a mandatory prohibition and has been strictly applied. A large number of decisions has 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. There is no discretion involved.

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 doesn't want the telephone and has asked to have it removed. 33 Comp. Gen. 530 (1954); A-99355, January 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 (1980). 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, February 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. Once again, as noted earlier, the Comptroller pointed out that the authority to make expenditures "deemed necessary" does not include the authority to disregard mandatory statutory restrictions on the use of appropriated funds.

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. § 679. 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.

While 31 U.S.C. § 679 does not by its express terms apply to the installation of mobile radio telephones in private automobiles, the policy considerations behind the statute apply with equal force, and the Comptroller General has indicated that GAO would view this as an unauthorized use of appropriated funds. B-186877, August 12, 1976.

Exceptions

To say that the statute is strictly applied is not to suggest that there are no exceptions.

There have been some statutory exceptions. For example, early decisions applied 31 U.S.C. § 679 equally to diplomatic personnel overseas since the statute as originally enacted permitted no distinctions. See 10 Comp. Gen. 428 (1931); 11 Comp. Gen. 365 (1932); 15 Comp. Gen. 963 (1936); 16 Comp. Gen. 59 (1936). Congress in 1940 created a statutory exception, now included in 31 U.S.C. § 679, for residences owned or leased by the United States in foreign countries for use of the Foreign Service. The restrictions on long-distance tolls, however, still apply.

Another statutory exception is 31 U.S.C. § 680, 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. Still another is 16 U.S.C. § 580f, for telephones necessary for the protection of national forests. 40/

Non-statutory exceptions generally stem from 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., 22 Comp. Dec. 602 (1916); 59 Comp. Gen. 723, supra. However, a few exceptions have been recognized where a Government-owned private residence was the only location available under the circumstances for the conduct of official business.

The first of these exceptions occurred in the unpublished decision of November 12, 1912, cited above, 63 MS Comp. Dec. 575, in which the Comptroller of the Treasury held that a Forest Ranger who must necessarily use a telephone on official business and use it from his station in the forest, which also happens to be the place where he lives, would be entitled to have a telephone installed at Government expense. (This situation would now be covered by 16 U.S.C. § 580f.)

The Comptroller General reached a similar result in 4 Comp. Gen. 891 (1925), in which an isolated lighthouse keeper was allowed to have a telephone installed in his combined home and duty station at Government expense. Similar exceptions were granted for a lock tender in 19 Comp. Dec. 350 (1912) and a national park superintendent in 19 Comp. Dec. 212 (1912).

40/ The editors have made no attempt to identify all statutory exceptions. Those listed are given merely as illustrations.

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, February 27, 1957. 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 an absolute 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).

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. § 679 was held to prohibit payment for telephones in Government-owned residences of Department of Agriculture employees at a sheep experiment station. The employees claimed 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. 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.

Exceptions have occasionally been sought, but only rarely granted, on the grounds of military necessity. Several cases illustrate the general rule. For example, in A-99355, January 11, 1939, a telephone could not be maintained at Government expense in the private quarters of the Officer-in-Charge on a Naval 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, September 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.

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, 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.

Following B-128144, supra, GAO approved a General Services Administration proposal to install Federal Secure Telephone Service (FSTS) 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. ___ (B-199793, January 27, 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 the 1956 decision, the proposal included a number of safeguards against abuse, which GAO deemed adequate.

A different type of exception occurred in 60 Comp. Gen. 490 (1981). In order to ensure continuous service, the Government secures 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 pays the charges. The question presented 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 nonoccupancy.

(b) Long Distance Calls

Residential telephones (31 U.S.C. § 679)

31 U.S.C. § 679, quoted at the beginning of this Section, permits the reimbursement of long distance calls made from residential telephones if they are properly certified as being "required strictly for the public business."

Calls billed on a message unit basis are regarded as local calls. B-75124, May 10, 1948; A-13067, April 30, 1940; A-13067, June 17, 1939. Thus, multi-message unit charges are not reimbursable even if incurred on official business. This is true regardless of whether the calls are dialed directly or placed through an operator. 35 Comp. Gen. 615 (1956); B-126760, August 21, 1972.

Normally, the original itemized bill from the telephone company is required in order to obtain reimbursement. However, in one case where the agency lost the original invoice and the telephone company was unable to furnish a copy of the original itemized bill, a letter from the telephone company indicating the exact amount representing long distance toll charges was held acceptable as the best evidence obtainable. 32 Comp. Gen. 432 (1953). (Evidentiary requirements in the presentation of claims are discussed in Chapter 11, this Manual.)

In B-149048, July 18, 1962, GAO evaluated a proposed Department of Justice regulation which would have required Federal Marshals to pay the cost of long distance telephone calls from their homes to their offices on evenings and weekends. The Department felt that a marshal's choice not to live in the city of his headquarters was a matter of personal convenience and therefore the cost of communication should be a personal expense. Since there was no requirement for a marshal to live near his work site, and since statutory authority existed to reimburse long distance calls necessary for official business, GAO recommended against the proposed regulation.

Government telephones (31 U.S.C. § 680a)

31 U.S.C. § 680a provides that "no part of any appropriation for any executive department, establishment, or agency shall be used for the payment of long-distance telephone calls except for the transaction of public business which the interests of the Government require to be so transacted * * *." Payments must be certified as necessary in the interest of the Government.

The language of 31 U.S.C. § 680a applies to residential as well as Government telephones and it is often cited along with 31 U.S.C. § 679 in residential telephone cases. However, it has independent significance for the use of Government telephones.

The cost of a call is a factor to be considered in determining whether the call was necessary. B-149048, July 18, 1962. The administrative approval of a travel voucher, including long distance telephone calls, will satisfy 31 U.S.C. § 680a and separate certification is not required. 56 Comp. Gen. 28 (1976). A certifying officer will not be liable for improperly certified long distance calls as long as the certification was made by an official designated under 31 U.S.C. § 680a. 56 Comp. Gen. 28, supra.

As noted above, calls billed on a message unit basis are regarded as local calls. Therefore, message unit calls do not have to be certified under 31 U.S.C. § 680a. See cases cited under "Residential telephones" above. In addition, calls made using the Federal Telecommunications System (FTS) do not have to be certified since the flat rate charge to agencies under FTS is a rental payment for the lease of the lines rather than a payment for long distance tolls within the meaning of 31 U.S.C. § 680a. 43 Comp. Gen. 163 (1963).

In 57 Comp. Gen. 321 (1978), the Internal Revenue Service asked how to apply the certification requirement to its Hartford, Connecticut office, where the telephone company did not use a message unit system but rather listed and billed all calls separately as toll calls. The Comptroller General pointed out that all calls billed as long distance calls must be certified under 31 U.S.C. § 680a. However, certification for "short haul" toll calls may be based on statistical sampling. The sampling procedure must include a large enough number of calls to assure probable accuracy. The decision contains further guidelines on establishing an adequate statistical sampling system.

Several cases have dealt with the Government's liability to a telephone company for calls placed in violation of 31 U.S.C. § 680a. A contract for telephone services must be viewed as having been made subject to 31 U.S.C. § 680a, and no authority exists to waive the statutory requirements. Thus, where the agency cannot make the required certification, it cannot pay that portion of the bill unless it first collects from the individual(s) responsible for the unauthorized calls. B-172155, August 13, 1971; B-165102, September 10, 1968; B-164699, July 8, 1968; B-90487, November 29, 1949; B-36190, August 12, 1943. To illustrate, in B-172155, supra, an airman had applied for telephone service in a barracks and was assigned a special billing

identification number. Another airman used the telephone and special billing number without permission and made several unauthorized long distance calls. Since the statute amounts to a legislative limitation on an agency's contracting authority, the Air Force could not use appropriated funds to pay the telephone company for the unauthorized calls.

Questions also arise under 31 U.S.C. §§ 679 and 680a concerning telephone installation and use charges incident to travel, temporary duty, or relocation. See, e.g., 56 Comp. Gen. 767 (1977); 44 Comp. Gen. 595 (1965); B-196549, January 31, 1980. These areas are beyond the scope of this Manual and are covered in the Personnel Law Manuals.

CHAPTER 4

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CHAPTER 4

AVAILABILITY OF APPROPRIATIONS AS TO TIME

A. GENERAL PRINCIPLES--DURATION OF APPROPRIATIONS

The two basic "uses" of appropriations are expenditures and obligations. An expenditure is the actual disbursement of funds. An obligation (see Chapter 6, this Manual) is a binding commitment against an appropriation which will require an expenditure at some later time. This Chapter discusses the limitations on the use of appropriations relating to time--when they may be obligated and when they may be expended. Many of the rules are statutory and will be found in the provisions of title 31, United States Code, cited throughout the Chapter.

The placing of time limits on the availability of appropriations is one of the primary means of congressional control. By imposing a time limit, Congress reserves to itself the prerogative of periodically reviewing a given program or agency's activities.

Time limitations usually relate to obligations rather than expenditures. When an appropriation is by its terms made available until a specified date, the general rule is that the availability relates to the authority to obligate the appropriation, and does not necessarily prohibit payments after the available date for obligations previously incurred, unless the payment is otherwise expressly prohibited by statute. 16 Comp. Gen. 205 (1936); 18 Comp. Gen. 969 (1939); 23 Comp. Gen. 862 (1944). Thus, a time-limited appropriation is available for obligation only during the period for which it is made, but remains available beyond that period for expenditures to liquidate properly made obligations. In this connection, 31 U.S.C. § 200(d) provides:

> "No appropriation or fund which is limited for obligation purposes to a definite period of time shall be available for expenditure after the expiration of such period except for liquidation of amounts obligated in accord with subsection (a) of this section [see Chapter 6, this Manual]; but no such appropriation or fund shall remain available for expenditure for any period beyond that otherwise authorized by law."

Occasionally, an appropriation may be made available for obligation prior to the period for which the appropriation is being made. Certainly no obligation may be incurred before the appropriation act is enacted. This is prohibited by the Antideficiency Act, 31 U.S.C. § 665(a), discussed in detail in Chapter 5 of this Manual. However, if the appropriation act is enacted prior to the start of the fiscal year for which the appropriation is being made, the Comptroller General has held that contracts may be entered into upon enactment and before the start of the fiscal year, provided that no payments or expenditures may be made under them until the start of the fiscal year. Any such contract should make this limitation clear. 2 Comp. Gen. 739 (1923); 16 Comp. Gen. 1007 (1937); 20 Comp. Gen. 868 (1941). Of course Congress may by statute authorize the actual expenditure of appropriations prior to the beginning of the fiscal year, in which event the above rule does not apply. 4 Comp. Gen. 918 (1925). This result may also follow if an appropriation is made to carry out the provisions of another law which clearly by its terms requires immediate action. 1 Comp. Dec. 329 (1895). However, the general rule remains that obligations and expenditures prior to the beginning of the fiscal year(s) covered by the appropriation are not authorized.

The Comptroller General has also held that the awarding of a "conditional contract" prior to the enactment of the relevant appropriation act does not violate statutory funding restrictions. A "conditional contract" must expressly provide that the Government's liability is contingent upon the future availability of appropriations. Under this arrangement, performance cannot begin prior to the date of enactment of the appropriation, although it may begin after the enactment of the appropriation but before the start of the fiscal year. The contract must also provide that the Government is under no obligation to make any contract payments until the start of the fiscal year. 21 Comp. Gen. 864 (1942); 39 Comp. Gen. 340 (1959); 39 Comp. Gen. 776 (1960); B-171798(1), August 18, 1971, pp. 11-12.

Classified on the basis of duration, apropriations are of three types: annual, multiple-year, and no-year.

Annual appropriations (also called fiscal year or one-year appropriations) are made for a specified fiscal year and are available for obligation only during the fiscal year for which made. Routine activities of the Federal Government are, for the most part, financed by annual appropriations. The concept that annual appropriations can be obligated only during the fiscal year for which made originated with the

first general appropriation act for the Government in 1789 (1 Stat. 95, see Chapter 2, Section B, this Manual) and, except as otherwise specifically provided in particular cases, has been followed consistently since that time. See 18 Comp. Gen. 969 (1939). The concept is now reflected in 31 U.S.C. § 712a as follows:

> "Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year."

The requirements for properly obligating an annual appropriation are discussed in Chapter 6 of this Manual.

All appropriations are presumed to be annual appropriations unless the appropriation act expressly provides otherwise. There are several reasons for this. First, the title and enacting clause of all regular and supplemental appropriation acts specify the making of appropriations "for the fiscal year ending September 30, 19XX." Thus, everything in that act is presumed to be applicable only to the fiscal year covered unless specified to the contrary. Second, appropriation acts commonly include the following general provision:

> "No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." 1/

1/ See, for example, the following fiscal year 1980 appropriation acts: Pub. L. No. 96-68, § 603, 93 Stat. 435 (State, Justice, and Commerce); Pub. L. No. 96-69, § 501, 93 Stat. 450 (energy and water development); Pub. L. No. 96-74, § 504, 93 Stat. 573 (Treasury, Postal Service); Pub. L. No. 96-103, § 404, 93 Stat. 787 (Housing and Urban Development); Pub. L. No. 96-108, § 608, 93 Stat. 841 (Agriculture); Pub. L. No. 96-126, § 306, 93 Stat. 980 (Interior); Pub. L. No. 96-131 § 310, 93 Stat. 1038 (Transportation); Pub. L. No. 96-154, § 712, 93 Stat. 1154 (Defense).

See 58 Comp. Gen. 321 (1979); B-118638, November 4, 1974. Third, 31 U.S.C. § 718 provides that, with specified exceptions--

> "No specific or indefinite appropriation * * * in any regular annual appropriation Act shall be construed to be permanent or available continuously without reference to a fiscal year * * * unless it is made in terms expressly providing that it shall continue available beyond the fiscal year for which the appropriation Act in which it is contained makes provision."

One situation which may provide the basis for an exception to this rule, that is, in which an appropriation may be available for obligation beyond its fiscal year without express language in the appropriation act, occurs in certain situations when an appropriations authorization act provides a multiple-year or no-year authorization. The rules to be applied in this situation and the pertinent Comptroller General decisions have been discussed in Chapter 2, Section F(6), this Manual.

A limitation item included in an appropriation (for example, a lump-sum appropriation with a proviso that not to exceed a specified sum or not less than a specified sum shall be available for a particular object) is subject to the same fiscal year limitation attaching to the parent appropriation unless the limitation is specifically exempted from it in the appropriation act. 37 Comp. Gen. 246, 248 (1957).

Annual appropriations are available only to meet bona fide needs of the fiscal year for which they were appropriated (Section B, this Chapter). If an agency fails to obligate its annual funds by the end of the fiscal year for which they were appropriated, they are no longer available for obligation and are said to have "expired" (Section D, this Chapter). Annual appropriations remain available indefinitely, however, to liquidate the liabilities arising from obligations made within the fiscal year for which the funds were appropriated. 31 U.S.C. § 702.

These principles are illustrated in 56 Comp. Gen. 351 (1977). In that case, the Interior Department proposed to obtain and exercise options on certain land, obligate the full purchase price, and take title to and possession of the property. Payment of the purchase price, however, would be disbursed over a period of up to 4 years. The

reason for this proposal was that sellers were, in view of the capital gains tax, inclined to insist on higher purchase prices if payment was made in a lump sum. The Comptroller General concluded that the proposal was not legally objectionable, provided (a) a bona fide need for the property exists in the fiscal year the option is exercised, and (b) the full purchase price is obligated against appropriations for the fiscal year in which the option is exercised. If these conditions are met, the timing of the actual disbursements is irrelevant.

Just as Congress can by statute expand the obligational availability of an appropriation beyond a fiscal year, it can also reduce the availability to a fixed period less than a full fiscal year. To illustrate, a fiscal year 1980 appropriation for the Community Services Administration included funds for emergency energy assistance grants. Since the program was intended to provide assistance for increased heating fuel costs, and Congress did not want the funds to be used to buy air conditioners, the appropriation specified that awards could not be made after June 30, 1980. Department of the Interior and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-126 (November 27, 1979), 93 Stat. 954, 978. (Due to the severe heat wave in the summer of 1980, the program was expanded to include fans and the appropriation was subsequently extended to the full fiscal year. Pub. L. No. 96-321, August 4, 1980.) Appropriations available for obligation for less than a full fiscal year are, however, uncommon.

Multiple-year appropriations are available for obligation for a definite period in excess of one fiscal year. 37 Comp. Gen. 861, 863 (1958). Except for the extended period of availability, multiple-year appropriations are subject to the same principles applicable to annual appropriations and do not present any special problems.

A no-year appropriation is available for obligation without fiscal year limitation. In order for an appropriation to be a no-year appropriation, the appropriating language must expressly so provide. 31 U.S.C. § 718, supra. The standard language used to make a no-year appropriation is "to remain available until expended." 40 Comp. Gen. 694, 696 (1961). However, other language will suffice as long as its meaning is unmistakable, such as "without fiscal year limitation." See 57 Comp. Gen. 865, 869 (1978).

An exception to the rule that an appropriation cannot be a no-year appropriation unless the appropriation act

expressly so provides is found in 31 U.S.C. § 682. Under this provision, appropriations for the construction of public buildings shall remain available until completion of the work for which appropriated. Upon final completion of the building and the payment of all outstanding liabilities, any unexpended balances must be returned to the Treasury. If an appropriation falls within the scope of 31 U.S.C. § 682, the phrase "to remain available until expended" is unnecessary. 36 Comp. Gen. 790, 793 (1957). See Chapter 9, this Manual, for further discussion of 31 U.S.C. § 682.

The rules relating to no-year appropriations are simple: All statutory time limits as to when the funds may be obligated and expended are removed, and the funds remain available for their original purposes until expended. 40 Comp. Gen. 694, supra; 43 Comp. Gen. 657 (1964). Thus, there has been little occasion for the Comptroller General to render decisions on the availability of no-year appropriations. In one case, Congress had made a no-year appropriation to the Federal Aviation Administration for the purchase of aircraft. A question arose as to the continued availability of the appropriation because, in the following year, Congress explicitly denied a budget request for the same purpose. The Comptroller General held that the subsequent denial did not restrict the use of the unexpended balance of the prior no-year appropriation. The availability of the prior appropriation could not be changed by a later act "except in such respects and to such extent as is expressly stated or clearly implied by such act." 40 Comp. Gen. 694 (1961). See also B-200519, November 28, 1980.

An earlier decision concerned the disposition of liquidated damage penalties deducted from payments made to a contractor. The Comptroller General concluded that, if the contractor had not objected to the deduction within two years, the funds could be treated as unobligated balances available for expenditure in the same manner as other funds in the account, assuming the no-year account contained a sufficient balance for the discharge of unanticipated claims. 23 Comp. Gen. 365 (1943).

In another case, a no-year appropriation for the National Capital Park and Planning Commission included a dollar ceiling on non-contract services during the fiscal year. GAO concluded that the specific restriction had the effect of suspending the "available until expended" provision as far as personal services were concerned for any fiscal year in which the restriction was included. Thus, unobligated balances of prior no-year appropriations could not be used to

augment the ceiling. 30 Comp. Gen. 500 (1951). For the application of this principle to multiple-year appropriations in various contexts, see 31 Comp. Gen. 368 (1952); 31 Comp. Gen. 543 (1952), overruling 31 Comp. Gen. 275 (1952).

There is one important statutory restriction on the availability of no-year funds. Under 31 U.S.C. § 706, the unobligated balance of a no-year appropriation will cease to be available and must be withdrawn (a) if the agency head determines that the purposes for which the apporopriation was made have been fulfilled, or (b) "in any event, whenever disbursements have not been made against the appropriation for two full consecutive fiscal years." The purpose of section 706 is to permit the closing of inactive appropriations. 39 Comp. Gen. 244 (1959); B-182101, October 16, 1974. The statute further authorizes the restoration of withdrawn amounts if necessary for the payment of obligations or the settlement of accounts.

Deobligated no-year funds are available for obligation on the same basis as if they had never been obligated, subject to the restrictions of 31 U.S.C. § 706. B-200519, November 28, 1980.

No-year appropriations have advantages and disadvantages. One of the disadvantages is a loss of congressional control over actual program levels from year to year. GAO has taken the position that no-year appropriations should not be used in the absence of compelling programmatic or budgetary reasons. See report entitled "No-Year Appropriations in the Department of Agriculture," PAD-78-74, September 19, 1978.

Like a no-year appropriation, a permanent indefinite appropriation (e.g., 31 U.S.C. § 724a, Chapter 12, this Manual) is not subject to fiscal year limitations. However, the 31 U.S.C. § 706 requirement that the agency charge some expenditures to the appropriation over a two-year period does not apply to permanent indefinite appropriations.

B. BONA FIDE NEEDS

One of the fundamental principles of appropriations law is the so-called bona fide need rule: A fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in the fiscal year for which the appropriation was made. Citations to this principle are numerous. See, e.g., 33 Comp. Gen. 57, 61 (1953); 38 Comp. Gen. 628 (1959); 54 Comp. Gen. 962, 966 (1975); 58 Comp. Gen. 471, 473 (1979); B-183184, May 30, 1975. The bona fide need rule applies to multiple-year as well as fiscal year appropriations. 55 Comp. Gen. 768, 773 (1976). However, it does not apply to no-year funds. 43 Comp. Gen. 657, 661 (1964).

In its most elementary form--where the entire transaction (contract or purchase, delivery, and payment) takes place during the same fiscal year--the rule means simply that the appropriation is available for needs of the current year rather than future years. For example, suppose that, as the end of a fiscal year approaches, an agency purchases a truckload of pencils when it is clear that, based on current usage, it already has in stock enough pencils to last several years into the future. It would seem apparent that the agency was merely trying to use up its appropriation before it expired, and the purchase would violate the bona fide need rule.

Bona fide need questions arise more frequently, however, where a given transaction covers more than one fiscal year. In the typical situation, a contract is made (or attempted to be made) in one fiscal year, with performance and payment to extend at least in part into the following fiscal year. The issue is which fiscal year should be charged with the obligation. In this context, the rule is that, in order to obligate a fiscal year appropriation for payments to be made in a succeeding fiscal year, the contract imposing the obligation must have been made within the fiscal year sought to be charged, and the contract must have been made to meet a bona fide need of the fiscal year to be charged. E.g., 35 Comp. Gen. 692 (1956); 33 Comp. Gen. 57, 61, supra; 20 Comp. Gen. 436 (1941); 16 Comp. Gen. 37 (1936); 21 Comp. Dec. 821 (1915). More detailed discussion of the rule and its rationale is contained in 4 Comp. Dec. 553 (1898) and 37 Comp. Gen. 155 (1957). As to what constitutes a sufficient obligation, see Chapter 6, this Manual.

There is statutory basis for the bona fide need rule. As noted earlier in this Chapter and in Chapter 2, Section B, this Manual, the first general appropriation act in 1789 made appropriations "for the service of the present year," and this "one-year" concept is now reflected in 31 U.S.C. § 712a

(Section A, this Chapter). The bona fide need rule evolved as a pragmatic response to the need for procurement practices responsive to the "one-year" restriction. For an early but still relevant discussion, see 6 Comp. Dec. 815 (1900). Additional statutory basis for the rule may be found in the Antideficiency Act, 31 U.S.C. § 665, and the so-called Adequacy of Appropriations Act, 41 U.S.C. § 11, discussed in Chapters 5 and 8 of this Manual, respectively.

It follows from the above statement of the rule that there are situations in which performance or delivery can extend into a subsequent fiscal year with payment to be charged to the prior fiscal year, as long as the need arose in the fiscal year to be charged. This principle applies even though the funds are not to be disbursed and the exact amount owed by the Government cannot be determined until the subsequent fiscal year. 21 Comp. Gen. 574 (1941); 18 Comp. Gen. 363 (1938). Thus, in a case where the United States entered into an agreement with a State to provide assistance for the procurement of Civil Defense items for the State and to pay a specified percentage of the cost, the Comptroller General found that the need arose in the year the agreement with the State was made. Therefore, appropriations current at that time were to be charged with the cost, notwithstanding the fact that the actual procurement contracts with suppliers, including the exact price, were not negotiated and executed until a subsequent fiscal year. 31 Comp. Gen. 608 (1952).

Determination of what constitutes a bona fide need of a particular fiscal year depends largely on the facts and circumstances of the particular case, and there is no general rule applicable to all situations. 44 Comp. Gen. 399, 401 (1965); 37 Comp. Gen. 155, 159 (1957). Nevertheless, it is possible to construct certain guidelines. 2/

(1) Delivery of Materials Beyond the Fiscal Year

When the Government purchases goods or materials and delivery occurs even partially in a subsequent fiscal year, the issue of whether the contract meets a bona fide need of the fiscal year in which it was made may arise. In such instances, where materials cannot be obtained in the same

2/ The remainder of this Section is structured in large measure on a comprehensive and well-documented article entitled "Legal Aspects of Funding Department of the Army Procurements" by Capt. Dale Gallimore, 67 Mil. L. Rev. 85 (1975).

fiscal year in which they are needed and contracted for, provisions for delivery in the subsequent fiscal year do not violate the bona fide need rule so long as the time intervening between contracting and delivery is not excessive and the procurement is not for standard commercial items readily available from other sources. 38 Comp. Gen. 628 (1959); 35 Comp. Gen. 692 (1956).

On the other hand, an agency may not obligate funds when it is apparent from the outset that there will be no requirement until the following fiscal year. Accordingly, it was found that annual appropriations obligated to fund an agreement between the General Services Administration and the Federal Power Commission whereby GSA agreed to renovate space in a Federal building incident to relocation of FPC personnel, were not available since the relocation was not required to, and would not, take place by the end of the fiscal year, and because the space in question would not be made tenantable until the following fiscal year. B-95136-O.M., August 11, 1972.

Similarly, deliveries under a contract concluded in one fiscal year may be delayed until the subsequent fiscal year if the material contracted for will not be obtainable on the open market at the time needed for use, provided the intervening period is necessary for production or fabrication of the material. 37 Comp. Gen. 155, 159 (1957). In one case, although work under a construction contract was performed during the fiscal year following its execution, the Comptroller General approved payment to the contractor since the agency awarded the contract as expeditiously as possible and made provision for the work to begin within the current fiscal year, but experienced a delay in obtaining certain materials the Government had agreed to provide. 1 Comp. Gen. 708 (1922). See also 23 Comp. Gen. 82 (1943).

However, this situation must be distinguished from circumstances in which supplies are purchased for consumption as delivered. See 1 Comp. Gen. 115 (1921). When materials are needed on a periodically recurring basis, the contract term may not exceed 1 year and only requirements for the first year can be classified as bona fide needs of the year in which the contract is made. 36 Comp. Gen. 683 (1957).

A 1935 decision, A-60589, July 12, 1935, concerned a "requirements contract" for supplies in which no definite quantity was required to be purchased and under which no legal obligation would be imposed on the Government until an order was placed, other than the requirement not to purchase the

items elsewhere. The decision held that such a contract could extend into the following fiscal year as long as the contract term was not for more than one year. 3/ However, in 42 Comp. Gen. 272 (1962), the type of requirements contract involved in A-60589, supra, was distinguished from a three-year "requirements" contract for equipment and services to maintain an Air Force base at Wake Island, to be funded from an annual appropriation of the first contract year, on the grounds that, under the Wake Island contract, the need for the equipment and services was certain to arise as long as the base remained open. The Wake Island contract was held to violate not only the bona fide need rule but the Antideficiency Act as well. This decision is discussed in more detail in "Multi-Year Contracts," infra, this Chapter. Both decisions (A-60589 and 42 Comp. Gen. 272) are discussed in 48 Comp. Gen. 497 (1969) in which the Comptroller General stated:

> "For the reasons stated in 42 Comp. Gen. 272, we are not convinced that the decision of July 12, 1935, A-60589, permitting requirements contracts under fiscal year appropriations to cover 1-year periods extending beyond the end of the fiscal year is technically correct. Since that practice, however, has been followed for over 30 years apparently in reliance upon the July 12, 1935, decision, no objection will be made to its continuance." 48 Comp. Gen. at 500.

If, however, an indefinite quantity requirements contract does not include the requirement not to purchase the items elsewhere, then there is really no "contract" and obligations arise only as orders are actually placed. A given payment must be charged to the fiscal year in which the order creating the obligation was definitely placed. See 60 Comp. Gen. 219 (1981).

If deliveries are scheduled only for a subsequent fiscal year, or if contract timing effectively precludes delivery until the following fiscal year, it will be presumed that the contract was made in the earlier fiscal year only to obligate funds from an expiring appropriation and that the goods or materials were not intended to meet a bona fide need of that year. See 27 Comp. Dec. 640 (1921); 21 Comp. Gen. 1159 (1941); 38 Comp. Gen. 628, 630 (1959). Accordingly, when an

3/ Also relevant is 41 U.S.C. § 13, covering contracts for "stationery and supplies," discussed separately in Chapter 8, this Manual.

agency requisitioned the printing of sales promotion material near the end of a fiscal year, the Comptroller General determined that the material did not meet a bona fide need of the fiscal year in which the order was placed. 44 Comp. Gen. 695 (1965). The Comptroller stated that because the items were especially created for a particular purpose and required a lengthy period for creation, the printing requisitions could not be viewed as "replacement of stock" and did not lawfully obligate the current annual appropriation. Further, since the manuscript copy did not accompany the original order and was not furnished to the Government Printing Office until seven months after the end of the fiscal year, the printing could not have fulfilled a need of the fiscal year in which the requisition was issued.

As pointed out in 44 Comp. Gen. 695, supra, an order or contract for the replacement of stock is viewed as meeting a bona fide need of the year in which the contract is made as long as it is intended to replace stock used in that year, even though the replacement items will not be used until the following year. "Stock" in this context refers to "readily available common-use standard items." Id. at 697. See also 32 comp. Gen. 436 (1953).

(2) Services Rendered Beyond the Fiscal Year

Services are generally viewed as chargeable to the appropriation current at the time the services are rendered. However, a need may arise in one fiscal year for services which, by their nature, cannot be separated for performance in separate fiscal years. The Comptroller General has held that the question of whether to charge the appropriation current on the date the contract is made, or to charge the funds current at the time services are rendered, depends upon whether the services are "severable" or "entire".

> "The fact that the contract covers a part of two fiscal years does not necessarily mean that payments thereunder are for splitting between the two fiscal years involved upon the basis of services actually performed during each fiscal year. In fact, the general rule is that the fiscal year appropriation current at the time the contract is made is chargeable with payments under the contract, although performance thereunder may extend into the ensuing fiscal year." 23 Comp. Gen. 370, 371 (1943).

Thus, a contract which is viewed as "entire" is chargeable to the fiscal year in which it was made, notwithstanding that performance may have extended into the following fiscal year. The determining factor for whether certain services are severable or entire appears to be whether they represent a single undertaking. Thus, in 23 Comp. Gen. 370, supra, a contract for the cultivation and protection of a tract of rubber-bearing plants, payable upon the completion of the services, was chargeable against fiscal year funds for the year in which the contract was made. Because the services necessarily covered the entire growing period which extended into the following fiscal year, the Comptroller General characterized them as a single undertaking which "although extending over a part of two fiscal years, nevertheless was determinable both as to the services needed and the price to be paid therefor at the time the contract was entered into." Id. at 371. See also 10 Comp. Dec. 284 (1903); 50 Comp. Gen. 589, 591 (1971). The rationale of 23 Comp. Gen. 370 was applied in 59 Comp. Gen. 386 (1980) (requisition for printing accompanied by manuscript sufficient for Government Printing Office to proceed with job) and B-141839-O.M., May 2, 1960 (contract for cancer research).

However, where the services are continuing in nature, the contract is severable and the services must be charged to the fiscal year in which they are rendered. 33 Comp. Gen. 90 (1953) (trucking services). As stated in that decision:

> "The need for current services, such as those covered by the contract here under consideration, arises only from day to day, or month to month, and the Government cannot, in the absence of specific legislative authorization, be obligated for such services by any contract running beyond the fiscal year." 33 Comp. Gen. at 92.

See also 35 Comp. Gen. 319 (1955), modified by B-125444, February 16, 1956 (gardening and window cleaning services).

Another distinction arising from the decisions is whether the services are viewed as personal or nonpersonal. Personal services are presumptively severable by their nature and are properly chargeable to the fiscal year in which the services are rendered. B-174226, March 13, 1972 (performance on an evaluation team); B-187881, October 3, 1977 (overseas school teachers with employment contracts); 27 Comp. Gen. 764 (1948) (travel); 38 Comp. Gen. 316 (1958) (salaries and expenses of Government employees whose duties involve the inspection and supervision of contract construction work). Legal services have been viewed as either personal or nonpersonal, depending

on the nature of the work to be done. B-122596, February 18, 1955; B-122228, December 23, 1954.

Service contracts which are "severable" may not cross fiscal year lines in the absence of statutory authority to the contrary. B-192518, August 9, 1979; B-133001, March 9, 1979; B-187881, October 3, 1977; 58 Comp. Gen. 321, 324 (1979).

A recent application of these principles occurred in connection with agreements made by the Small Business Administration with private organizations to provide technical and management assistance to businesses eligible for assistance under the Small Business Act. The typical agreement covered one calendar year and crossed fiscal year lines. Under the agreement, payment was to be made only for completed tasks and SBA was under no obligation to place any orders, nor to place all orders with any given contractor. The question was whether the "contract" was chargeable to the fiscal year in which it was executed. The Comptroller General found that the services involved were clearly severable and that the agreement was not really a contract since it lacked mutuality of obligation. Accordingly, SBA created a contract obligation only when it placed a definite order, and each fiscal year could be charged only with obligations incurred during that fiscal year. 60 Comp. Gen. 219 (1981). The principles were reiterated in 61 Comp. Gen. ___ (B-202222, December 31, 1981).

In another recent case, GAO considered the District of Columbia's recording of obligations for social security disability medical examinations. A person seeking to establish eligibility for disability benefits is given an appointment for a medical examination and a purchase order is issued at that time. However, for any of a number of reasons beyond the District's control, the examination may not take place until the following fiscal year (for example, person makes application at end of fiscal year or does not show up for initial appointment). Nevertheless, the need for the examination arises when the applicant presents his claim for disability benefits. The decision concluded that the obligation occurs when the purchase order is issued and is chargeable to that fiscal year. GAO found the situation more closely analogous to a procurement of goods where actual delivery cannot possible be made until the next fiscal year (discussed above). 60 Comp. Gen. 452 (1981).

(3) Replacement Contracts

In an early decision, the Comptroller of the Treasury was asked whether fiscal year 1902 funds originally obligated under a contract but unexpended because of contractor default could be used in the following year to continue the original object of the contract. The Comptroller stated:

> "A contract was properly made within the fiscal year 1902, and it would seem that any part of the consideration of that contract which failed of use owing to the default of the contractor could still be used in carrying out the object of the original contract within the meaning of section 3690 [now 31 U.S.C. § 712a]. Appropriations are made to be used and not to be defeated in their use, and it would be a narrow construction to hold that a default on a properly made contract would prevent the use of the appropriation for the object for which it was made and for carrying out which the contract was executed." 9 Comp. Dec. 10, 11 (1902).

This marked the beginning of the replacement contract theory.

The rule, stated in a number of decisions, is: In cases where a contract performance period has extended beyond the expiration of the period of availability for obligation of a fiscal year appropriation, and where it becomes necessary to terminate the contract because of the contractor's default, the funds obligated under the original contract are available for the purpose of engaging another contractor to complete the unfinished work, provided a need for the work, supplies, or services existed at the time of execution of the original contract and that it continued to exist up to the time of execution of the replacement contract. 55 Comp. Gen. 1351 (1976); 44 Comp. Gen. 623 (1965); 40 Comp. Gen. 590 (1961); 34 Comp. Gen. 239 (1954); 32 Comp. Gen. 565 (1953); 2 Comp. Gen. 130 (1922); 21 Comp. Dec. 107 (1914); B-160834, April 7, 1967; B-105555, September 26, 1951.

The rule is based on the notion that the default termination does not eliminate the bona fide need of the fiscal year in which the original contract was executed. 44 Comp. Gen. 399, 401 (1965). Accordingly, the replacement contract seeks only to meet the pre-existing and continuing need.

However, if the terminated contract was improperly made to fulfill a bona fide need of a fiscal year other than that in which annual funds were obligated, it would also be improper to charge that same appropriation for obligations incident to the replacement contract. 35 Comp. Gen. 692 (1956). Similarly, if the replacement contract exceeds the scope of the original contract (44 Comp. Gen. 399 (1965); B-181176-O.M., June 26, 1974) or is awarded after undue delay in terminating the original contract (32 Comp. Gen. 565 (1953)), only those funds available for obligation at the time of its execution may be used.

If a contract is determined to be invalid and cancelled rather than terminated, no binding agreement ever existed and the original funds cannot be regarded as having been obligated. Therefore, in the case of a cancellation, the original funds are not available to fund a "replacement contract" in the following fiscal year. 38 Comp. Gen. 190 (1958). Contract cancellations are rare today.

At one time, the replacement contract rule was limited strictly to the default situation. See 24 Comp. Gen. 555 (1945) (overruled by 55 Comp. Gen. 1351 (1976)). However, the rule has been expanded slightly. Thus, in 34 Comp. Gen. 239 (1954), a default termination was subsequently converted to a termination for convenience to permit settlement of the contractor's claim for damages. The decision held that, in view of the original termination, the funds originally obligated were available for the timely execution of a new contract for the performance of the unfinished work.

More recently, a contract for flooring repairs was awarded in FY 1975 using FY 1975 funds, conditioned upon a determination from the Small Business Administration that the contractor qualified as a small business. The SBA found the contractor not to be a small business. The Comptroller General applied the replacement contract rule and held that the funds obligated for the contract in FY 1975 could be used to resolicit in FY 1976. 55 Comp. Gen. 1351 (1976).

The replacement contract rule does not apply to terminations for the convenience of the Government. 60 Comp. Gen. 591 (1981). That decision reviewed the entire rule and summarized its application as follows:

(a) The original funds remain obligated and available for funding a replacement contract, regardless of the year in which the replacement contract is awarded:

--Where the contracting officer terminates an existing contract for default on the part of the contractor, and the determination that the contractor defaulted has not been overturned by a board of contract appeals or a court; or

--Where a replacement contract has already been awarded, after an agency terminates for default, by the time a competent administrative or judicial authority converts the default termination to a termination for convenience.

In these situations, as noted previously, the bona fide need of the original contract must continue, and the replacement contract must be made without undue delay after the original contract is terminated and must be awarded on the same basis and be substantially similar in scope and size as the original contract.

(b) The original funding obligation is extinguished upon termination of the contract and the funds will not remain available to fund a replacement contract:

--Where the contracting officer terminates an existing contract for the convenience of the Government, either on his own initiative or upon the recommendation of GAO; or

--Where the contracting officer has terminated an existing contract for default and has not executed a replacement contract on the date that a competent administrative or judicial authority orders the conversion of the original termination for default to a termination for convenience.

For the application of the replacement contract theory to grants, see Chapter 13, this Manual.

(4) Contract Modifications and Amendments Affecting Price

Most Government contracts contain provisions which, under certain conditions, render the Government liable to make equitable adjustments in the contract price. Such liability may arise due to changes in specifications, Government-caused delay, changed conditions, increased overhead rates, etc. These conditions are set out in standard contract clauses such as the "Changes" clause, "Government Property Clause," or "Negotiated Overhead Rates" clause.

Because the amount of the Government's liability under these provisions remains uncertain until the occurrence of the specified conditions (cf. 50 Comp. Gen. 589, 591 (1971)), the appropriations charged with cost of the contract are not firmly obligated to cover future price increases which arise due to the operation of such clauses. Nevertheless, Government contracts containing these provisions frequently contemplate that contract performance will extend into the subsequent fiscal years. Accordingly, a price adjustment which is requested and approved in a subsequent fiscal year pursuant to the "Changes" clause, for example, will be charged against the appropriation current at the time the contract was originally executed. 55 Comp. Gen. 768, 773-74 (1976); 23 Comp. Gen. 943 (1944); 21 Comp. Gen. 574 (1941); 18 Comp. Gen. 363 (1938); B-146285-O.M., September 28, 1976, p. 4; A-15225, September 24, 1926. See also 37 Comp. Gen. 861 (1958). The reasoning is that a change order does not give rise to a new liability, but instead, only renders fixed and certain the amount of the Government's pre-existing liability to adjust the contract price. Since that liability arises at the time the original contract is executed, the subsequent price adjustment will be viewed as reflecting a bona fide need of the same year in which funds were obligated for payment of the original contract price. 23 Comp. Gen. 943 (1944). Thus, in order to avoid over-obligating the original appropriation, the contracting officer must estimate the expected net additional obligations to insure that available appropriations are not committed to other purposes. See, e.g., B-192036, September 11, 1978. On the other hand, contingent liabilities require constant review to insure that appropriations do not remain encumbered in excess of the amounts which will actually be needed to meet the total liability under the contract.

Not all price adjustments arising from contract amendments or modifications, however, represent a bona fide need of the year in which the original agreement was made. If the change or amendment exceeds the general scope of the contract or is not made pursuant to a provision in the original contract,

it is not based on any antecedent liability and may only be used to obligate appropriations current at the time it is issued. 56 Comp. Gen. 414 (1977); 38 Comp. Gen. 316 (1958); 37 Comp. Gen. 861 (1958); 25 Comp. Gen. 332 (1945). Compare 57 Comp. Gen. 459 (1978); 41 Comp. Gen. 134 (1961). These principles were recently reiterated in 59 Comp. Gen. 518 (1980).

Two recent cases will further illustrate the application of these principles:

--A contractor performed supplemental research services in accordance with an informal agreement essentially pursuant to the "Changes" clause of the original contract, although a formal contract modification was never issued. Since the supplemental work fell within the general scope of the original contract, payment was chargeable to funds available at the time the basic contract was executed, not to current appropriations. B-197344, August 21, 1980.

--A contract to provide facilities and staff to operate a project camp was modified in the last month of FY 1980. The modification called for work to be performed in FY 1981. Regardless of whether the contract was viewed as a service contract or a contract to provide facilities, the modification did not meet a bona fide need of FY 1980. The modification amounted to a separate contract and could be charged only to FY 1981 funds, notwithstanding that it purported to modify a contract properly chargeable to FY 1980 funds. 61 Comp. Gen. ___ (B-202222, December 31, 1981).

(5) Multi-Year Contracts

Government agencies frequently procure supplies and services requiring the contractor to invest heavily in equipment having a useful life exceeding one year, or to make substantial expenditures to recruit and train personnel. When this is done with annual funds, the Government may either include option provisions allowing it to extend the single year contracts beyond the initial fiscal year without assuring the contractor that the Government will actually do so, or may supply the contractor with Government equipment and facilities obviating the need for significant contractor investment. If neither alternative is chosen, the Government is left to pay the contractor's investment costs as part of a contract price reflecting increased unit prices for the supplies or services procured.

If the procurements were made on a multiple-year basis under terms where termination would provide the only means for the Government and contractor to obtain release from their respective obligations, it would be possible for the contractor to apportion his initial costs over the entire contract term. The Comptroller General, however, has held that the statutory restrictions on obligating funds in advance of appropriations prohibit the use of annual funds for multi-year procurement. For example, in one case where the Air Force had awarded a three-year contract for aircraft maintenance, troop billeting, and base management services on Wake Island, the Comptroller General refused to adopt the Air Force's position that the agreement was a requirements contract. The Air Force contended that no funds were obligated under 31 U.S.C. § 200 until requisitions were issued, thereby exempting the contract "from the statutory prohibitions against obligating the Government in advance of appropriations and beyond the extent and availability of the authorizing [annual] appropriation." 42 Comp. Gen. 272 (1962). Although the contractor had expressly agreed to perform only services for which he had received the contracting officer's order, the Comptroller found that there was no need for an administrative determination that requirements existed, since the contract services were "automatic incidents of the use of the air field." As a result, only a decision to close the base would eliminate the requirements. The contract was therefore construed to bind the Government only to the end of the fiscal year. Further, even if the contract were to contain an option in the Government to renew from one year to the next, contingent upon the availability of future appropriations, "affirmative action, in effect making a new contract and complying with the advertising requirement,"

would be required to exercise the Government's renewal option. See also, Leiter v. United States, 271 U.S. 204 (1926); 36 Comp. Gen. 683 (1957); 33 Comp. Gen. 90 (1953); 29 Comp. Gen. 91 (1949); 28 Comp. Gen. 553 (1949); B-88974, November 10, 1949.

Additionally, if contract payments in any given fiscal year are unreasonable, that is, more than the lowest cost of the supplies or services otherwise obtainable for bona fide needs of that fiscal year, the charge cannot be found to relate to current fiscal year needs. Such payments violate the statutory provisions restricting the use of annual appropriations to expenditures required for the particular fiscal year in which they are made. B-190659, October 23, 1978.

Statutory authority for multi-year contracting with annual funds exists in certain situations. For example, 10 U.S.C. § 2306(g)(1) gives the Department of Defense authority, subject to certain limitations, to award contracts for up to five-year periods when procuring certain types of services or related supplies in overseas locations.

Where a multi-year contractual arrangement is not based upon an express statutory provision and includes an option to renew the contract after the initial year, the contractor (since he can never be sure whether the renewal option will be exercised) may seek to provide for a contract termination penalty equal to the unamortized balance of the initial investment cost if the Government fails to renew the contract for any fiscal year. The Comptroller General, however, has also held that these provisions contravene the bona fide need rule:

> "The theory behind such obligations (covering amortized facility costs unrecovered at time of termination) has been that a need existed during the fiscal year the contracts were made for the productive plant capacity represented by the new facilities which were to be built by the contractor to enable him to furnish the supplies called for by the contracts. After thorough consideration of the matter, we believe that such obligations cannot be justified on the theory of a present need for productive capacity* * *.
>
> "The real effect of the termination liability is to obligate the Commission to purchase a certain quantity of magnesium during each of five successive years or to pay damages for its failure to do so. In other words, the termination charges represent a

part of the price of future, as distinguished from current, deliveries and needs under the contract, and for that reason such charges are not based on a current fiscal year need." 36 Comp. Gen. 683, 685 (1957). See also 37 Comp. Gen. 155 (1957).

The potential for early termination poses particular problems in automatic data processing (ADP) equipment procurement. In one case, a competitor for a Government contract to acquire use of an automatic data processing system for a 65-month period, proposed to include a provision under which the Government was assessed a penalty if it failed to exercise its annual renewal options. 56 Comp. Gen. 142 (1976). The Comptroller General noted that the penalty was clearly intended to recapitalize the contractor for his investment based upon the full life of the system in the event the Government did not continue using the equipment. Accordingly, he held that the penalty did not reasonably relate to the value of the equipment's use during the fiscal year in which it would be levied. The penalty charges would, therefore, not be based on a bona fide need of the current fiscal year and their payment would violate statutory funding restrictions. See also 56 Comp. Gen. 167 (1976); B-190659, October 23, 1978.

One scheme, however, has been found to be legally sufficient to permit the Government to realize the cost savings that may accrue through multi-year contracting. The plan approved by the Comptroller General at 48 Comp. Gen. 497, 501-502 (1969) provided for a one-year rental contract with an option to renew each subsequent year. If the Government completed the full rental period by continuing the contract on a year by year basis, it would be entitled to have monthly rental credits applied during final months of the rental period. The Comptroller General noted that:

"Under this arrangement the Government would not be obligated to continue the rental beyond the fiscal year in which made, or beyond any succeeding fiscal year, unless or until a purchase order is issued expressly continuing such rental during the following fiscal year. In effect, the company is proposing a one-year rental contract with option to renew. Also, under this proposal rental for any contract year would not exceed the lowest rental otherwise obtainable from company 'C' for one fiscal year. We have no legal objection to this type of rental plan for ADP equipment."

(6) Exceptions to the Bona Fide Need Rule

Congress may grant general statutory exemptions from the bona fide need requirement or may, in limited cases, include exemption language in an agency's annual appropriation act. These, however, are more frequently addressed as statutory exemptions to the prohibition on advance payments. See Section C, this Chapter.

An example of a statutory exception is 31 U.S.C. § 668a, discussed further in Chapter 6 of this Manual in connection with the recording of obligations for public utility services, 31 U.S.C. § 200(a)(7).

C. ADVANCE PAYMENTS PROHIBITION

(1) General

Advance payments in general are prohibited by 31 U.S.C. § 529, which provides in part:

> "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment.* * *"

Section 529 is derived from legislation originally enacted in 1823 (3 Stat. 723). The statute has been described as "so plain that construction of it is unnecessary." 27 Comp. Dec. 885, 886 (1921).

In an early decision, the advance payment statute was applied to a question regarding the legality of Government partial (progress) payments for materials which had not been delivered. The Comptroller General held that the statute does not necessarily require withholding of payment under a contract until the entire subject has been completed and delivered to the Government. The statute "was not intended to prevent a partial payment in any case in which the amount of the payment had actually been earned by the contractor and the United States had received an equivalent therefor." 1 Comp. Gen. 143, 145 (1921). The partial payments proposed in that case were not in excess of the amount actually expended by the contractor in performance of the contract, and because the contract provided that title to all property upon which payment was made vested in the Government, the Government would receive the corresponding benefit. Partial payments in advance of complete delivery were therefore permissible.

In another case, a supply contract provided for payment "for articles delivered and accepted" and for the contractor to retain responsibility for the supplies or materials until they were actually in the possession of a Government representative at their destination. The Comptroller General held that payments on the basis of vouchers or invoices supported by evidence of shipment only, without evidence of arrival of the supplies at destination and without assurance of receipt or acceptance by the Government, would be unauthorized.

20 Comp. Gen. 230 (1940). In 20 Comp. Gen. 917 (1941), the Comptroller General approved a proposed contract amendment to provide for partial payment of the contract price prior to delivery to the Government on the condition that title to the materials would pass to the Government at the time of payment.

From these and similar cases, the rule evolved that partial payments for equipment or land made in advance of their delivery into the actual possession of the United States would not violate the advance payment statute if title therein had vested in the Government at the time of payment or if the equipment or land was impressed with a valid lien in favor of the United States in an amount at least equal to the payment. 20 Comp. Gen. 917, supra; 28 Comp. Gen. 468 (1949). Applying this rule, the Comptroller General has approved the payment of "earnest money" under a contract for the sale of real estate to the Government. Because (a) under the proposed agreement, equitable title would vest in the Government prior to the vesting of legal title, which remained in the seller only to secure payment of the purchase price, and (b) the contract obligated the seller to deliver title insurance commitment, the arrangement was found sufficient to protect the Government's interests. 34 Comp. Gen. 659 (1955). However, in B-155253, December 18, 1964, GAO questioned the legality of a procedure providing for payment in full in advance of delivery of ordinary day-to-day supplies and materials under a contract provision that vested title in the United States upon delivery to the post office or carrier.

Limited authority to make advance payments under certain contracts is now recognized by statute. The Federal Property and Administrative Services Act (41 U.S.C. § 255) and the Armed Services Procurement Act (10 U.S.C. § 2307) authorize advance, partial, progress or other payments under property or service contracts and permit the inclusion in bid solicitations of a provision limiting this authority to small business concerns. However, under this authority, advance payments may not exceed the unpaid contract price, and may be made only if the agency head determines that the use of advance payment procedures is in the public interest and if adequate security is provided. This authority applies to both advertised and negotiated procurements. See B-158487, April 4, 1966. In view of this authority, the Comptroller General approved in B-158487, April 4, 1966, an advance payment procedure somewhat similar to the one previously disapproved in B-155253, supra. The proposal in B-158487 was for the General Services Administration to make payments on direct delivery vouchers

prior to the receipt of "receiving reports" from the consignees. The proposal was designed to effect savings to the Government by enabling GSA to take advantage of prompt payment discounts. 4/ GAO's approval was, of course, conditioned upon compliance with the statutory conditions noted above. GAO has since approved similar "fast payment" procedures for other agencies in B-155253, March 20, 1968 (Defense Department) and B-155253, August 20, 1969 (Federal Aviation Administration), and has recently reaffirmed them for GSA in 60 Comp. Gen. 602 (1981). "Fast pay" procedures should have adequate controls. GAO's recommended controls are outlined in B-205868, June 14, 1982.

However, the Comptroller General declined approval of a "purchase order draft" procedure which called for the Government to send a blank check to the supplier upon placing an order. The supplier was to fill in the check for the actual amount due, not to exceed a sum specified on the check, thereby effecting immediate payment and eliminating the need for the supplier to bill the Government. The Comptroller General concluded that an agency head could not reasonably find that this plan would provide adequate security for the Government. B-158873, April 27, 1966.

The authority in 41 U.S.C. § 255 and 10 U.S.C. § 2307 is a financing tool to be used only in limited circumstances. See 57 Comp. Gen. 89, 94 (1977).

The advance payment statute has been held applicable to the District of Columbia, and the statute was violated where the District paid the full contract price on a computer services contract prior to system installation and delivery of the software package. B-195595(1), December 18, 1979.

The advance payment statute permits exceptions, which may be found in appropriation acts or in "other law." A number of specific exemptions may be found in 31 U.S.C. §§ 529b thru 529j. Another exception is the authority in 41 U.S.C. § 255 and 10 U.S.C. § 2307, supra. Numerous other statutory exemptions exist in various contexts.

A major exception exists in the case of grants. Since many grants by their nature anticipate payment in advance, it has been held that 31 U.S.C. § 529 does not preclude advance funding in authorized grant relationships. 41 Comp.

4/ The method of determining the correct date of payment for prompt payment discount purposes is discussed in 61 Comp. Gen. ___ (B-201384, December 29, 1981).

Gen. 394 (1961); 59 Comp. Gen. 424 (1980); 60 Comp. Gen. 208 (1981). There are, however, limitations on the advance funding of grants. For example, the grantee must establish or demonstrate the willingness and ability to establish procedures to minimize the time elapsing between the advance of funds and their disbursement by the grantee. See Office of Management and Budget Circular Nos. A-102 and A-110; Treasury Department Circular No. 1075 (1977). See also Chapter 13, this Manual.

Advance payment problems may nevertheless arise in grant-related cases. Under the College Work-Study Program, a student is placed with an employer, which may be a Federal agency. The student's salary is paid from two sources: 80 percent is paid by the college under an Office of Education (now Department of Education) grant, and the remaining 20 percent is paid by the employer. In one case, a proposal for the employing Federal agency to pay 100 percent of the student's salary and to collect 80 percent from the college at a later date was found to violate 31 U.S.C. § 529. B-159715, August 18, 1972. More recently, a proposal for the agency/employer to advance its 20 percent share to the college which would in turn place the funds in an escrow account for payment to the student after the work was performed was similarly found to contravene 31 U.S.C. § 529. 56 Comp. Gen. 567 (1977). In the latter decision, the Comptroller General rejected a suggestion that the proposed arrangement might be authorized by 41 U.S.C. § 255, supra.

Payments to or on behalf of Federal civilian employees and military personnel constitute another area in which exceptions may be found, and cases may arise over the scope of these exceptions. For example, section 303 of the Career Compensation Act of 1949, 37 U.S.C. § 404, authorizes advance payments of certain travel and transportation allowances to military personnel. The authority does not, however, extend to station housing allowances, 56 Comp. Gen. 180 (1976), nor does it authorize the advance payment of trailer allowances, 39 Comp. Gen. 659 (1960), or rental vehicle expenses, 54 Comp. Gen. 764 (1975). The advance payment statute has also been held to prohibit advances to a military member for the travel of dependents incident to the member's release from active duty. 40 Comp. Gen. 77 (1960).

The exceptions in this area relate to various allowances. The advance payment of salary remains prohibited. In 1979, the Treasury Department proposed to authorize the use of imprest funds to make partial salary payments to new Federal employees early in the week following the first week of employment. The objective was to minimize the hardship on

new employees resulting from delay in receiving their first regular paycheck. GAO concurred, but cautioned that, in view of 31 U.S.C. § 529, no payments could be made before the work had been performed, that is, the partial payment had to be limited to payment for work already performed and could not represent an advance payment. 58 Comp. Gen. 646 (1979).

Certain tuition payments may be paid in advance. For example, legislation authorizing the Coast Guard to provide training for its personnel at private or State colleges and universities and to pay certain expenses including tuition was viewed as authorization by "other law" within the meaning of 31 U.S.C. § 529. Tuition could therefore be paid at the time of enrollment if required by the educational institution. 41 Comp. Gen. 626 (1962). See also B-70395, October 30, 1947 (tuition payments by Public Health Service in connection with research fellowships); B-56585, May 1, 1946 (tuition payments by the Veterans Administration in connection with schooling of veterans). An exception is also provided in the Government Employees Training Act, 5 U.S.C. § 4109.

Exceptions to the advance payment prohibition may appear in appropriation acts as well as permanent legislation. An exception in an appropriation act will, of course, be limited to the appropriation(s) in the act to which it applies, unless it can be construed as permanent legislation. (See Chapter 2, Section F, this Manual.) Also, the bona fide need rule (supra, this Chapter) would apply. In one case, a FY 1955 appropriation for an Indian education program included authority for the Bureau of Indian Affairs to make certain payments in advance. Since funds can be obligated only for the bona fide needs of the period for which appropriated, the Comptroller General held that the advance payment authority was limited to the portion of the program to be furnished during FY 1955 and could not operate to extend the period of availability of the appropriation, i.e., could not be used to pay for portions of the program extending into FY 1956. 34 Comp. Gen. 432 (1955). This principle would be equally applicable to advance payment authority contained in permanent legislation.

(2) Lease and Rental Agreements

The advance payment statute has been consistently construed as applicable to lease or rental agreements as well as purchases, and applies with respect to both real and personal property. 3 Comp. Gen. 542 (1924); 18 Comp. Gen. 839 (1939); B-188166, June 3, 1977. Thus, when the Government acquires land by leasing, payments must be made "in arrears"

unless the applicable appropriation statute or other law provides an exemption from 31 U.S.C. § 529. 19 Comp. Gen. 758, 760 (1940). In 57 Comp. Gen. 89 (1977), the Comptroller General held that a leasing arrangement of telephone equipment called "tier pricing," under which the Government would be obligated to pay the contractor's entire capital cost at the outset of the lease, would violate 31 U.S.C. § 529. See also 58 Comp. Gen. 29 (1978).

Certain long-term lease/rental agreements may present more complicated problems in that they may involve not only 31 U.S.C. § 529 but also the Antideficiency Act, 31 U.S.C. § 665. Since appropriations are made only for the bona fide needs of a particular fiscal year, and since a lease purporting to bind the Government for more than one fiscal year would necessarily include the needs of future years, such a lease would be contrary to the Antideficiency Act prohibition against contracting for any purpose in advance of appropriations made for such purpose. Thus, a lease agreement for the rental of nitrogen gas cylinders for a 25-year period, the full rental price to be paid in the first year, would violate both statutes. 37 Comp. Gen. 60 (1957). A contractual arrangement on an annual basis with an option in the Government for renewal from year to year was seen as the only way to accomplish the desired objective. Id., at 62. See also 19 Comp. Gen. 758, supra. For further discussion, see Chapter 5, this Manual, and Rollee H. Efros, "Statutory Restrictions on Funding of Government Contracts," 10 Pub. Cont. L. J. 255, 267-269 (1979).

(3) Publications

Specific authority exists in 31 U.S.C. § 530a to make advance payments for "subscriptions or other charges for newspapers, magazines, periodicals, and other publications for official use," notwithstanding the prohibition of 31 U.S.C. § 529. Prior to 1974, a number of questions arose over the meaning of "other publications" 5/ and, based on

5/ A number of earlier decisions will be found in which the sole issue was whether a given item constituted a "periodical" as opposed to a "publication." E.g., 37 Comp. Gen. 720 (1958); 17 Comp. Gen. 455 (1937); A-90102, September 3, 1938. These decisions arose under an obsolete version of 31 U.S.C. § 530a and should be disregarded. This factor combined with the subsequent enactment of 31 U.S.C. § 530b, discussed in the text, render many of the pre-1974 decisions on section 530a obsolete. The validity of a given decision must be assessed in light of the present statutory language.

judicial precedent, GAO construed the term to mean publications in the customary and usually understood sense of the word, that is, books, pamphlets, newspapers, periodicals, or prints. B-125979, June 14, 1957. In other words, the authority in 31 U.S.C. § 530a applied to items which must be read as contrasted to items which are made to be heard. 48 Comp. Gen. 784 (1969). Under this rule, microfilm products were held to be publications, 41 Comp. Gen. 211 (1961), as were 35 millimeter slides, 48 Comp. Gen. 784, supra. However, the term "publications" was held not to include phonograph records. B-125979, supra; 21 Comp. Gen. 524 (1941). Nor did it include tape-recorded material. 46 Comp. Gen. 394 (1966); B-137516, October 28, 1958. In 35 Comp. Gen. 404 (1956), the use of advance payments for the procurement of books through "book club" facilities was held permissible.

In 1974, Congress resolved the problems over the interpretation of "other publications" by enacting 31 U.S.C. § 530b. That statute defines "other publications" for purposes of 31 U.S.C. § 530a to include "any publication printed, microfilmed, photocopied, or magnetically or otherwise recorded for auditory or visual usage."

The question next presented was whether a microfilm library could be acquired under a lease/rental arrangement or whether the advance payments were authorized only where the Government actually purchased the library. The Comptroller General concluded that in the absense of statutory language or evidence of legislative intent to the contrary, there is no meaningful difference between the purchase and rental of publications needed by the Government, and that the rental or leasing of a microfilm library for official Government use fell within the purview of 31 U.S.C. § 530a. 57 Comp. Gen. 583 (1978). However, advance payments for items of equipment necessary for use in conjunction with a microfilm library are still prohibited. B-188166, June 3, 1977.

(4) Advance Payments to State and Local Governments

The Comptroller General has not applied the advance payment prohibition to State and local governments because the primary purpose of the prohibition is to preclude the possibility of loss in the event a contractor, after receipt of payment, should fail to perform his contract and refuse or fail to refund the money to the Government. The danger of such a loss is minimized when a State or local government is the contractor. 57 Comp. Gen. 399 (1978). This exception, however, applies only where the State furnishes noncommercial services reasonably available only from the State. 39 Comp.

Gen. 285 (1959) (sewer service charge); B-118846, March 29, 1954 (expenses of State Water Commissioner administering Indian irrigation project pursuant to court order); B-109485, July 22, 1952 (repair, operation, and maintenance of roads in conjunction with permanent transfer of Federal roads to county); B-34946, June 9, 1943, and B-65821, May 29, 1947 (State court fees and other items of expense required to litigate in State courts in compliance with the requirements of State law); B-36099, August 14, 1943 (lease of State lands); and B-35670, July 19, 1943 (State forest fire prevention and suppression services). Conversely, where a State provides the Federal Government with services that are freely and readily available in the commercial market, the statutory advance payment restrictions applicable to private contractors govern. 58 Comp. Gen. 29 (1978) (telephone services).

The same reasoning naturally applies to payments to another Federal entity. Thus, 31 U.S.C. § 529 does not prohibit advance payment for post office box rentals. 25 Comp. Gen. 834 (1946). Also, the Economy Act, 31 U.S.C. § 686 (Chapter 8, this Manual), expressly authorizes advance payments for transactions within its scope.

The exception recognized in the case of State and local governments does not extend to public utilities. 42 Comp. Gen. 659 (1963) (telephone services). See also 27 Comp. Dec. 885 (1921).

D. DISPOSITION OF APPROPRIATION BALANCES

(1) Unobligated Balances

Annual funds which remain unobligated at the end of the fiscal year are said to "expire" and no longer remain available for obligation. The unobligated balances of fixed-year appropriations must be withdrawn by November 15 of the fiscal year following the fiscal year in which the period of availability expires and returned to the general fund of the Treasury or to the source from which they were derived. 31 U.S.C. § 701. Unobligated balance is defined as "the difference between the obligated balance and the total unexpended balance." 31 U.S.C. § 701(c).

No-year appropriations must also be withdrawn and redeposited into the general fund of the Treasury if they become inactive. The unobligated balances of no-year appropriations revert to the Treasury when the head of the agency concerned determines that the purposes for which the appropriation was made have been fulfilled, or when a disbursement has not been made against the appropriation for two consecutive fiscal years (even though it was initially established to remain available until expended). 31 U.S.C. § 706 (Section A, this Chapter).

This principle also applies to revenues earned by a Government agency where Congress has authorized the agency to retain such revenues without any fiscal year limitations. For example, in subsection 111(h) of the Energy Reorganization Act of 1974, as added by Pub. L. No. 95-238 (to be codified as 42 U.S.C. § 5821(h)), Congress made provision for the Department of Energy to retain revenues from uranium enrichment services and use them to offset the costs of providing such services, the funds to remain available until expended. However, since under 31 U.S.C. § 706, the unobligated balance of a no-year appropriation must be withdrawn and redeposited in the general fund of the Treasury if no disbursements have been made from the appropriation for two consecutive fiscal years, the Department of Energy could not retain or set aside the revenues indefinitely. B-159687-O.M., October 25, 1979.

31 U.S.C. § 701(a)(2) authorizes the restoration of withdrawn unobligated balances in order to "liquidate obligations and effect adjustments." This authority may be used to adjust obligations recorded pursuant to 31 U.S.C. § 200, the operation of which is closely related to 31 U.S.C. § 701. Subsection (a) of 31 U.S.C. § 200 establishes the documentary evidence required for recording an obligation. Subsection (d)

provides that no appropriation or fund which is limited for obligation purposes to a definite period of time (annual and multiple-year appropriations) shall be available for expenditure after expiration of the period of availability, except for liquidation of amounts obligated in accordance with subsection (a). The authority in 31 U.S.C. § 701(a)(2) to restore withdrawn unobligated balances in order to "liquidate obligations and effect adjustments" may be used to adjust obligations recorded pursuant to 31 U.S.C. § 200(a) where the amount originally recorded proves to be less than the actual amount obligated. Likewise, the restoration authority of 31 U.S.C. § 701(a)(2) may be used to liquidate "new obligations" which arose but were not formally recorded prior to the appropriation's expiration, provided that the obligations meet one of the criteria specified in 31 U.S.C. § 200(a) and are otherwise valid. B-164031(3).150, September 5, 1979; B-179708-O.M., June 24, 1975.

Similarly, where an appropriation expires and the unobligated balance has been returned to the Treasury, and the agency later discovers that due to its own misinterpretation of a statutory payment formula, underpayments have resulted, the agency may adjust its error by seeking restoration of any unobligated balances from the fiscal year appropriations in question or, in the alternative, request a supplemental appropriation. B-167553-O.M., April 9, 1979. The restoration authority was designed to afford the agencies necessary flexibility. However, arbitrary deobligation in reliance upon the restoration authority to make subsequent adjustments is not consistent with the statutory purpose. B-179708-O.M., July 10, 1975. 31 U.S.C. § 706 provides similar restoration authority for withdrawn no-year funds.

Where Congress enacts legislation extending the obligational availability of a fiscal year appropriation into the subsequent fiscal year, the legislation creates new budget authority in the amount of the unobligated balance at the close of the earlier fiscal year and is not required to be withdrawn pursuant to 31 U.S.C. § 701. See B-201110-O.M., December 30, 1980.

In impoundment litigation it may be alleged that a Government agency has deliberately failed to incur obligations against a fiscal year appropriation with the intent of allowing the unobligated balance to expire and be returned to the Treasury. Where, in this context, a court grants a preliminary order requiring obligation of the appropriation, the Comptroller General has held that such an order, when entered within the period of appropriation availability, is

consistent with normal concepts permitting obligations based on bona fide fiscal year needs and effectively establishes a valid obligation against the unobligated balance of the appropriation in question. 54 Comp. Gen. 962 (1975); B-115398.48, December 29, 1975.

(2) Obligated Balances--"M" Accounts

As indicated in Section A of this Chapter, obligated balances of annual and multiple-year appropriations remain available beyond expiration to liquidate properly made obligations. Upon the close of the period of obligational availability, the unobligated balance, as noted, expires and must be returned to the Treasury. The obligated balance retains its fiscal year identity for two full fiscal years following the expiration date. On September 30 of the second full fiscal year, any remaining obligated but unexpended balance is transferred to a consolidated successor account, where it is merged with the obligated balances of all other appropriation accounts of that department or agency for the same general purpose. 31 U.S.C. § 701. This successor account is known as the "M" account. Funds in the "M" account are available indefinitely to liquidate obligations properly incurred against any of the appropriations from which the account is derived. 31 U.S.C. § 702. Thus, as of September 30, 1980, the "M" account for a given agency will consist of the consolidated obligated balances of fixed-year appropriations which expired for obligation in fiscal year 1978 and earlier.

Upon merger in the "M" account, the obligated but unexpended balances of all annual and multiple-year appropriations of the agency or department lose their fiscal year identity for expenditure purposes. Accordingly, most questions regarding "M" accounts concern determinations of whether current fiscal year funds or the successor account is chargeable with a specific obligation.

For example, the Comptroller General held that since the annual leave of a Federal employee becomes a valid obligation against the appropriations current at the time it is taken, neither the obligated nor the unobligated balances from prior year appropriations could be used by the Postal Service to pay for the earned and unused annual leave of employees of the former Post Office Department. 50 Comp. Gen. 863 (1971). In another case, however, a Federal employee was charged with leave without pay because he did not have sufficient accumulated sick leave. This was later held to be erroneous. Recredited sick leave and payment to the employee for the period of leave without pay was held to be payable from the "M" account to which the balances of salary funds from prior years had been transferred. The payment was a debt or obligation owing to the employee in the year in which he was erroneously charged leave without pay. 47 Comp. Gen. 308 (1967).

Similarly, where an agency is required to pay the Government's contribution to an employee's Civil Service Retirement or Social Security account pursuant to a judgment awarding back pay (see Chapter 12, Section E(2), this Manual), payment should be charged to the appropriation that would have been charged had the payment been made when it was originally due. If, because of the time involved, more than one appropriation is affected, the charge should be apportioned among the appropriations involved, including the "M" account if applicable. 58 Comp. Gen. 115, 119 (1978).

An "M" account is available for payment of any obligation attributable to any of the appropriations from which it is derived. Payments from an "M" account need not be related to specific balances of appropriations transferred to it. Thus, as a practical matter, once an appropriation balance reaches the "M" account, it is no longer susceptible to violations of the Antideficiency Act, 31 U.S.C. § 665(a). B-179708-O.M., June 24, 1975.

However, this is not true during the two fiscal years prior to transfer to the "M" account. Since an appropriation retains its fiscal year identity during those two years, obligations against the appropriation liquidated before transfer to the "M" account can only be paid from the individual appropriation account, and the potential for violation of the Antideficiency Act does exist during the two-year period between expiration and transfer to the "M" account. In this connection, 31 U.S.C. § 703 provides in part:

> "If the undisbursed balance in any account [established pursuant to 31 U.S.C. §§ 701-708] exceeds the obligated balance pertaining thereto, the amount of the excess shall be withdrawn in the manner provided by section 701(a)(2) of this title; but if the obligated balance exceeds the undisbursed balance [this may happen if previously unrecorded obligations are identified or if previously recorded obligations are adjusted upward], the amount in excess, not to exceed the remaining unobligated balances of the appropriations available for the same general purposes, may be restored to such account."

Accordingly, where identifiable obligations during the two-year period exceed the entire undisbursed appropriated balance--both obligated and unobligated--such excess constitutes an Antideficiency Act violation and can only be liquidated pursuant to a deficiency appropriation.

B-179708-O.M., June 24, 1975. (Presumably this principle would apply equally to "M" accounts. That is, an Antideficiency Act violation could occur if identifiable obligations exceeded the entire "M" account balance plus the aggregate of all funds potentially restorable under 31 U.S.C. § 703. This possibility is highly remote.)

By enacting 31 U.S.C. §§ 701-708, Congress has provided an exclusive method for the payment of obligations chargeable to expired appropriations. Thus, it has been held that the use of a trust fund account or working fund for this purpose is unauthorized. B-101860, December 5, 1963. (See also 31 U.S.C. § 628-1 which prohibits the transfer of appropriations to a working fund without statutory authority.)

A 1975 decision illustrates several of the concepts discussed in this Section. In 1973, the Postal Service determined that the Library of Congress was not entitled to a special subsidized rate it had used in the past. There was some initial confusion as to whether the decision applied to FY 1973 as well as future years. The increased rate was ultimately determined to be applicable to FY 1973, but the clarification did not occur until FY 1974. The Postal Service then billed the Library for the increased postal charges for both years. The Library requested a deficiency appropriation for FY 1973 and a supplemental appropriation for FY 1974. Congress approved the supplemental but denied the deficiency request. The Library then asked GAO how to treat the amount still due for FY 1973.

The ensuing decision--B-114874, September 16, 1975--concluded as follows:

1. The action of Congress in failing to approve the deficiency appropriation request did not discharge the Library's obligation as a matter of law.

2. The Library should use the restoration authority of 31 U.S.C. § 701(a)(2) to satisfy the obligation to the extent of any remaining expired unobligated balance from that year.

3. The Library could not use its "M" account due to the pendency of the Postal Service's claim prior to transfer of the FY 1973 appropriation balances into the "M" account.

4. Since obligations chargeable to a particular fiscal year may be paid only from appropriations available for the service of that fiscal year, the Library could not use current or future appropriations (unless, of course, made for that purpose). Thus, to the extent restoration action was insufficient to liquidate the entire obligation, any remaining balance would have to remain unsatisfied.

(3) Lapsed Appropriations: Note on Terminology

At the close of a fiscal year, annual appropriations made for that year cease to be available for obligation--that is, they expire. The term "lapsed appropriation" is sometimes used to refer to an expired appropriation, but the terms are not the same.

Prior to 1949, unexpended balances of annual appropriations retained their fiscal year identity for two full fiscal years following expiration, the same as obligated balances still do under current law. At the end of the two fiscal years, the remaining undisbursed balance had to be covered into the surplus fund of the Treasury. Subsequent claims against the appropriation had to be settled by GAO. E.g., B-24565, April 2, 1942; B-18740, July 23, 1941. It was at this point--two fiscal years after the expiration of the period of availability--that the appropriation was said to "lapse," that is, it lapsed when it was covered into the surplus fund of the Treasury. See 21 Comp. Gen. 46 (1941).

The problem with this arrangement was that, in view of Article I, Section 9 of the Constitution (Chapter 2, Section C, this Manual), once the money was covered into the Treasury, another appropriation was needed to get it back out. E.g., 23 Comp. Gen. 689, 694 (1944). Congress used various devices to pay claims against lapsed appropriations--reappropriation of lapsed funds, definite and indefinite appropriations for the payment of claims under $500, and appropriations for specific claims--but none proved entirely satisfactory.

In 1949, Congress enacted the Surplus Fund-Certified Claims Act (63 Stat. 407), intended to permit payment of claims against lapsed appropriations without the need for specific appropriations or reappropriations. The statute provided for the transfer of unexpended balances remaining after two years to a Treasury account designated "Payment of certified claims." Funds in this account remained available until expended for the payment of claims certified by the Comptroller General to be lawfully due and chargeable to the respective balances in the account. See B-61937, September 17, 1952. The term "lapsed appropriation" continued to be used, now referring to the balances transferred to the "Payment of certified claims" account. Although the concept had changed somewhat, the essence of the term was still an appropriation which had lost its fiscal year identity and which had ceased to be available to the agency to liquidate prior obligations.

The present statutory scheme, discussed previously in this Section, derives from legislation enacted in 1956 (70 Stat. 647). The most significant change made by the 1956 law was to pass the direct responsibility for making payments from "lapsed appropriations" from GAO to the cognizant agencies, that is, to permit agency disposition of clearly valid claims against prior year appropriations in lieu of submission of all such charges to GAO. Thus, there is no longer a point beyond which unexpended balances cease to be available to the agency for the liquidation of prior obligations, and in this sense appropriations no longer "lapse." To the extent that there is any residual meaning to the term "lapsed appropriation," it would refer simply to obligated balances which, upon transfer to the applicable "M" account, have lost their fiscal year identity. In any event, the terms "expired appropriation" and "lapsed appropriation" are not synonymous.

The statutory evolution outlined above is discussed in more detail in B-179708-O.M., November 20, 1973.

(4) Repayments and Deobligations

31 U.S.C. § 701(c) provides that the obligated balance of an appropriation account as of the end of a fiscal year shall be the amount of unliquidated obligations applicable to such appropriation less the amount collectible as repayments to the appropriation. Collections not received until after the transfer of the obligated balance to the "M" account are to be creditied to the "M" account unless otherwise authorized by law. Section 701(c) further provides that "any collection made by the General Accounting Office for other Government agencies may be deposited into the Treasury as miscellaneous receipts."

The term "repayments" within the meaning of section 701(c) has been defined in Treasury Department-GAO Joint Regulation No. 1 to include two general categories:

(a) Reimbursements to appropriations which represent amounts collected from outside sources for commodities or services furnished or to be furnished, and which by law may be credited directly to appropriations, that is, which are not required by 31 U.S.C. § 484 to be deposited as miscellaneous receipts. (See Chapter 5, this Manual.)

(b) Refunds to appropriations which represent amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, including returns of authorized advances.

See also Title 7, GAO Policy and Procedures Manual. With respect to an agency's authority to credit repayments to the disbursing appropriation, see 5 Comp. Gen. 734, 736 (1926); 6 Comp. Gen. 337 (1926); B-138942-O.M., August 26, 1976. Excess obligations which are later deobligated are accounted for in the same manner as repayments. See 52 Comp. Gen. 179 (1972). For more detailed discussion, see Chapter 5, this Manual.

Where a transaction between Government agencies is governed solely by the Economy Act, 31 U.S.C. § 686 (Chapter 8, this Manual), reimbursements for work, service, or other materials must be credited to the fiscal year appropriations which earned them, regardless of when the reimbursements are collected. If the appropriation which earned the reimbursement

remains available at the time of collection, there is no distinction between a credit to the year earned or to the year collected. If, however, the appropriation which earned the reimbursement has expired for obligation purposes at the time of collection, then reimbursement can only be credited to the expired account or to the appropriate "M" account, as the case may be. B-179708-O.M., December 1, 1975; B-194711-O.M., January 15, 1980.

The subject of reimbursements to appropriations within the Department of Defense has been discussed in a report of the Comptroller General entitled "Reimbursements to Appropriations: Legislative Suggestions for Improved Congressional Control," FGMSD-75-52, November 1, 1976.

Under the discretionary authority granted to GAO by 31 U.S.C. § 701(c), collections made by GAO on debts referred to it by another agency as uncollectible involving appropriation or fund accounts other than trust or deposit fund accounts are deposited as miscellaneous receipts, notwithstanding the authority of the referring agency to otherwise make use of the collections. Collections applicable to trust or deposit fund accounts are deposited directly into the Treasury for credit to the applicable fund. B-138706, May 13, 1963 (circular letter); B-138706-O.M., October 1, 1963; B-156011, April 30, 1965; B-156343, January 17, 1966. See also 4 GAO Section 71. This policy, however, does not govern the disposition of funds collected by the Justice Department rather than by GAO. B-152247, December 13, 1965.

If an agency deobligates funds after the expiration of the period of availability, the funds are not available for any new obligation and must be returned to the Treasury (except for permissible replacement contracts, supra). To avoid this result, Congress may, by statute, authorize an agency to reobligate any such deobligated sums. This is called deobligation-reobligation ("deob-reob") authority. Deobligation-reobligation authority is not necessary for no-year funds, and this is true even though Congress may have eliminated such authority with respect to certain fiscal year appropriations of the same agency. B-200519, November 28, 1980.

CHAPTER 5

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CHAPTER 5

AVAILABILITY OF APPROPRIATIONS AS TO AMOUNT

A. INTRODUCTION--TYPES OF APPROPRIATION LANGUAGE

The two preceding Chapters have discussed the purposes for which appropriated funds may be used and the time limits within which they may be obligated and expended. This Chapter will discuss the third major element of the concept of the "legal availability" of appropriations--restrictions relating to amount. It is not enough to know what you can spend appropriated funds for and when you can spend them. You must also know how much you have available for a particular object.

In this respect, the legal restrictions on Government expenditures are different from those governing your spending as a private individual. For example, as an individual, you can buy a house and finance it with a mortgage that may run for 25 or 30 years. Of course you don't have enough money to cover your full legal obligation under the mortgage. You sign the papers on the hope and assumption that you will continue to have an income. If your income stops and you can't make the payments, you lose the house. The Government cannot operate this way. The main reason why is the Antideficiency Act, discussed in Section B.

The foundation of our Government is the doctrine of "separation of powers" established by the Constitution. Congress, presumably reflecting the will of the people, makes the laws and provides the money to implement them. The executive branch carries out the laws with the money Congress provides. Under this system, Congress, not the executive branch, must have the "final word" as to how much money can be spent by a given agency or on a given program. In exercising this power, Congress may give the executive branch considerable discretion within broad limits, but it is ultimately up to Congress to determine how much the executive branch can spend. In applying this theory to the day-to-day operations of the Federal Government, it should be readily apparent that restrictions on purpose, time, and amount are very closely related. Again, the Antideficiency Act is one of the primary "enforcement devices." Various other applications of the theory are covered in Sections C, D, and E.

Congress has been making appropriations since the beginning of the Republic. Over the course of this time, certain forms of appropriation language have become standard. The remainder of this Section will point out the more commonly used language.

Congress may wish to "earmark" part of a more general lump-sum appropriation for a particular object, as either a maximum, a minimum, or both. For simplicity of illustration, let us assume that we have a lump-sum appropriation of $1,000 for "smoking materials" and a particular object within that appropriation is "Cuban cigars."

If the appropriation specifies "not to exceed" $100 for Cuban cigars or "not more than" $100 for Cuban cigars, then $100 is the maximum available for Cuban cigars. 15 Comp. Dec. 660 (1909).

If the entire $100 is not used for Cuban cigars, unobligated balances may--within the time limits for obligation--be applied to the other objects of the appropriation. B-4568, June 27, 1939.

If later in the fiscal year a supplemental appropriation is made for "smoking materials," the funds provided in the supplemental may not be used to increase the $100 maximum for Cuban cigars unless the supplemental appropriation act so specifies. See Section E, this Chapter.

Similarly, if the agency has limited transfer authority, an authorized transfer of funds to the "smoking materials" appropriation may not be used to increase the $100 limit on Cuban cigars absent more specific statutory authority. 18 Comp. Gen. 211 (1938). (It must be emphasized that we are talking about amounts earmarked from a more general lump-sum appropriation. This would not apply if the "Cuban cigar" item were a separate appropriation.)

Words like "not to exceed" are not necessary to establish a maximum limitation. If the appropriation includes a specific amount for a particular object (such as "For Cuban cigars, $100"), then the appropriation is a maximum which may not be exceeded. 16 Comp. Gen. 282 (1936); 19 Comp. Gen. 892 (1940); 36 Comp. Gen. 526 (1957).

If a lump-sum appropriation includes several particular objects and provides further that the appropriation "is to be accounted for as one fund" or "shall constitute one fund," then the individual amounts are not limitations, the only

limitation being that the total amount of the lump-sum appropriation cannot be exceeded. However, individual items within that lump-sum appropriation that include the "not to exceed" language will still constitute maximum limitations. 3 Comp. Dec. 604 (1897); A-79741, August 21, 1936. The "one fund" language is uncommon.

If Congress wishes to specify a minimum for the particular object but not a maximum, the appropriation act may provide "Smoking materials, $1,000, of which not less than $100 shall be available for Cuban cigars." B-137353, December 3, 1959. If the phrase "not less than" is used, in contrast with the "not to exceed" language, portions of the $100 not obligated for Cuban cigars may not be applied to the other objects of the appropriation.

Another phrase Congress often uses to earmark a portion of a lump-sum appropriation is "shall be available." There are variations. For example, our hypothetical $1,000 "smoking materials" appropriation may provide that, out of the $1,000, $100 "shall be available" or "shall be available only" or "shall be available exclusively" for Cuban cigars. Still another variation is "$1,000, including $100 for Cuban cigars." There appear to be no significant differences resulting from which variation is used.

If the "shall be available" phrase is combined with the maximum or minimum language noted above ("not to exceed," "not less than," etc.), then the above rules apply and the phrase "shall be available" adds little. See, e.g., B-137353, December 3, 1959.

However, if the earmarking phrase "shall be available" is used without the "not to exceed" or "not less than" modifiers, the rules are not quite as firm. At the very least, the earmarking language will indicate a minimum which may not be applied to other objects within the appropriation. Also, it will normally indicate a maximum as well. However, the phrase is capable of being read as a mere earmarking to assure the availability of the specified sum. Thus, the phrase may be construed as establishing a minimum but not a maximum if there is a clear indication in the legislative history that this is what Congress intended. For the application of these rules, see the following:

--"Shall be available only": 18 Comp. Gen. 1013 (1939); 53 Comp. Gen. 695 (1974); B-142190, March 23, 1960; B-70933, March 1, 1948; B-70933, December 11, 1947.

--"Shall be available exclusively": B-102971, August 24, 1951; B-113272-O.M., May 21, 1953; B-111392-O.M., October 17, 1952.

--"Shall be available": B-137353, December 3, 1959; B-128943, September 27, 1956; B-5526, September 14, 1939; B-137353-O.M., October 14, 1958.

--"Including": A-99732, January 13, 1939.

As indicated, the construction is the same regardless of which variation is used.

Finally, earmarking language may be found in appropriation authorization acts as well as appropriation acts. The relationship between the two types of legislation is discussed in Chapter 2, this Manual.

B. THE ANTIDEFICIENCY ACT

(1) Introduction

The so-called Antideficiency Act, 31 U.S.C. § 665, 1/ is the linchpin of the legislative machinery established to protect and preserve the congressional power of the purse. 2/

It is no secret that for many years after the Constitution was adopted, executive departments and agencies paid little attention to congressional spending limitations. Obligations were made in excess of or in advance of appropriations. Funds were commingled or used for purposes far different than the purposes for which they were appropriated. And most egregious of all, the departments and agencies would spend their entire fiscal year appropriations during the first few months of the year and then present the Congress with a list of "coercive deficiencies." These were obligations to others who had fulfilled their part of the bargain with the United States and who now had a moral--and possibly also a legal--right to be paid. The Congress felt it had no choice but to fulfill these commitments, but the frequency of deficiency appropriations played havoc with the United States budget. 3/

The first true precursor of the present Antideficiency Act was enacted in 1870 (Act of July 12, 1870, 16 Stat. 251). In 1905, the Act was amended to give it teeth (Act of March 3, 1905, 33 Stat. 1257), and was further tightened the very next year (Act of February 27, 1906, 34 Stat. 48). It assumed its final form in 1950, complete with criminal penalties and civil sanctions for violations (Act of September 6, 1950, 64 Stat. 765).

1/ The Antideficiency Act is often cited by its older designation, Revised Statutes (R.S.) § 3679. The United States Code citation is used throughout this Manual because the text of the law is more readily accessible in that form.

2/ "No money shall be drawn from the Treasury but in consequence of appropriations made by law." U.S. CONST., Art. I, sec. 9.

3/ See Annals of Congress, 10th Cong., 2d Sess. Senator Hillhouse recited an incredible litany of agency abuses to support a resolution be introduced on February 14, 1809, to look into ways to correct the situation.

It is important to understand that the Antideficiency Act is just one of the legislative solutions to the problem of irresponsibility on the part of Government servants entrusted with the duty to spend the taxpayers' dollars properly. The various restrictions discussed throughout this Manual are closely related. Thus, this Section should be read in conjunction with the discussion of the "Adequacy of Appropriations Act," 41 U.S.C. § 11 (Chapter 8), the purpose restrictions of 31 U.S.C. § 628 (Chapter 3), the "one year rule" of 31 U.S.C. § 712a (Chapter 4), and the Advance Payment Statute, 31 U.S.C. § 529 (Chapter 4).

The fiscal principles inherent in the various subsections of the Antideficiency Act are really quite simple. The idea is to "pay-as-you-go." Government officials are warned not to make payments--or to commit the United States to make payments at some future time--for goods or services unless there is enough money in the "bank" to cover the cost in full. The "bank," of course, is the available appropriation.

The combined effect of the various funding restriction statutes was summarized in a 1962 decision. The summary has been quoted in numerous later Antideficiency Act cases and bears repeating here:

> "These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made." 42 Comp. Gen. 272, 275 (1962).

To the extent it is possible to summarize appropriations law in a single paragraph, this is it.

In its current form, the Antideficiency Act contains 9 subsections, designated (a) through (i). The remainder of this Section will discuss each of these subsections in sequence. A concise summary of the entire Act may be found in B-131361, May 9, 1957.

Further discussion, from varying perspectives, will be found in the following sources:

--Efros, Rollee H., Statutory Restrictions on Funding of Government Contracts, 10 Public Contract Law Journal 254 (Dec. 1978).

--Fenster, Herbert H., and Christian Volz, The Antideficiency Act: Constitutional Control Gone Astray, 11 Public Contract Law Journal 155 (No. 1, Nov. 1979).

--Frazier, John R., Col., Use of Annual Funds with Conditional, Option, or Indefinite Delivery Contracts, 8 A.F. JAG L. Rev. 50 (No. 2, Mar.-Apr. 1966).

--Hopkins, Gary L., Major, and Lt. Col. Robert M. Nutt, The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51 (1978).

--Spriggs, William J., The Anti-Deficiency Act Comes to Life in U.S. Government Contracting, 10 National Contract Management Journal 33 (Winter 1976-77).

(2) Obligation/Expenditure in Excess or Advance of Appropriations (Subsection (a))

> "No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law." 31 U.S.C. § 665(a).

This subsection is the key provision of the Act. In fact, for a long period, it was the only provision, the others being added to ensure enforcement of the basic prohibitions of subsection (a).

There are two distinct prohibitions in subsection (a). Unless otherwise authorized by law, no officer or employee of the United States shall make (or authorize the making of) an expenditure, or create or involve (or authorize the creation or involvement of) the United States in any contract or obligation to make future expenditures, in the absence of sufficient funds in the account to cover the payment or the obligation at the time it is made or incurred. Put another way, the two sets of prohibitions are concerned with:

--Making expenditures or incurring obligations in excess of available appropriations; and

--Making expenditures or incurring obligations in advance of appropriations.

There is a tendency on the part of financial officers of the Government to perceive a violation only when a payment becomes due and their accounts are overdrawn. It is important to realize that the very act of obligating the United States to make a payment when the necessary funds are not already in the account is also a violation of this subsection.

(a) Making Payments When Appropriation Is Exhausted

In many ways, the prohibitions in the Adequacy of Appropriations Act, 41 U.S.C. § 11, are parallel to those of subsection (a). For example, a contract in excess of the available appropriation violates both statutes. E.g.,

9 Comp. Dec. 423 (1903). However, a contract in compliance with 41 U.S.C. § 11 can still result in a violation of the Antideficiency Act. Presumably, if a contract is entered into and there are sufficient funds available when the contract is signed, there is no violation of 41 U.S.C. § 11. The Antideficiency Act, however, anticipates a further development. Suppose there are sufficient funds available when a particular contract is signed, but during the period before payment becomes due, the agency makes a number of payments to other contractors or incurs a number of other obligations, all charged to the same appropriation account, and finds it has nothing left to pay the contract in question.

The most serious violation of subsection (a) in recent years was uncovered in 1975 in connection with the Department of the Army's customer order program, under which the Army furnished equipment, material, and services ordered by foreign governments and other Government agencies, both military and civilian. For a variety of reasons, Army discovered around November of 1975 that its accounts were some $225,000,000 short and it had to halt payments to some 900 contractors. The Army asked and received the Comptroller General's advice on a number of courses of action. 55 Comp. Gen. 768 (1976). (Some of the options are discussed under Subsection (b), infra.) The Army acknowledged that there were adequate funds available when all the contracts were signed and therefore the contractors all had valid, enforceable obligations. (See subsequent discussion on "Status of Contracts When Appropriation Is Exhausted".) It was clear that without a deficiency appropriation, all the contractors could not be paid. There is no authority to apply current funds to pay off debts incurred in a previous year. See also B-14331, January 24, 1941. GAO sanctioned a reduction in the amount of the deficiencies by terminating some of the contracts for convenience, although the termination cost would still have to come from the deficiency appropriation unless there was enough left in the appropriation account to cover them.

(b) Status of Contracts When Appropriation Is Exhausted.

There are two separate lines of court cases which discuss the effect of the exhaustion of appropriations on Government obligations. The difference seems to lie in the presence or absence of notice to the contractor--constructive or actual--on the limitations of the appropriation involved. In Ferris v. United States, 27 Ct. Cl. 542

(1892), the plaintiff had a contract with the Government to dredge a channel in the Delaware River. The Corps of Engineers made him stop work halfway through the job because it had run out of money. In discussing his rights in a breach of contract suit, the Court held:

> "An appropriation per se merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." Id., at 546.

See also Dougherty v. United States, 18 Ct. Cl. 496 (1883), and two Capehart Housing Act cases, Anthony P. Miller, Inc. v. United States, 348 F.2d 475 (Ct. Cl. 1965), and Ross Construction Corp. v. United States, 392 F.2d 984 (Ct. Cl. 1968). In the latter two cases, the Court explained that it made a distinction between contractors paid out of a general appropriation and those contracts for which a specific and limited appropriation is made by the Congress. The former are not barred from recovering damages for breach of contract even though the appropriation is exhausted, because the contractor "cannot justly be expected to keep track of appropriations where he is but one of several being paid from the fund." Ross, supra, at 987.

In another line of cases, where the appropriation was specifically made for a particular contract, the contractor was deemed to have notice of the limits on the spending power of the Government official with whom he contracted. See Hooe v. United States, 218 U.S. 322 (1910); Sutton v. United States, 256 U.S. 575 (1921). Such a contract was valid only up to the amount of the available appropriation. If the contract became under-funded due to unexpected expenses or extra work ordered, it was a "nullity" to the extent that appropriations were exceeded.

(c) Intent/Factors Beyond Agency Control

A violation of the Antideficiency Act does not depend on the lack of good faith or innocence of the contracting officials who obligate or pay in advance or in excess of appropriations. The Comptroller General once expressed the principle as follows; although stated in a slightly different context, it is equally applicable here:

"Where a payment is prohibited by law, the utmost good faith on the part of the officer, either in ignorance of the facts or in disregard of the facts, in purporting to authorize the incurring of an obligation the payment of which is so prohibited, cannot take the case of the statute, otherwise the purported good faith of an officer could be used to nullify the law." A-86742, June 17, 1937.

To illustrate, a contracting officer at the United States Mission to the North Atlantic Treaty Organization accepted an offer for installation of automatic telephone equipment at twice the amount of the unobligated balance remaining in the applicable account. The Department of State explained that the contracting officer had misinterpreted General Accounting Office regulations and implementing State Department procedures. But for this misinterpretation, additional funds could have been placed in the account. State therefore felt that the transaction should not be considered in violation of the Act. GAO did not agree and held that the over-obligation must be immediately reported as required by 31 U.S.C. § 665(i)(2) (discussed infra). The official's state of mind was not relevant in deciding whether a violation had occurred. 35 Comp. Gen. 356 (1955).

In 58 Comp. Gen. 46 (1978), a violation occurred because the dollar amount obligated by the Department of the Army to pay a particular German contractor in Deutsch marks, sufficient when the contract was signed, was insufficient when the payment came due since the dollar had hit an all-time low in Germany. The Army argued that a payment under these circumstances should not be considered a violation of the Act because currency fluctuations are totally beyond the control of the contracting officer or any other agency official. GAO refused to buy that argument. The fact that the contracting officer was a victim of circumstances does not make a payment in excess of available appropriations any less illegal. (It is, of course, relevant in determining whether to assess any penalties for the violation. See discussion of 31 U.S.C. § 665(i), infra.)

(d) Contracts or Obligations in Advance of or in Excess of Appropriations

It is easy enough to say that the Antideficiency Act prohibits you from obligating a million dollars when you

have only a half million left in the account, or that it prohibits you from entering into a contract in September purporting to obligate funds that will not be available until October 1. However, many of the situations that actually arise from day to day are not quite that simple.

The following passage provides a starting point:

> "[T]he recording of obligations under 31 U.S.C. § 200 is not the sole consideration in determining violations of 31 U.S.C. § 665 * * *. We believe that the words 'any contract or other obligation' as used in 31 U.S.C. § 665 encompass not merely recorded obligations but other actions which give rise to Government liability and will ultimately require the expenditure of appropriated funds." 55 Comp. Gen. 812, 824 (1976).

See also B-133170, January 29, 1975; B-163058, March 17, 1975.

The statute forbids not only the incurring of obligations beyond the period of availability but also "any other obligation or liability which may arise thereunder and ultimately require the expenditure of funds." 42 Comp. Gen. 272, 277 (1962).

The recording of obligations is covered in detail in Chapter 6, this Manual. It should be apparent that, if the Antideficiency Act is to mean anything, the actual recording of obligations cannot by itself provide a sufficient basis on which to assess potential violations. This is because, in many situations, the amount of the Government's liability is not definitely fixed at the time the obligation is incurred. An example is a contract with price escalation provisions. In other situations, such as certain contingent liability cases, the Government is not required to record any obligation unless and until the contingency materializes. Thus, while examining the actual recording of obligations is a necessary first step, it is also essential to look at what happens as the contract is executed. Concrete illustrations of these concepts can be seen by examining a number of situations grouped under the general heading "contingent contracts."

Contingent contracts: requirements vs. indefinite quantity

The Air Force had a three-year agreement with a firm to provide any service or maintenance work that might be necessary for Government aircraft landing on Wake Island. GAO

questioned the legality of the contract for more than one year, since the Air Force had only a one-year appropriation available. The Air Force argued that it was a "requirements" contract. No obligation arises unless or until some maintenance work is ordered. The only obligation is a negative one--not to buy service from anyone else but the contractor, should the services be needed. The GAO disagreed. The services covered were "automatic incidents of the use of the air field." There was no place for a true administrative determination that the services were or were not needed. There was no true "contingency"; the services would almost certainly be needed. GAO recognized that these rules create difficult problems, especially in remote spots like Wake Island, but felt that the only solution was to ask the Congress for multi-year procurement authority. 42 Comp. Gen. 272 (1962).

In contrast, see 55 Comp. Gen. 812 (1976). The exercise of one contract option required the Navy to furnish various items of Government-furnished property (GFP), but another contract clause authorized the Navy to unilaterally delete items of GFP. Since the Navy was not absolutely obligated to furnish all the GFP items at the time the option was exercised, there was no basis to use the full value of all GFP items under the contract to assess a violation of 31 U.S.C. § 665(a) or 41 U.S.C. § 11. See also 37 Comp. Gen. 688 (1958). The contracts there in question stated that listed quantities were only estimates and not a guarantee of the exact number of items that the Government would later require. Thus, a sharp reduction in the requirements of the Government did not justify a price adjustment because the estimate could not be considered a firm obligation. In another case, GAO considered a contract for mobile generator sets which specified minimum and maximum quantities to be purchased over a 12-month period to be an "indefinite quantity" or conditional contract, rather than a requirements contract. The Government was only required to obligate funds to cover the minimum quantity to avoid a violation of the Antideficiency Act, although naturally it could not elect to order the maximum quantity unless there were sufficient funds to cover the cost. 47 Comp. Gen. 155 (1967).

Where, however, there was a "complete and outright obligation" for providing and maintaining a large stock of supplies and for keeping operational a substantial quantity of equipment, if the Government ran out of funds, it would have to terminate for convenience. See 42 Comp. Gen. 272, 277 (1962).

Regardless of the terminology used to describe contracts of this sort--requirements, indefinite quantity, etc.--two points apply as far as the Antideficiency Act is concerned:

--Whether or not there is a violation at the time the contract is entered into depends on exactly what the Government is obligated to do under the contract.

--Even if there is no violation at the time the contract is entered into, a violation may occur later if the Government subsequently incurs an obligation under the contract in excess of available funds, for example, by electing to order a maximum quantity without sufficient funds to cover the quantity ordered.

The obligational treatment of this type of contract is discussed further in Chapter 6 of this Manual, Section B(1), subsection entitled "Variations in quantity to be furnished."

A conceptually related situation is a contract which gives the Government the option of two performances at different prices. The Government can enter into such a contract without violating the Antideficiency Act as long as it has sufficient appropriations available at the time the contract is entered into to pay the lesser amount. For example, the Defense Production Act of 1950 authorizes the President to contract for synthetic fuels, but the contract must give the President the option to refuse delivery and instead pay the contractor the amount by which the contract price exceeds the prevalent market price at the time the delivery is made. Such a contract would not violate the Antideficiency Act at the time it is entered as long as sufficient appropriations are available to pay any anticipated difference between the contract price and the estimated market price at the time of performance. 60 Comp. Gen. 86 (1980). Of course, the Government could not choose to accept delivery unless there were sufficient appropriations available at that time to cover the full cost of the fuel under the contract.

Contingent contracts: indemnity contracts

As a general rule, an agency may not obligate the United States to pay an indefinite or indeterminate amount of money for property damage or personal injury directly to the one injured or by way of indemnity to someone else, since it can never be said that sufficient appropriations are available to cover all possible liabilities. However, GAO did sanction a liability clause in 42 Comp. Gen. 708 (1963) which

would obligate the Government, in the event that a rented aircraft was damaged or destroyed, to pay the contractor up to the fair market value of the aircraft at the time the contract was made (less salvage value). This type of clause fixes the maximum liability by a measurable standard and is therefore not objectionable as creating an indefinite or unlimited liability.

At the time 42 Comp. Gen. 708 was decided, GAO felt that the mere possibility that payment under the clause could be required was not sufficient to require establishment of a reserve or obligation of funds to cover the contingency. This part of the decision was subsequently overruled in 54 Comp. Gen. 824 (1975). The Comptroller General held that an agency could assume the risk of loss to a contractor's property, in limited circumstances, in lieu of including insurance premiums in the cost of the contract. However, because it is conceivable that the indemnity payments could exceed available appropriations, it is still necessary to include a clause in the contract that provides that:

--In the event that the Government has to pay for losses, such payments will not entail expenditures which exceed appropriations available at the time of the losses; and

--Nothing in the contract may be considered as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

Thus, the Antideficiency Act can be violated by a contract which imposes an indefinite and potentially unlimited liability on the Government, or even by a contract which imposes a determinable though contingent liability which exceeds the amount of appropriations available for obligation at the time the contract is made, unless appropriate safeguards are provided. Indemnification agreements are discussed in more detail in Chapter 6 of this Manual.

Contingent contracts: guaranteed loans

When an agency guarantees a loan, the contingency, of course, is that the borrower will be unable to meet his obligations to the lender and the agency will have to pay the lender the agreed-upon percentage of the outstanding balance on the loan. The Economic Development Administration was authorized by statute (42 U.S.C. § 3142) to guarantee certain loans. EDA customarily obligated amounts equal to 25 percent of the total loans it guaranteed each

year to serve as a contingency reserve against losses. The question was whether it had any right to guarantee the other 75 percent of the loans if the face amount of the loans exceeded available appropriations.

GAO recognized that there was a theoretical possibility that the defaulted loans could exceed the amount of the contingency reserve or other available funds at some point, requiring a deficiency appropriation to cover the excess liability. However, there was no violation of the Antideficiency Act in view of specific statutory authority for the loan guarantee program and congressional acquiescence in this funding method. B-133170-O.M., December 22, 1977.

Generally, loan guarantees do not present Antideficiency Act problems as the statutory authority to guarantee loans is viewed as authority to incur obligations in advance of appropriations. Loan guarantees are further discussed in Chapter 14, this Manual.

Other contingent obligations

As a general rule, acceptance of a bid by a contracting officer imposes on the contractor an obligation to perform in accordance with the terms of the bid. Where, however, the advertised specifications provide that the contract is not binding on the United States until, for example, some named official of the agency approves it (14 Comp. Gen. 170 (1934)), or until the building code is complied with (15 Comp. Gen. 104 (1935)), no binding obligation arises until the contingency is satisfied.

GAO also sanctioned procedures to solicit bids and to enter into a conditional contract to construct a salt water distillation facility at St. Thomas, Virgin Islands, with a proviso that the contract would not take effect until (a) appropriate committees of the Congress approved it, and (b) authority to borrow sufficient funds from the Treasury of the United States was provided in an appropriation act. The contract had to specifically provide that no obligation to pay the contractor would arise until the conditions were fulfilled. In view of the true contingent nature of the liability, there was no violation of the Antideficiency Act. 39 Comp. Gen. 340 (1959). The contract could provide for work to be commenced after the relevant appropriation act was passed but before the funds were actually available (i.e., the first day of the new fiscal year), as long as it clearly provided that the Government was under no obligation to make any contract payments until the funds became available for expenditure. 39 Comp. Gen. 776 (1960).

"Continuing" contracts

"Continuing" contracts involve goods or services which the Government requires for a period of years. Problems arise when an agency has only one year's appropriation available, and the appropriation is insufficient to fund the agency's total needs at one time; or it finds that it could obtain a much more advantageous price from the contractor if it could only commit the Government for a longer period.

For example, the Air Force wanted to purchase computer equipment on the installment plan because it had insufficient funds to obligate the entire price in one year. The Comptroller General said:

> "The proposal to sell the equipment to the Government with payment therefor to be made over a period of years is a proposal for a sale on credit. * * * The economic advantages of a purchase over rental cannot be used to frustrate the statutory prohibition against the contracting for purchases in excess of available funds and any departure from such statutes must be authorized by Congress." 48 Comp. Gen. 494, 496 (1969)

This type of purchase may be funded by use of a no-year appropriation, such as the automatic data processing fund, 40 U.S.C. § 759(c), but there must be sufficient funds to cover the full purchase obligation. It can't be funded on the basis of yearly increments. See B-195260, July 11, 1979.

One agency thought it had found the way around the various statutory funding restrictions. It entered into a long-term lease for office space with one-year money but its contract specifically provided that payment for periods after the first year was "subject to the availability of future appropriations." In Leiter v. United States, 271 U.S. 204 (1925), the Supreme Court specifically rejected that theory. It held that the lease was binding on the Government only for one fiscal year and it ceased to exist at the end of the fiscal year in which the obligation was incurred. It takes affirmative action to bring the obligation back to life.

The GAO relied heavily on the Leiter decision in all subsequent cases involving continuing service contracts. For example, GAO refused to approve an automatic, annual renewal of a contract for repair and storage of automotive equipment, even though the contract provided that the Government had a right to terminate. The reservation of a right to terminate

does not save the contract from the prohibition against binding the Government in advance of appropriations. 28 Comp. Gen. 553 (1949).

The Post Office wanted to enter into a contract for services and storage of Government-owned highway vehicles for periods up to four years because it could obtain a more favorable flat rate per mile of operations instead of an item by item charge required if the contract was for one year only. GAO held that any contract for continuous maintenance and storage of the vehicles would be prohibited by subsection (a) because it would obligate the Government beyond the extent of the existing appropriation. However, there would be no legal objection to including a provision which gave the Government an affirmative option to renew the contract from year to year, not to exceed four years. 29 Comp. Gen. 451 (1950). See also 29 Comp. Gen. 91 (1949); B-116427, September 27, 1955; and the cases and discussion under the "One Year Rule," 31 U.S.C. § 712a, Chapter 4, this Manual.

Where a contract gives the Government a renewal option, it may not be exercised until appropriations for the subsequent fiscal year actually become available. 61 Comp. Gen. ___ (B-202222, December 31, 1981).

Note that the fact that the payment to the contractor--as opposed to the incurrence of the obligation--may not be made until the following fiscal year or later, does not mean that the contract was made in violation of subsection (a) or any of the other funding statutes. As long as the contract fixes a definite obligation on the United States, and the appropriation current when the contract was made is sufficient to pay the full obligation, there is no violation solely because payments are withheld until the work is completed or because the payments are subject to some other contingency. Again, it is the appropriation for the year in which the contract is made which is chargeable with the cost and not the appropriation for the year in which payments come due or the contingency materializes. 24 Comp. Gen. 195, 196 (1944); 23 Comp. Gen. 370 (1943); 18 Comp. Gen. 363 (1938).

The necessity for an affirmative option to renew, which, if not exercised, terminates the contract at the end of the fiscal year in which the contract was made, is pretty well accepted throughout the Government today. However, two recent companion automatic data processing (ADP) system cases introduced a new wrinkle--a clause requiring payment of "separate charges" in the event that options to renew were not exercised and the ADP system was terminated before its intended lifespan was over.

In 1976, the GAO considered a protest by the Burroughs Corporation of an award to the Honeywell Corporation to provide ADP equipment to the Mine Enforcement and Safety Administration. Honeywell, bidding on an ADP system with a 96-month lifespan, included separate charges for failure to renew at any time during the system's life, amounting to the equivalent of two years' rent or a percentage of future years' rentals to the end of the system's intended life. Not all "separate charges" are bad, GAO said, as long as payment of the charges (including any payments already made for services rendered) represents the reasonable value (e.g., the ADP schedule price) of the work already performed at termination. The problem here was that the contract specified that payments were to be based on the contractor's "list prices" at the time of termination. The "list prices" were the "current catalog prices" in effect at that time. Since the catalog prices could be raised at any time by the contractor, the Government had no way of knowing how much it had committed itself for. As discussed earlier, an indefinite indeterminate commitment violates subsection (a) because there is no way to be sure that there are sufficient funds in the appropriation to cover such a contingency. Moreover, such a commitment makes the Government's option rights largely illusory; it might not be able to afford to terminate. 56 Comp. Gen. 142 (1976); 56 Comp. Gen. 167 (1976), affirmed, 56 Comp. Gen. 505 (1977).

As a general rule, termination charges will be considered to be void as a matter of law to the extent that they provide a measure of compensation greater than that provided under the standard Termination for Convenience clause. The reason is that termination charges actually represent partial payment for (unused) future years' services, in violation of funding statutes which require that annual appropriations be spent only on bona fide needs of the Government for the current fiscal year (31 U.S.C. § 712a), and also because it violates the subsection (a) prohibition against contracts in advance of the appropriation. Thus, the maximum legal liability for termination of a "one-year" funded contract is restricted to the provisions of the Termination for Convenience clause. B-190659, October 23, 1978.

Specific appropriation limitations

The cases discussed thus far have generally concerned over-obligating as measured against the available amount of the agency's appropriation. Amounts otherwise available can become unavailable for the costs of a particular contract or

group of contracts by reason of a specific limitation inserted in an appropriation. If an agency exceeds the limitation, a violation of subsection (a) may also occur.

For example, a proviso in the Customs Service's 1980 appropriation expressly prohibited the use of the appropriation for administrative expenses to pay any employee overtime pay in an amount in excess of $20,000. By allowing employees to earn overtime pay in excess of that amount, the Customs Service also violated 31 U.S.C. § 665(a). 60 Comp. Gen. 440 (1981). The Comptroller General explained the violation as follows:

> "When an appropriation act specifies that an agency's appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. Since the Congress has not appropriated funds for the designated purpose, the obligation may be viewed either as being in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose. In either case the Antideficiency Act is violated."

See also B-204270, October 13, 1981.

(e) Amount of Available Appropriation or Fund

Questions occasionally arise over precisely what assets an agency may count for purposes of determining the amount of available resources against which it may incur obligations.

GAO considered one aspect of the question in 60 Comp. Gen. 520 (1981). The General Services Administration buys furniture and other equipment for other agencies through the General Supply Fund, a revolving fund established by statute. Agencies pay GSA either in advance or by reimbursement. For reasons of economy, GSA normally makes consolidated and bulk purchases of commonly-used items. Concern over the application of the Antideficiency Act arose when, for several reasons, the Fund began experiencing cash flow problems. GSA wanted to obligate against the value of inventory in the Fund. In other words, GSA wanted to consider the amount of the available appropriation as the cash assets, including advances, in the Fund, plus inventory.

The Comptroller General held that inventory in the General Supply Fund did not constitute a "budgetary resource" against which obligations could be incurred. The items in the inventory had already been purchased with appropriated funds and could not be counted again as a new budgetary resource. This was in accord with OMB Circular No. A-34, which provides that inventory is not a "budgetary resource" for purposes of determining unobligated balances. Thus, a violation of the Antideficiency Act would occur at the moment GSA incurs obligations in excess of available "budgetary resources."

OMB Circular No. A-34 includes "accounts receivable" as a "budgetary resource." This does not mean anticipated receipts from transactions that have not yet occurred or orders that have not yet been placed. Thus, obligations cannot be charged against anticipated proceeds from an anticipated sale of property. 35 Comp. Gen. 356 (1955). More recently, the Comptroller General found that the Air Force had violated the Antideficiency Act by overobligating its Industrial Fund based on estimated or anticipated customer orders. Report entitled "The Air Force Has Incurred Numerous Overobligations in its Industrial Fund," AFMD-81-53, August 14, 1981. Even where receivables are properly included as budgetary resources, an agency may not incur obligations against receipts expected to be received after the end of the current fiscal year without specific statutory authority. 51 Comp. Gen. 598, 605 (1972).

(f) Exceptions to Antideficiency Act Prohibition

An exception to the general rule that no agency may involve the Government in a contract or other obligation for the payment of money in advance of or in excess of appropriations made for that purpose is built right into subsection (a). The last clause of the subsection provides: "* * * unless such contract or obligation is authorized by law."

Contract authority

Contract authority is statutory authority which specifically authorizes an agency to enter into a contract or other obligation prior to enactment of the applicable appropriation.

In an earlier case involving contract authority, the GAO insisted that the Corps of Engineers had to include a "no liability unless funds are later made available" clause for any work done in excess of available funds. 2 Comp. Gen. 477

(1923). The Corps had trouble with this clause because a Court of Claims decision, C.H. Leavell and Co. v. United States, 530 F.2d 878 (Ct. Cl. 1976), allowed the contractor an equitable adjustment for suspension of work due to a delay in enacting an appropriation to pay him, notwithstanding the "availability of funds" clause. In 56 Comp. Gen. 437 (1977), GAO overruled 2 Comp. Gen. 477, supra, deciding that section 10 of the River and Harbor Act of 1922, by expressly authorizing the Corps to enter into large multi-year civil works projects without seeking a full appropriation in the first year, constituted the necessary exception to the Anti-deficiency Act and a "funds available" clause was not necessary.

In 28 Comp. Gen. 163 (1948), the Commissioner of Reclamation was authorized in an appropriation act to enter into certain contracts in advance of appropriations but subject to a monetary ceiling. Since the contract authority was explicit, with no language making it contingent on appropriations being made at some later date, the statute authorized the Commissioner to enter into a firm and binding contract.

More recently, in B-196132, October 11, 1979, GAO found that the Interstate Commerce Commission was authorized by statute to order a substitute rail carrier to service shippers abandoned by a primary carrier, and to reimburse the carrier certain costs, even though sufficient funds were not available at the time to cover whatever additional costs the ICC might become obligated to pay. Since there was specific statutory authority to issue such an order in advance of appropriations in emergency situations, the prohibition in 31 U.S.C. § 665(a) did not apply. See also B-164497(3), June 6, 1979.

Contract authority may be "transferred" from one agency to another in certain circumstances. The Director of the Bureau of Mines was authorized to enter into a contract (in advance of the appropriation) to construct and equip an anthracite research laboratory. He asked the General Services Administration to enter into the contract on his behalf, pursuant to § 103 of the Federal Property and Administrative Services Act of 1949. A question arose because the latter act has a proviso that "funds appropriated to other executive departments, independent establishments, or other Federal agencies for the foregoing purposes [execution of contracts and supervision of construction] shall be available for transfer to and expenditure by the [General Services Administration]." GAO held that the transfer language merely authorized the transfer of funds appropriated to the various

agencies to GSA. It did not, however, preclude GSA from entering into contracts before the funds were appropriated, in this instance, because GSA was acting for the Director of the Bureau of Mines who clearly did have the necessary authority. 29 Comp. Gen. 504 (1950).

A somewhat different kind of contract authority is found in 41 U.S.C. § 11, the so-called Adequacy of Appropriations Act (discussed further in Chapter 8, this Manual). An exception to the necessity to have adequate appropriations--or any appropriation at all--is made for procurements by "the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year." By administrative interpretation, the Defense Department has limited this authority to emergency circumstances where immediate action is necessary. Department of Defense Directive No. 7220.8.

It must be emphasized that to constitute an exception to 31 U.S.C. § 665(a), the "contract authority" must be specific authority to incur the obligation in excess or advance of appropriations, not merely the general authority any agency has to enter into contracts to carry out its functions.

A related type of exception is the authority to guarantee loans, discussed supra.

Additional duties later mandated

As GAO told the Chairman of the Securities and Exchange Commission in 15 Comp. Gen. 167 (1935), if the Congress directs you to assume additional duties for which it made no further appropriation, such duties may be regarded as "duties imposed by law or in pursuance of law" and there will be no violation of the Antideficiency Act.

The statute relied on must require the agency to take some specific action which results in the over-obligation of its appropriation. In other words, incurring the deficiency must be beyond the administrative control of the agency. See, e.g., 28 Comp. Gen. 300 (1948); 31 Comp. Gen. 238 (1951); 44 Comp. Gen. 89 (1964). Generally, the statutory directive must be stated in clear and unmistakable terms. E.g., 39 Comp. Gen. 422, 425-26 (1959). However, legislative history, if particularly clear and unambiguous, may be used to establish the necessary congressional intent. See B-159141, August 18, 1967.

The most frequently cited example of this type of exception is the obligation to pay increases granted by administrative action to Wage Board employees. By law, the obligation to pay increases arises on the date the increases are effective, even though the agency's "Salaries and Expenses" appropriation may be insufficient at that time. 39 Comp. Gen. 422 (1959). Note that the administrative action must have granted an increase in basic compensation. GAO has not treated the granting of increases retroactively to correct past administrative errors as creating the same type of exception. See 24 Comp. Gen. 676 (1945).

Another example of this type of exception is illustrated in B-156932, August 17, 1965. When the Criminal Justice Act of 1964 was enacted, it directed the courts to set up their programs within a year. In view of this mandatory deadline, it was possible that obligations might be incurred under the statute before Congress made the necessary appropriations. Therefore, the statutory mandate constituted authority to incur obligations in advance of appropriations for that fiscal year. See also B-168796, February 2, 1970 (mandatory statutory increase in retired pay for Tax Court judges).

(3) Voluntary Services Prohibition (Subsection (b))

(a) Introduction

31 U.S.C. § 665(b) provides:

> "No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property."

This provision first appeared, in almost identical form, in a deficiency appropriation act enacted in 1884 (23 Stat. 17). Although the original prohibition read "hereafter, no department or officer of the United States shall accept * * *," it was included in an appropriation for the (then) Indian Office of the Interior Department, and the Court of Claims held that it was applicable only to the Indian Office. Glavey v. United States, 35 Ct. Cl. 242, 256 (1900), reversed on other grounds, 182 U.S. 595. The Comptroller of the Treasury continued to apply it across the board. See, e.g., 9 Comp. Dec. 181 (1902). In any event, the applicability of the 1884 statute soon became moot because Congress reenacted it as part of the Antideficiency Act in 1905 (33 Stat. 1257) and again in 1906 (34 Stat. 48).

Subsection (b) supplements and is a logical extension of subsection (a). If an agency cannot directly obligate in excess or advance of its appropriations, it should not be able to accomplish the same thing indirectly by creating a so-called "coercive deficiency"--accepting services and then presenting Congress with the bill, in the hope that Congress will recognize a "moral obligation" to pay for the benefits conferred. The legislative history of subsection (b) reveals that this is precisely why Congress enacted it. See 30 Op. Atty. Gen. 51 (1913).

Note that subsection (b) contains two distinct although closely related prohibitions: It bans, first, the acceptance of any type of voluntary services for the United States, and second, the employment of personal services "in excess of that authorized by law."

(b) Personal Services

One of the evils which the "personal services" prohibition was designed to correct was a practice which

was controversial in 1905 but is much less so today. Low-level Government employees were being asked to "volunteer" their services for overtime periods far in excess of the periods allowed by law, thus enabling the agency to economize at the employees' expense. Although this practice appears to have receded, the applicability of subsection (b) is nevertheless relevant in a number of contexts involving services by Government employees or services which would otherwise have to be performed by Government employees.

The prohibition was most recently discussed in B-197841, March 3, 1980, in connection with an inquiry from the Chairperson of the House Subcommittee on Compensation and Employee Benefits, Committee on Post Office and Civil Service, who asked whether agency heads could legally permit employees to come to work when the applicable appropriation for salaries had expired and the Congress had not yet enacted a regular or interim appropriation act for the next fiscal year. The Comptroller General said that both subsections (a) and (b) of the Antideficiency Act were violated as soon as any employee reported for work under those circumstances. With respect to the violation of subsection (b), the fact that the employee was willing to take a chance that the necessary appropriation would eventually be enacted did not avoid the violation. The employee still expected to be paid eventually.

The prohibition has also been applied not only to misuse of existing Government employees, but to the unauthorized hiring of new employees. Thus, GAO held in B-181934, October 7, 1974, that a retired Army officer who had served without compensation in a position with the Foreign Service pending the processing of his formal appointment could not be paid. (However, see 55 Comp. Gen. 109 (1975), which overruled the 1974 decision because additional information showed that the Army officer was a "de facto employee" performing under color of appointment and with a claim of right to his position. A "voluntary" employee has no such "color of title" or indicia of lawful employment.)

Voluntary vs. gratuitous services

An important distinction to keep in mind in applying subsection (b) is the distinction between "voluntary services" and "gratuitous services." The terms are not necessarily synonymous. GAO has consistently construed subsection (b) as not prohibiting the acceptance of services understood and agreed at the outset to be "gratuitous." Thus, the prohibition against voluntary services:

"contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with, the United States therefor. Services furnished pursuant to a formal contract are not voluntary within the meaning of said section." 7 Comp. Gen. 810, 811 (1928).

This distinction follows logically from the purpose of the statutory prohibition--to preclude situations which might generate future claims for compensation which might be in excess of an agency's funds.

To illustrate, 26 Comp. Gen. 956 (1947) involved a request by the (then) Civil Service Commission to employ college students without compensation as part of an internship program. The Comptroller General raised no objection, provided the services were "gratuitous." The decision pointed out an essential element of "gratuitous services"--the person rendering the services must agree in writing and in advance that he waives any and all claims against the Government on account of the services. 4/

In 54 Comp. Gen. 560 (1975), the issue was the Comprehensive Employment and Training Act of 1973 (CETA), under which enrollees and trainees, paid by a State with grant funds, were hired under a program initiated and funded by the United States. Relying on the underlying purpose of the CETA program, it was clear that the enrollees and trainees entered the program knowing and expecting to perform services at no cost to the Government. This was sufficient to reassure GAO that the acceptance of their services was not likely to afford a basis for a future claim on Congress and therefore was not prohibited by 31 U.S.C. § 665(b). 54 Comp. Gen. 560 modified an earlier decision, 51 Comp. Gen. 152 (1971).

Appointment without compensation and waiver of salary

One of the earliest questions to arise under 31 U.S.C. § 665(b) was whether a Government officer or employee could voluntarily work for nothing or for a reduced salary.

4/ 5 U.S.C. § 3111, added by the Civil Service Reform Act of 1978, generally exempts students from the subsection (b) prohibition if the work is part of the student's education and does not displace a career employee. See 60 Comp. Gen. 456 (1981).

Initially, the Comptroller of the Treasury ducked the question on the grounds that it did not involve a payment from the Treasury, and suggested that the question was appropriate to take to the Attorney General. 19 Comp. Dec. 160, 163 (1912).

The Attorney General tackled the question and concluded that subsection (b) was "not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried." 30 Op. Atty. Gen. 51 (1913). In reaching this conclusion, the Attorney General drew a distinction which the Comptroller of the Treasury thereafter adopted and which the Comptroller General continues to follow to this day--the distinction between "voluntary services" and "gratuitous services" noted above. The two are not synonymous, said the Attorney General. Therefore, and in view of the statute's legislative history:

> "[I]t is evident that the evil at which Congress was aiming was not appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress." Id., at 55.

The Comptroller of the Treasury agreed with this interpretation. 27 Comp. Dec. 131 (1920). Thus:

> "A service offered clearly and distinctly as gratuitous with a proper record made of that fact does not violate this statute against acceptance of voluntary service. An appointment to serve without compensation which is accepted and properly recorded is not a violation of the statutory inhibition against acceptance of voluntary service, and is valid if otherwise lawful." Id., at 132-33.

More specifically, if compensation for a position is fixed by law, an appointee may not agree to serve without compensation. The agreement would not be "otherwise lawful." However, if the level of compensation is discretionary, it can be set at zero and an appointment without compensation is permissible. 27 Comp. Dec. at 133. This is the same distinction the Attorney General had drawn.

Several later decisions have been issued clarifying and applying these rules.

In 27 Comp. Gen. 194 (1947), GAO addressed the "if otherwise lawful" proviso noted in 27 Comp. Dec. 131, supra. Reiterating the rule that an employee may not waive his ordinary right to compensation where that compensation is "fixed by or pursuant to law," the Comptroller General went on to say:

> "However, even where the compensation for a particular position is fixed by or pursuant to law, the occupant of the position may waive his ordinary right to the compensation fixed for the position and thereafter forever be estopped from claiming and receiving the salary previously waived, if there be some applicable provision of law authorizing the acceptance of services without compensation." Id., at 195 (emphasis in original).

The remainder of the decision held that experts and consultants employed on a temporary or intermittent basis could agree to serve without compensation since their compensation was not fixed by law.

54 Comp. Gen. 393 (1974) is a good illustration of the kind of situation 31 U.S.C. § 665(b) is designed to prevent. Members of the Commission on Marihuana and Drug Abuse had, apparently at the Chairman's urging, agreed to waive their statutory entitlement to $100 per day while involved on Commission business. Several years later, after the Commission had ceased to exist, one of the former members changed his mind and filed a claim for the total compensation he would have received but for the waiver. Since the $100 per day had been a statutory entitlement, the purported waiver was invalid and the former commissioner was entitled to be paid.

In 58 Comp. Gen. 383 (1979), GAO pointed out that compensation is not "fixed by statute" for purposes of the waiver rule where the statute merely sets a maximum limit for the salary. Therefore, members of the United States Metric Board could waive their salaries since the relevant statute merely prescribed a maximum rate of pay. See also 26 Comp. Gen. 956 (1947). In addition, since the Board had statutory authority to accept gifts (see Section C(3), this Chapter), a member who chose to do so could accept compensation and then return it to the Board as a gift.

A 1978 case, 57 Comp. Gen. 423, must be noted although its effect is not entirely clear. The decision held that a statute authorizing the Agency for International Development to accept gifts of "services of any kind" did not meet the test of 27 Comp. Gen. 194, supra, and therefore did not permit waiver of salary by employees whose compensation is fixed by statute. While 57 Comp. Gen. 423 did not purport to overrule or modify any prior cases, it seems to say that statutory authority to accept gifts of personal service is no longer adequate to permit waiver of compensation fixed by statute. However, in B-139261, June 26, 1959, for example, GAO repeated the rules set down in 27 Comp. Gen. 194 and gave several examples of statutes that would authorize waiver of compensation fixed by statute. One of the statutes cited was a gift statute very similar to the AID statute involved in 57 Comp. Gen. 423. If 57 Comp. Gen. 423 is in fact a modification of the prior case law, then an agency would need explicit authority to employ persons without compensation. For an example of such authority, see 32 Comp. Gen. 236 (1952). 5/

The rules for waiver of salary or appointment without compensation may be summarized as follows:

--If compensation is not fixed by statute, i.e., if it is fixed administratively or if the statute merely prescribes a maximum, it may be waived as long as the waiver qualifies as "gratuitous." This requires a written agreement in advance waiving all claims.

--If compensation is fixed by statute, it may not be waived, the voluntary vs. gratuitous distinction notwithstanding, without specific statutory authority. The extent to which authority to accept donations of personal services (as opposed to explicit authority to employ persons without compensation) is sufficient is not entirely clear.

--If the employing agency has statutory authority to accept gifts, the employee can accept the compensation and return it to the agency as a

5/ For another discussion of subsection (b) and many of the cases noted in the text, see the article by Major Hopkins and Lt. Col. Nutt, cited in Section B(1), supra, 80 Mil. L. Rev. at pp. 64 ff.

gift. Even if the agency has no such authority, the employee can still accept the compensation and donate it to the United States Treasury. (See Section C(3), this Chapter.)

Applicability to legislative and judicial branches

In 1977, GAO was asked by a congressional committee chairman whether section 665(b) applies to members of the Congress who use volunteers to perform official office functions. GAO noted that, except for subsection (c) relating to apportionments, the other provisions of section 665 clearly apply. For example, subsections (a) and (h) cover "any officer or employee of the United States." Therefore, since subsection (b) by its terms is similarly comprehensive, it too must be held to apply. However, to the extent that a particular employee's salary could be fixed administratively by the Member in any amount he chooses to set, that employee's salary can be fixed at zero. (This was essentially an application of the rule set down more than 50 years earlier in 27 Comp. Dec. 131, supra.) The important thing, GAO stressed, is that everyone concerned agree that the services were to be gratuitous so that there would be no basis for future claims. B-69907, February 11, 1977.

While there are no decisions concerning the judicial branch, the issue was considered in a paper entitled "A Part-Time Clerkship Program in Federal Courts for Law Students" by the Honorable Jack B. Weinstein and William B. Bonvillian, written in 1975 and printed at 68 F.R.D. 265. Based on the statute's legislative history and the 1913 Attorney General's opinion discussed above, Judge Weinstein concluded that the use by Federal judges of law students as part-time clerks without compensation did not violate 31 U.S.C. § 665(b).

(c) Other Voluntary Services

Before entering the mainstream of the modern case law, two very early decisions deserve brief mention. In 12 Comp. Dec. 244 (1905), the Comptroller of the Treasury held that an offer by a meat-packing firm to pay the salaries of Department of Agriculture employees to conduct a pre-export pork inspection could not be accepted because of the voluntary services prohibition. Similar cases have since come up, but they have been decided under the augmentation theory without reference to 31 U.S.C. § 665(b). See 2 Comp. Gen. 775 (1923) and 59 Comp. Gen. 294 (1980), discussed in Section C, infra, this Chapter.

In another 1905 decision that has not been cited in the 75 years since it was issued, a vendor asked permission to install an appliance on Navy property for trial purposes at no expense to the Government. Presumably, if the Navy liked the appliance, it would then buy it. The Comptroller pointed out an easily overlooked phrase in the voluntary service prohibition--the services that are prohibited are voluntary services "for the United States." Here, temporary installation by the vendor for trial purposes amounted to service for his own benefit and on his own behalf. Therefore, Navy could grant permission without violating the Antideficiency Act as long as the vendor agreed to remove the appliance at his own expense if the Navy chose not to buy it. 11 Comp. Dec. 622 (1905).

For the most part, the cases have been resolved by applying the "voluntary vs. gratuitous" distinction first enunciated by the Attorney General in 30 Op. Atty. Gen. 51, discussed above.

For example, in 7 Comp. Gen. 810 (1928), the Federal Trade Commission had proposed to contract for stenographic services at no cost to the Government. GAO held that the services were not prohibited by subsection (b), even though they were "free," because there was a formal agreement memorializing the fact that the Government would not have to pay for them.

Similarly, in B-13378, November 20, 1940, the Comptroller General held that the Secretary of Commerce could accept gratuitous services from a private agency, created by various social science associations, which had offered to assist in the preparation of official monographs analyzing census data. The services were to be rendered under a cooperative agreement which specified that they would be free of cost to the Government. The Commerce Department agreed to furnish space and equipment, but the monographs would not otherwise have been prepared.

Applying the same approach, GAO found no violation of subsection (b) for the Commerce Department to accept services by the Business Advisory Council, agreed in advance to be gratuitous. B-125406, November 4, 1955. Likewise, the Commission on Federal Paperwork could accept free services from the private sector as long as they were agreed in advance to be gratuitous. B-182087-O.M., November 26, 1975.

In 7 Comp. Gen. 167 (1927), a customs official had stored, in his own private boathouse, a boat which had been seized for smuggling whiskey. The customs official later filed a claim for storage charges. Noting that "the United States did not expressly or impliedly request the use of the premises and therefore did not by implication promise to pay therefor," GAO concluded that the storage had been purely a voluntary service, payment for which would violate 31 U.S.C. § 665(b).

As if to prove the old saw that "there is nothing new under the sun," GAO considered another storage case over 50 years later, B-194294, July 12, 1979. There, an Agriculture Department employee had an accident while driving a Government-owned vehicle assigned to him for his work. A Department official ordered the damaged vehicle towed to the employee's driveway, to be held there until it could be sold. Since the Government did have a role in the employee's assumption of responsibility for the wreck, GAO found no violation of 31 U.S.C. § 665(b) and allowed the employee's claim for reasonable storage charges on a quantum meruit basis.

As noted previously, experts and consultants retained on a temporary or intermittent basis under 5 U.S.C. § 3109 may agree to serve without compensation since their compensation is not "fixed by law." 27 Comp. Gen. 194 (1947). Similarly, the voluntary vs. gratuitous distinction is the basis on which so-called "dollar-a-year" men are hired. The Comptroller General pointed out in 23 Comp. Gen. 900 (1944) that payment of one dollar a year is not required by the Antideficiency Act. The practice is unnecessary unless it is required by some other law.

Services by contractors

Subsection (b) covers any type of service which has the effect of creating a moral or legal obligation to pay the person rendering the service. Naturally, this includes Government contractors. For example, a landowner whose property was damaged by the Army could not recover for the cost of the tools he purchased and the miles he travelled to repair the damage because, under his contract with the Army, the Army, not the landowner, was legally required to repair any damage to the land. The landowner in this instance was acting as a pure volunteer. B-177836, April 24, 1973.

The prohibition includes arrangements in which Government contracting officers solicit or permit--tacitly or otherwise--a contractor to continue performance on a "temporarily unfunded" basis while the agency, which has exhausted its appropriations and can't pay the contractor immediately, seeks deficiency appropriations. This was one of the options submitted for GAO approval in the 1976 Army contractors case, 55 Comp. Gen. 768, discussed under subsection (a), supra. The Army proposed a contract modification which would explicitly recognize the Government's obligation to pay for any work performed under the contract, possibly including reasonable interest, subject to subsequent availability of funds. The Government would use its best efforts to obtain a deficiency appropriation. Certificates to this effect would be issued to the contractor, including a statement that any additional work performed would be done at the contractor's own risk. In return, the contractor would be asked to defer any action for breach of contract.

GAO found this proposal "of dubious validity at best." Although the certificate given to the contractor would say that continued performance was at the contractor's own risk, it was clear that both parties expected the contract to continue. The Government expected to accept the benefits of the contractor's performance and the contractor expected to be paid--eventually--for it. This is certainly not an example of a clear written understanding that work for the Government is to be performed gratuitously. Also, the proposal to pay interest was improper as it would compound the Antideficiency Act violation. Although 55 Comp. Gen. 768 does not specifically discuss 31 U.S.C. § 665(b), the relationship seems obvious. This is the very situation subsection (b) was enacted to prevent.

(d) Exceptions

Two kinds of exceptions to 31 U.S.C. § 665(b) have already been discussed--where acceptance of services without compensation is specifically authorized by law, and where the Government and the volunteer have a written agreement that the services are to be rendered gratuitously with no expectation of future payment.

There is a third exception, written into the statute itself: "cases of emergency involving the safety of human life or the protection of property."

Safety of human life

The services provided to protect human life must have been rendered in a true emergency situation. What constitutes an emergency is discussed in several decisions.

In 12 Comp. Dec. 155 (1905), a municipal health officer disinfected several Government buildings to prevent the further spread of diphtheria. Several cases of diphtheria had already occurred at the Government compound, including four deaths. The Comptroller of the Treasury found that the services had been rendered in an emergency involving the loss of human life, and held accordingly that the doctor could be reimbursed for the cost of materials used and the fair value of his services.

In another case, the S.S. Rexmore, a British vessel, deviated from its course to London to answer a call for help from an Army transport ship carrying over 1,000 troops. The ship had sprung a leak and appeared to be in danger of sinking. The Comptroller General allowed a claim for the vessel's actual operating costs plus lost profits attributable to the services performed. The Rexmore had rendered a tangible service to save the lives of the men aboard the Army transport, as well as the transport vessel itself. 2 Comp. Gen. 799 (1923).

On the other hand, GAO denied payment to a man who was boating in the Florida Keys and saw a Navy seaplane make a forced landing. He offered to tow the aircraft over two miles to the nearest island, and did so. His claim for expenses was denied. The aircraft had landed intact and the pilot was in no immediate danger. Rendering service to overcome mere inconvenience or even a potential future emergency is not enough to overcome the statutory prohibition. 10 Comp. Gen. 248 (1930).

Protection of property

The main thing to remember here is that the property must be either Government-owned property or property in which the Government has some responsibility. The standard was established by the Comptroller of the Treasury in 9 Comp. Dec. 182 (1902) as follows:

> "I think it is clear that the statute does not contemplate property in which the Government has no immediate interest or concern; but I do not think it was intended to apply exclusively to property owned by the Government. The term 'property' is used in the statute without any qualifying words, but it is used in connection with the rendition of services for the Government. The implication is, therefore, clear that the property in contemplation is property in which the Government has an immediate interest or in connection with which it has some duty to perform." 9 Comp. Dec. at 185.

In the cited decision, an individual had gathered up mail scattered in a train wreck and delivered it to a nearby town. The Government did not "own" the mail but had a responsibility to deliver it. Therefore, the services came within the statutory exception and the individual could be paid for the value of his services.

Applying the approach of 9 Comp. Dec. 182, the Comptroller General held in B-152554, February 24, 1975, that section 665(b) did not permit the Agency for International Development to make expenditures in excess of available funds for disaster relief in foreign countries.

A case clearly within the exception is 3 Comp. Gen. 979 (1924), allowing reimbursement to a municipality which had rendered firefighting assistance to prevent the destruction of Federal property where the Federal property was not within the territory for which the municipal fire department was responsible. (Firefighting services are discussed further in Chapter 3, this Manual.)

An exception was also recognized in 53 Comp. Gen. 71 (1973), where a Government employee brought in food for other Government employees in circumstances which would justify a determination that the expenditure was incidental to the protection of Government property in an extreme emergency. This case is discussed in more detail in the coverage of "voluntary creditors" (see below).

(e) Voluntary Creditors

A related line of decisions are the so-called "voluntary creditor" cases. A voluntary creditor is an individual, Government or non-Government, who pays what he perceives to be a Government obligation from personal funds. With certain exceptions, the decisions hold uniformly that he cannot be

reimbursed. For the most part, the decisions have not related the voluntary creditor prohibition to the Antideficiency Act, with the exception of one very early case (17 Comp. Dec. 353 (1910)) and two more recent ones (42 Comp. Gen. 149 (1962) and 53 Comp. Gen. 71 (1973)). The voluntary creditor cases are discussed in detail in Chapter 11 (Part I), this Manual.

(4) Apportionment of Appropriations (Subsection (c))

(a) Statutory Requirement for Apportionment

As a general proposition, an agency does not have the full amount of its appropriation available to it at the beginning of the fiscal year. This is because of subsection (c) of the Antideficiency Act, 31 U.S.C. § 665(c). Subsection (c)(1) establishes the basic requirement:

> "Except as otherwise provided in this section, all appropriations or funds available for obligation for a definite period of time shall be so apportioned as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period; and all appropriations or funds not limited to a definite period of time, and all authorizations to create obligations by contract in advance of appropriations, shall be so apportioned as to achieve the most effective and economical use thereof. As used hereafter in this section, the term 'appropriation' means appropriations, funds, and authorizations to create obligations by contract in advance of appropriations."

Subsection (c)(1) requires that all appropriations be administratively apportioned by the Director of the Office of Management and Budget (OMB) so as to ensure their expenditure at a controlled rate which will prevent deficiencies from arising at the end of a fiscal year.

Although apportionment was first required legislatively in 1906 (33 Stat. 1257), the current form of the statute derives from a revision enacted in 1950 as § 1211 of the General Appropriation Act, 1951. The 1950 revision was part of the overall effort of the Congress to amplify and enforce the restrictions of subsection (a).

The term "apportionment" may be defined as--

> "A distribution made by the Office of Management and Budget of amounts available for obligation * * *in an appropriation or fund account. Apportionments divide amounts available for obligation by specific time periods (usually quarters), activities, projects,

objects, or a combination thereof. The amounts so apportioned limit the amount of obligations that may be incurred." 6/

Apportionment is required not only to prevent the need for deficiency or supplemental appropriations but to insure that there is no drastic curtailment of the activity for which the appropriation is made. 36 Comp. Gen. 699 (1957). See also 38 Comp. Gen. 501 (1959). In other words, the apportionment requirement is designed to prevent an agency from spending its entire appropriation before the end of the fiscal year and then putting the Congress in a position in which it must either grant an additional appropriation or allow the entire activity to come to a halt.

In 36 Comp. Gen. 699 (1957), supra, the Director of the Bureau of the Budget (now the Office of Management and Budget) reapportioned Post Office funds in such a way that the fourth quarter funds were substantially less than he allowed for the third quarter. The Comptroller General held:

> "A drastic curtailment toward the close of a fiscal year of operations carried on under a fiscal year appropriation is a prima facie indication of a failure to so apportion an appropriation as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period. In our view, this is the very situation the amendment of the law in 1950 was intended to remedy." 36 Comp. Gen. at 703.

Therefore, the very fact that a deficiency or supplemental appropriation is necessary or that services in the last quarter must be "drastically" cut means that the apportioning authority has violated section (c)(1) of the act. (But see 31 U.S.C. § 665(e)(1), discussed infra, for exceptions to the apportionment requirement.)

A more recent case involved the Department of Agriculture's Food Stamp Program. The program was subject to certain spending ceilings which, it seemed certain, the Department was going to exceed if it continued its

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6/ Glossary of Terms Used in the Federal Budget Process, PAD-81-27, p. 34. See also OMB Circular No. A-34, sec. 21.1; B-167034, September 1, 1976.

present rate of expenditures. The Department feared that, if it was bound by a formula in a different section of its authorizing act to pay the mandated amount to each eligible recipient, it would just have to stop the whole program when the funds were exhausted. Based on both the Antideficiency Act and the program legislation, GAO held that there had to be an immediate pro rata reduction for all participants. Discontinuance of the program when the funds ran out would violate the purpose of the apportionment requirement. A-51604, March 28, 1979.

This is not to say that every sub-activity or project must be carried out for the full fiscal year, on a reduced basis, if necessary. Section (c)(1) applies to amounts made available in an appropriation or fund. Where, for example, the Veterans Administration nursing home program was funded from moneys made available in a general, lump-sum VA medical care appropriation, the agency was free to discontinue the nursing home program and reprogram the balance of its funds to other programs also funded under that heading. B-167656, June 18, 1971. (It would be different if the nursing home program had received a line item appropriation).

The requirement to apportion applies not only to "one year" appropriations and other appropriations limited to a fixed period of time, but also to "no-year" money and even to "contract authority" -- i.e., authority to contract in advance of appropriations. In the case of indefinite term appropriations and contract authority, the requirement states only that the apportionment is to be made in such a way "as to achieve the most effective and economical use thereof."

(b) Establishing Reserves

> "In apportioning any appropriation, reserves may be established solely to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations. Whenever it is determined by an officer designated in subsection (d) of this section to make apportionments and reapportionments that any amount so reserved will not be required to carry out the full objectives and scope of the appropriation concerned, he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations. Except as specifically provided by particular appropriations Acts or other laws, no reserves shall be established other than as authorized

by this subsection. Reserves established pursuant to this subsection shall be reported to the Congress in accordance with the Impoundment Control Act of 1974." 31 U.S.C. § 665(c)(2).

Subsection (c)(2) deals with the converse situation. Unlike subsection (c)(1), subsection (c)(2) seeks to limit the circumstances in which the full appropriation is not apportioned or utilized and a reserve fund is established. Under this subsection, the apportioning official is authorized to establish reserves to provide for contingencies or to effect savings only.

This section has been a major battleground between the Executive Branch and the Legislative Branch over which has ultimate control over Government program and fiscal spending policy. The Executive Branch has often asserted this section of the Antideficiency Act as authority to impound funds for general fiscal or economic policy reasons such as containment of Federal spending and executive judgment of the relative merits, effectiveness, and desirability of competing Federal programs. See 54 Comp. Gen. 453, 458 (1974); B-135564, July 26, 1973.

The reason for this was that prior to 1974, § 665(c)(2) contained a rather expansive third exception stating that a reserve fund could be established pursuant to "other developments subsequent to the date on which [the] appropriation was made available." However, despite this expansive language, the Comptroller General's position had continually been that the authority to establish reserves under the Antideficiency Act was limited to providing for contingencies or effecting savings which are in furtherance of or at least consistent with the purposes of an appropriation. B-130515, July 10, 1973. The Act does not authorize reserve funds (i.e., impoundments) based upon general economic, fiscal or policy considerations which are extraneous to the individual appropriation or are in derogation of the appropriation's purpose. B-130515, supra; B-125187, September 11, 1973. See also State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973), which held that the right to reserve funds in order to "effect savings" or due to "subsequent events," etc., must be considered in the context of the applicable appropriation statute. 479 F.2d at 1118. If the apportioning authority goes beyond his delegated authority, subsection (c)(2) is violated.

The Impoundment Control Act of 1974, 31 U.S.C. §§ 1400-07, amended § 665(c)(2) by eliminating the "other developments" clause and by prohibiting the establishment of appropriation reserves except as provided under the Antideficiency Act for contingencies or savings, or as provided in other specific statutory authority. The intent was to expressly negate any implicit or residual authority on the part of the Executive Branch to unilaterally undertake general economic, fiscal or policy impoundments. B-148898, August 28, 1974. (For a general discussion of the Impoundment Control Act of 1974, see 54 Comp. Gen. 453 (1974) and Chapter 2, Section E(3), this Manual.)

Two examples of permissible reserves were discussed in 51 Comp. Gen. 598 (1972) and 51 Comp. Gen. 251 (1971).

The first case concerned the provisions of a long-term charter of several tankers for the Navy. The contract contained options to renew the charter for a period of 15 years. In the event that the Navy terminated the charter -- i.e., declined to renew -- short of the full 15 year period, the vessels were to be sold by a Board of Trustees, acting for the owners and bondholders. Any shortfall in the proceeds over the termination value was to be unconditionally guaranteed by the Navy. GAO held (in the light of certain statutory provisions that permitted obligating funds in advance of receiving the benefits therefrom), that it would not violate the Antideficiency Act to cover this contingent liability by setting up a reserve. 51 Comp. Gen. 598 (1972).

In 51 Comp. Gen. 251 (1971), GAO said that it was permissible to provide in regulations for a clause to be inserted in future contracts for payment of interest on delayed payments of a contractor's claim. It would not be a violation of section (c)(2) to reserve sufficient funds from the appropriation used to support the contract to cover these potential interest costs.

(c) Method of Apportionment

Subsections (c)(3) and (c)(4) of 31 U.S.C. § 665 provide as follows:

> "Any appropriation subject to apportionment shall be distributed by months, calendar quarters, operating seasons, or other time periods, or by activities, functions, projects, or objects, or by a combination thereof, as may be deemed appropriate by the officers designated in subsection (d) of this

section to make apportionments and reapportionments. Except as otherwise specified by the officer making the apportionment, amounts so apportioned shall remain available for obligation, in accordance with the terms of the appropriation, on a cumulative basis unless reapportioned."

"Apportionments shall be reviewed at least four times each year by the officers designated in subsection (d) of this section to make apportionments and reapportionments, and such reapportionments made or such reserves established, modified, or released as may be necessary to further the effective use of the appropriation concerned, in accordance with the purposes stated in paragraph (1) of this subsection."

These two paragraphs are largely technical, implementing the apportionment requirements of subsection (c)((1).

Subsection (c)(3) makes it clear that apportionments need not be made strictly on a monthly, quarterly, or other fixed time basis nor must they be for equal amounts in each time period. The apportioning officer is free to take into account the "activities, functions, projects, or objects" of the program being funded and the usual pattern of spending for such programs in deciding how to apportion the funds.

Subsection (c)(4) requires a minimum of four reviews each year to enable the apportioning officer to make reapportionments or other adjustments, as necessary.

(5) Control of Apportionments (Subsection (d))

Subsection (d) of 31 U.S.C. § 665 provides as follows:

"(d)(1) Any appropriation available to the legislative branch, the judiciary, the United States International Trade Commission, or the District of Columbia, which is required to be apportioned under subsection (c) of this section, shall be apportioned or reapportioned in writing by the officer having administrative control of such appropriation. Each such appropriation shall be apportioned not later than thirty days before the beginning of the fiscal year for which the appropriation is available, or not more than thirty days after approval of the Act by which the appropriation is made available, whichever is later.

"(2) Any appropriation available to an agency, which is required to be apportioned under subsection (c) of this section, shall be apportioned or reapportioned in writing by the Director of the Office of Management and Budget. The head of each agency to which any such appropriation is available shall submit to the Office of Management and Budget information, in such form and manner and at such time or times as the Director may prescribe, as may be required for the apportionment of such appropriation. Such information shall be submitted not later than forty days before the beginning of any fiscal year for which the appropriation is available, or not more than fifteen days after approval of the Act by which such appropriation is made available, whichever is later. The Director of the Office of Management and Budget shall apportion each such appropriation and shall notify the agency concerned of his action not later than twenty days before the beginning of the fiscal year for which the appropriation is available, or not more than thirty days after the approval of the Act by which such appropriation is made available, whichever is later. When used in this section, the term 'agency' means any executive department, agency, commission, authority, administration, board, or other independent establishment in the executive branch of the Government, including any corporation wholly or partly owned by the United States which is an instrumentality of the United States. Nothing in this subsection shall be

so construed as to interfere with the initiation, operation, and administration of agricultural price support programs and no funds (other than funds for administrative expenses) available for price support, surplus removal, and available under section 612(c) of Title 7, with respect to agricultural commodities shall be subject to apportionment pursuant to this section. The provisions of this section shall not apply to any corporation which obtains funds for making loans, other than paid in capital funds, without legal liability on the part of the United States."

Subsection (d) deals with the mechanisms for making the apportionments or reapportionments of appropriations which are required by subsection (c).

Subsection (d)(1) applies to appropriations of the Legislative and Judicial Branches of the Government, as well as those of the International Trade Commission and the District of Columbia. The authority to apportion is given to the "officer having administrative control of [each] such appropriation." Apportionment must be made no later than 30 days before the start of the fiscal year for which the appropriation was made or within 30 days after the appropriation was enacted, whichever is later.

Subsection (d)(2) assigns the authority to apportion or reapportion appropriations of the Executive Branch to the Director of the Office of Management and Budget (OMB). Time limits are established, first for submission of information by the agency head to OMB to enable it to make reasonable apportionments. See 36 Comp. Gen. 699 (1957), discussed in connection with subsection (c)(1), above. Although primary responsibility for a violation of subsection (c)(1) lies with the Director of OMB, the head of the agency concerned may also be found responsible if he fails to send the Director accurate information on which to base an apportionment. Secondly, the Director of OMB has up to 20 days before the start of the fiscal year or 30 days after approval of the appropriation act, whichever is later, to make the actual apportionment and notify the agency of the action taken.

In B-163628, January 4, 1974, GAO responded to a question from the chairman of a congressional committee about the power of OMB to apportion the funds of independent regulatory agencies, such as the Securities and Exchange Commission. The Comptroller General agreed with the chairman that independent agencies should generally be free from executive control or interference. However--

> "[T]he apportionment power may not lawfully be used as a form of executive control or influence over agency functions. Rather, it may only be exercised by OMB in the manner and for the purposes prescribed in 31 U.S.C. § 665--i.e., to prevent obligation or expenditure in a manner which would give rise to a need for deficiency or supplemental appropriations, to achieve the most effective and economical use of appropriations and to establish reserves either to provide for contingencies or to effect savings which are in furtherance of or at least consistent with, the purposes of an appropriation.
>
> "As thus limited, the apportionment process serves a necessary purpose--the promotion of economy and efficiency in the use of appropriations. * * *"

Thus, the appropriations of independent regulatory agencies like SEC are subject to apportionment by OMB, but OMB may not lawfully use its apportioment power to compromise the independence of those agencies. For example, if OMB tried to use apportionment to prevent the SEC from hiring personnel authorized by Congress, that would be an abuse of its apportionment powers. But this possibility does not justify denying OMB's basic apportionment authority altogether.

The Impoundment Control Act may permit OMB, in effect, to delay the apportioment deadlines prescribed in 31 U.S.C. § 665(d). For example, when the President sends a rescission message to Congress, the budget authority proposed to be rescinded may be withheld for up to 45 days pending congressional action on a rescission bill. 31 U.S.C. § 1402. In B-115398.33, August 12, 1976, GAO responded to a congressional request to review a situation in which an apportionment had been withheld for more than 30 days after enactment of the appropriation act. The President had planned to submit a rescission message for some of the funds but was late in drafting and transmitting his message. If the full amount contained in the rescission message could be withheld for the entire 45-day period, and Congress ultimately disallowed the full rescission, release of the funds for obligation would occur only a few days before the budget authority expired. The Comptroller General suggested that, where Congress has completed action on a rescission bill rescinding only a part of the amount proposed, OMB should immediately apportion the amounts not included in the rescission bill without awaiting the expiration of the 45-day period. See also B-115398.33, March 5, 1976.

(6) Apportionments Requiring Deficiency Estimate (Subsection (e))

Subsection (e) of 31 U.S.C. § 665 provides as follows:

> "(1) No apportionment or reapportionment, or request therefor by the head of an agency, which, in the judgment of the officer making or the agency head requesting such apportionment or reapportionment, would indicate a necessity for deficiency or supplemental estimate shall be made except upon a determination by such officer or agency head, as the case may be, that such action is required because of (A) any laws enacted subsequent to the transmission to the Congress of the estimates for an appropriation which require expenditures beyond administrative control; or (B) emergencies involving the safety of human life, the protection of property, or the immediate welfare of individuals in cases where an appropriation has been made to enable the United States to make payment of, or contributions toward, sums which are required to be paid to individuals either in specific amounts fixed by law or in accordance with formulae prescribed by law.
>
> "(2) In each case of an apportionment or a reapportionment which, in the judgment of the officer making such apportionment or reapportionment, would indicate a necessity for a deficiency or supplemental estimate, such officer shall immediately submit a detailed report of the facts of the case to the Congress. In transmitting any deficiency or supplemental estimates required on account of any such apportionment or reapportionment, reference shall be made to such report."

Subsection (e)(1) constitutes an exception to the requirements of subsection (c)(1) that apportionments be made in such way as to assure that the funds will last throughout the fiscal year and there will be no necessity for a deficiency appropriation. Apportionments can be made in an unbalanced manner (e.g., an entire appropriation could be obligated by the end of the second quarter) if the apportioning officer determines that (1) a law enacted subsequent to the transmission of budget estimates for the appropriation requires expenditures beyond administrative control; or (2) that there is an emergency involving safety of human life, protection of property, or immediate welfare of individuals in cases where an appropriation has been made to enable the United States to make payments to such individuals in fixed amounts or by formulae described by law.

The nature and limitations of the subsection (e) exception were discussed at some length in a letter to a Member of the Senate. B-167034, September 1, 1976. The Senator had proposed legislation to repeal the so-called "Feed and Forage Act," 41 U.S.C. § 11, which prohibits the making of contracts, not otherwise authorized by law, unless there is an appropriation "adequate to its fulfillment," except in the case of contracts made by the Departments of the Army, Navy, and Air Force for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies." The Senator felt that 41 U.S.C. § 11 was unnecessary in light of 31 U.S.C. § 665(e) which, he said, clearly "authorizes incurring deficiencies in emergencies involving the safety of human life or the protection of property."

Both the Deputy Secretary of Defense and the GAO disagreed that subsection (e) would be an adequate substitute for the 41 U.S.C. § 11 exception which allows the incurring of obligations for limited purposes even though the applicable appropriation is insufficient to cover the expenses at the time the commitment is made. The Deputy Secretary stated:

> "The authority to apportion funds on a deficiency basis in the Anti-Deficiency Act (31 U.S.C. 665(e)) does not, as alleged, provide authority to incur a deficiency. It merely authorizes obligating funds at a deficiency rate under certain circumstances, e.g., a $2,000,000 appropriation can be obligated in its entirety at the end of the third quarter, but it does not provide authority to obligate one dollar more than $2,000,000." Letter from the Deputy Secretary of Defense to the Chairman, House Armed Services Committee, April 2, 1976 (quoted in B-167034, September 1, 1976).

The Comptroller General agreed with the Deputy Secretary, stating:

> "[S]ubsection (e) in no way authorizes an agency of the Government actually to incur obligations in excess of the total amount of money appropriated for a period. It only provides an exception to the general apportionment rule set out in subsection (c) that an appropriation be allocated so as to insure that it is not exhausted prematurely. Subsection (e) says nothing about increasing the total amount of the appropriation itself or authorizing the incurring of obligations in excess of the total

amount appropriated. On the contrary, as noted above, apportionment only involves the subdivision of appropriations already enacted by Congress. It necessarily follows that the sum of the parts, as apportioned, could not exceed the total amount of the appropriations being apportioned.

"Any deficiency that an agency incurs where obligations exceed total amounts appropriated, including a deficiency that arises in a situation where it was determined that one of the exceptions set forth in subsection (e) was applicable, would constitute a violation of 31 U.S.C. § 665(a)***." B-167034, September 1, 1976.

See also 36 Comp. Gen. 699 (1957) for relevant legislative history.

The availability of the first exception in subsection (e) (for expenditures beyond administrative control) depends on whether the higher rate of expenditure was required by new obligations created by law or whether they arose through an exercise of agency discretion. For example, the obligation to pay severance pay to involuntarily separated employees under the Federal Employees Salary Act of 1965 was held to come within the exception. 45 Comp. Gen. 584 (1966). 7/ On the other hand, the discretionary grant of salary increases made by the Director of the Central Intelligence Agency did not fit the exception. 44 Comp. Gen. 89 (1964).

7/ For the current treatment of obligations for severance pay, see OMB Circular No. A-34, sec. 25.1, and B-200170, July 28, 1981, discussed in Chapter 6, Section B(7), this Manual.

(7) Exemption for Working Funds and Trust Funds (Subsection (f))

Subsection (f) of 31 U.S.C. § 665 provides:

> "(f)(1) The officers designated in subsection (d) of this section to make apportionments and reapportionments may exempt from apportionments trust funds and working funds expenditures from which have no significant effect on the financial operations of the Government, working capital and revolving funds established for intragovernmental operations, receipts from industrial and power operations available under law and any appropriation made specifically for--
>
> "(1) interest on, or retirement of, the public debt;
>
> "(2) payment of claims, judgments, refunds, and draw-backs;
>
> "(3) any item determined by the President to be of a confidential nature;
>
> "(4) payment under private relief Acts or other laws requiring payments to designated payees in the total amount of such appropriations;
>
> "(5) grants to the States under subchapters I, IV, or X of chapter 7 of Title 42, or under any other public assistance subchapter in such chapter.
>
> "(2) The provisions of subsection (c) of this section shall not apply to appropriations to the Senate or House of Representatives or to any Member, committee, Office (including the office of the Architect of the Capitol), officer, or employee thereof."

Subsection (f)(1) is largely self-explanatory. It exempts from the apportionment requirements of subsection (c) the type of special account or expenditure which is largely self-contained or self-executing and has very little effect on the budgeting and financial operations of the Federal Government.

Paragraph (2) of the subsection makes it very clear that appropriations made available to the Senate or House of

Representatives or to any offices considered a part of the Congress, such as the Office of the Architect of the Capitol, are not to be subject to the apportionment requirements of subsection (c).

The various enumerated exceptions in both paragraphs appear to be readily understood. In any event, the GAO has no record of a request for a decision or written advice on any portion of this subsection.

(8) Administrative Division of Apportionments (Subsection (g))

Subsection (g) of 31 U.S.C. § 665 provides:

> "(g) Any appropriation which is apportioned or reapportioned pursuant to this section may be divided and subdivided administratively within the limits of such apportionments or reapportionments. The officer having administrative control of any such appropriation available to the legislative branch, the judiciary, the United States International Trade Commission, or the District of Columbia, and the head of each agency, subject to the approval of the Director of the Office of Management and Budget, shall prescribe, by regulation, a system of administrative control (not inconsistent with any accounting procedures prescribed by or pursuant to law) which shall be designed to (A) restrict obligations or expenditures against each appropriation to the amount of apportionments or reapportionments made for each such appropriation, and (B) enable such officer or agency head to fix responsibility for the creation of any obligation or the making of any expenditure in excess of an apportionment or reapportionment. In order to have a simplified system for the administrative subdivision of appropriations or funds, each agency shall work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative subdivision for each appropriation or fund affecting such unit."

Subsection (g) is designed to ensure that the agencies in each branch of the Government (plus the International Trade Commission and the District of Columbia) keep their obligations and expenditures within the bounds of each apportionment or reapportionment. The officer or employee in each agency who has administrative control of the apportioned funds is required to set up, by regulation, a system of administrative controls to implement this objective. The system must: (1) be consistent with any accounting procedures prescribed by law or pursuant to law; (2) divide or subdivide the apportioned funds to the operating units of the agency in such a way as to keep obligations and expenditures within the amount of the apportionment; (3) fix responsibility for any obligation or expenditure in excess of the administrative division or allocation, and (4) provide for prompt reporting of any violations of the regulations or the Antideficiency Act.

Prior to 1956, agencies were dividing and subdividing their apportioned funds into numerous pockets of obligational authority, called "allowances." Obligating or spending more than the amount of each allowance was a violation of the Act. The Congress was flooded with reports of Antideficiency Act violations.

In 1955, the Commission on Organization of the Executive Branch of the Government recommended an amendment to subsection (g) (Recommendation #13), which was enacted on August 1, 1956. The Senate Committee on Government Operations explained its purpose:

> "The making of numerous allotments which are further divided and suballoted to lower levels leads to much confusion and inflexibility in the financial control of appropriations or funds as well as numerous minor violations of § 3679, Revised Statutes, as amended (the Anti-Deficiency Act)." S. Rep. No. 2265, 84th Cong., p. 9.

The House Committee on Government Operations made the same statement. H.R. Rep. No. 2734, 84th Cong., p. 7. See 37 Comp. Gen. 220, 223 (1957).

Thus, the last sentence of subsection (g) now directs each agency to simplify its administrative control system by fixing financial responsibility for each operating unit's funds at the highest practical level.

As GAO explained in a decision to the Public Housing Administration (37 Comp. Gen. 220 (1957)), it is quite permissible to authorize financial officers receiving an allotment from the apportioned funds to further subdivide the allotment into "allowances" or "targets" as a means of meeting an operational need. However, this subdivision should not be regarded as an apportionment control for purposes of the Antideficiency Act. In other words, obligations or expenditures in excess of the allowances or targets do not automatically constitute a violation of subsection (h)(B) of the Antideficiency Act unless they also constitute a violation of the apportionment or its first administrative division.

It should be noted that the statute does not prescribe the level of fiscal responsibility for violations of the Act below the apportionment level. It merely recommends that the agency set the level at the highest practical point and suggests no more than one subdivision below the apportionment level. If the agency chooses to elevate over-obligations

or over-expenditures to the level of Antideficiency Act violations by so designating its administrative divisions and subdivisions, it is free to do so.

The following example is illustrative. The General Services Administration (GSA) had two separate appropriations duly apportioned by OMB--one for "rental of space" and one for "alterations and major repairs." It chose to allocate these funds to its various regional offices. One of the regional offices exceeded its allotment for alterations and repairs and used its rental funds to liquidate outstanding obligations for alterations. The fact that the central office might have sufficient funds still available for alterations from the applicable appropriation and apportionment (they were "no-year" funds, available until expended) would not save the Regional Office from an Antideficiency Act violation since GSA had chosen to establish financial responsibility at the Regional Office level. B-95136, August 8, 1979. See also B-179849, December 31, 1974, which discusses a Department of Justice Order specifying that "The allotment process is the principal means whereby responsibility is fixed for the conduct of program activities within the funds available." In view of this Order, obligations incurred in excess of the amount allotted would violate subsection (h) of the Act.

As mentioned before, the administrative regulations must enable the agency head or officer controlling the distribution of the apportioned funds to fix responsibility for any over-obligation or over-expenditure that may occur. In testimony at hearings on H.R. 7786 (81st. Cong., 2nd Sess. p. 10 (1950)) which later became subsection (g), the Director of the Bureau of the Budget (now OMB) stated:

> "At the present time, theoretically, I presume the agency head is about the only one that you could really hold responsible for exceeding [an] apportionment. The revised section provides for going down the line to the person who creates the obligation against the fund and fixes the responsibility on the bureau head or the division head, if he is the one who creates the obligation."

Thus, depending on the agency regulations and the level at which administrative responsibility is fixed, the violating individual could be the person in charge of a major agency division or subdivision, or it could be a contracting officer of financial officer.

Where there are many individuals involved in a complex transaction, the pinpointing of responsibility is often difficult. The General Counsel of the Army suggested a sensible approach in a memorandum to the Assistant Secretary of the Army (Financial Management), dated March 28, 1976. He identified the individual to be held responsible for a violation of the Act as follows:

> "Generally, he would be the highest ranking official in the decision-making process who had knowledge, either actual or constructive, of (1) precisely what actions were taken and (2) the impropriety or at least questionableness of such actions. There will be officials who had knowledge of either factor. But the person in the best and perhaps only position to prevent the ultimate error-and thus the one who must be held accountable-is the highest one who is aware of both."

Thus, where multiple individuals are involved in a violation of the Act, the "responsible individual" should not be too remote from the cause of the violation and must be in a position to have prevented the violation from occurring.

(9) Expenditures in Excess of Apportionment (Subsection (h))

> "No officer or employee of the United States shall authorize or create any obligation or make any expenditure (A) in excess of an apportionment or reapportionment, or (B) in excess of the amount permitted by regulations prescribed pursuant to subsection (g) of this section." 31 U.S.C. § 665(h).

Subsection (h) must be read in conjunction with subsections (a) and (b), as well as (c) and (g). Not only is it a violation of the Antideficiency Act to authorize or create an obligation or make a payment in advance of or in excess of available appropriations (subsection (a)), or to accept voluntary services or employ personal services except as authorized by law (subsection (b)), but it is also a violation to obligate or make payments in excess of an apportionment or reapportionment (subsection (c)) or in excess of amounts permitted by administrative regulations (subsection (g)). The cases cited in the discussion of subsection (g) above are equally relevant here.

(10) Penalties and Reporting Requirement (Subsection (i))

(a) Administrative and Penal Sanctions

31 U.S.C. § 665(i)(1) provides:

> "(i)(1) In addition to any penalty or liability under other law, any officer or employee of the United States who shall violate subsections (a), (b), or (h) of this section shall be subjected to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office; and any officer or employee of the United States who shall knowingly and willfully violate subsections (a), (b), or (h) of this section shall, upon conviction, be fined not more than $5,000 or imprisoned for not more than two years, or both."

Paragraph 1 of subsection (i) was added to the Act in 1905 give it "teeth." It subjects the officer or employee found responsible for a violation of subsection (a), (b), or (h) of the Act to "appropriate administrative discipline," which may include suspension without pay or removal from office, in addition to any other penalties or liabilities prescribed by other laws or regulations. It should be noted that the absence of bad faith or lack of intent to violate the statute does not excuse a violation even when the violation was totally inadvertent (e.g., due to a misinterpretation of regulations) or beyond the control of the responsible parties (e.g., due to currency fluctuations). See cases cited under "Intent/Factors Beyond Agency Control" in the discussion of subsection (a), supra.

Intent is important, however, in determining whether the violation of the Act should be punished by administrative sanctions or treated as a criminal action. If the Act was violated "knowingly and willfully," the responsible officer or employee may, if convicted, be fined up to $5,000 or imprisoned for not more than two years, or both. These are felony punishments and, understandably, are intended to be reserved for particularly flagrant violations of the Act. As of early 1982, it appears that no officer or employee has ever been prosecuted, no less convicted, of a knowing and willful violation of the Act. However, a recent opinion by the Attorney General to the President (April 25, 1980) and subsequent testimony before the Subcommittee on Compensation and Employee Benefits, House Committee on Post Office and Civil Service (in connection with the closing

of the Federal Trade Commission), made it very clear that the Department of Justice would, in appropriate cases in the future, begin enforcing the criminal provisions of the Antideficiency Act. 8/

(b) Reporting Requirement

> "In the case of a violation of subsections (a), (b), or (h) of this section by an officer or employee of an agency, or of the District of Columbia, the head of the agency concerned or the [Mayor] of the District of Columbia, shall immediately report to the President, through the Director of the Office of Management and Budget, and to the Congress all pertinent facts together with a statement of the action taken thereon." 31 U.S.C. § 665(i)(2).

Paragraph (2) requires all violations of subsections (a), (b), or (h) of the Act to be reported immediately to the President, through the Director of OMB, and to the Congress. The reports are to contain the facts of the violation and a statement of the disciplinary action taken. Of course, if a deficiency appropriation is necessary to liquidate an overobligation, a request for such an appropriation would be part of the report. It is also understood that the agency will do everything it can lawfully do to mitigate the financial effects of the violation. See, e.g., 55 Comp. Gen. 768 (1976), which discusses various permissible options when the violation involved obligations to a number of contractors such as termination for convenience or an agreement with the contractor to accept a no-cost stop work order.

However, the fact that no deficiency appropriation is necessary does not affect the requirement to report the violation to the President and to the Congress. For example, in B-95136, August 8, 1979 (discussed, supra, in connection with subsection (g)), the central office of GSA had sufficient no-year funds available in its alteration apportionment to meet any new obligations in this category, and the contractors who performed the work for the Regional Office which violated the Act had long been paid in full, albeit from the wrong appropriation. There was, therefore, no need to request a deficiency appropriation from the Congress. Nevertheless, the violation had to be reported in accordance with subsection (i)(2).

8/ The Attorney General's opinion is discussed in "Funding Gaps Jeopardize Federal Government Operations," PAD-81-31, March 3, 1981. (See Chapter 7, this Manual.)

Note once again that mistake or inadvertence is irrelevant in determining whether the violation must be reported. (See cases cited under subsection (a), supra.) Also, the relatively minor nature of the violation does not affect the duty to report. Although the GAO has used the words "technical violation" in a few decisions in the past (see, e.g., B-185952, August 18, 1976), the term is unfortunate because it suggests to some agencies an offense of a lesser degree of severity which they think need not be reported. There is no such thing as a "technical violation"; all violations of subsection (a), (b), or (h) of the Act must be reported.

C. AUGMENTATION OF APPROPRIATIONS

(1) The Augmentation Theory

The Comptroller General has often found some particular transaction improper on the grounds that it would constitute an "unauthorized augmentation" of appropriated funds. The body of case law has produced a general rule that an agency may not augment its appropriations from outside sources without specific statutory authority.

The prohibition against augmentation is a corollary of the separation-of-powers doctrine. When Congress makes an appropriation, it is also establishing an authorized program level. In other words, it is telling the agency that it cannot operate beyond the level that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative. Restated, the objective of the theory against augmentation of appropriated funds is to prevent a Government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity.

There is no express statutory prohibition against the augmentation of appropriated funds. The concept does, nevertheless, have an adequate statutory basis although it must be derived from several separate enactments. Specifically:

--31 U.S.C. § 484, the "miscellaneous receipts" statute, discussed in detail later in this Section.

--31 U.S.C. § 628, restricting the use of appropriated funds to their intended purposes. See Chapter 3, this Manual. Early decisions often based the augmentation prohibition on the combined effect of 31 U.S.C. §§ 484 and 628. See, e.g., 9 Comp. Dec. 174 (1902); 17 Comp. Dec. 712 (1911).

--18 U.S.C. § 209, which prohibits the payment of, contribution to, or supplementation of the salary of a Government officer or employee as compensation for his official duties from any source other than the Government of the United States.

The augmentation concept manifests itself in a wide variety of contexts. One application, discussed in Chapter 2 of this Manual, is the prohibition against transfers between appropriations without specific statutory authority. An unauthorized transfer is an improper augmentation. E.g., 23 Comp. Gen. 694 (1944); B-206668, March 15, 1982.

It should be apparent that the augmentation theory is related to the concept of purpose availability as discussed in Chapter 3. However, it is also closely related to amount in that it has the effect of restricting executive spending to the amounts appropriated by Congress.

The remainder of this Section will explore some of the more important manifestations of the augmentation rule.

(2) Disposition of Moneys Received: Repayments and Miscellaneous Receipts

A very important statute in the overall scheme of Government fiscal operations is 31 U.S.C. § 484, known as the "miscellaneous receipts" statute. Originally enacted in 1849 (9 Stat. 398), 31 U.S.C. § 484 provides:

> "The gross amount of all moneys received from whatever source for the use of the United States * * * shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, charges, expenses, or claim of any description whatever. * * *"

Penalties for violating 31 U.S.C. § 484 are found in 31 U.S.C. § 490.

Simply stated, with exceptions to be noted below, any money an agency receives from a source outside of the agency must be deposited into the Treasury. This means deposited into the general fund ("miscellaneous receipts") of the Treasury, not into the agency's own appropriations, even though the agency's appropriations may be technically still "in the Treasury" until the agency actually spends them. The Comptroller of the Treasury explained the distinction in the following terms:

> "It [31 U.S.C. § 484] could hardly be made more comprehensive as to the moneys that are meant and these moneys are required to be paid 'into the Treasury.' This does not mean that the moneys are to be added to a fund that has been appropriated from the Treasury and may be in the Treasury or outside. [Emphasis in original.] It seems to me that it can only mean that they shall go into the general fund of the Treasury which is subject to any disposition which Congress might choose to make of it. This has been the holding of the accounting officers for many years. [Citations omitted.] If Congress intended that these moneys should be returned to the appropriation from which a similar amount had once been expended it could have been readily so stated, and it was not." 22 Comp. Dec. 379, 381 (1916).

See also 5 Comp. Gen. 289 (1925).

The term "miscellaneous receipts" does not refer to any single account in the Treasury. Rather, it refers to a number of receipt accounts under the heading "General Fund." These are all listed in the Treasury Department's publication "Federal Account Symbols and Titles." (Treasury has announced that the booklet will become an appendix to the Fiscal Requirements Manual starting with FY 1983.)

In addition to 31 U.S.C. § 484, several other statutes require the deposit of moneys received in various specific contexts into miscellaneous receipts. Examples are:

--User charges and fees collected under 31 U.S.C. § 483a. (User charges are discussed further in Chapter 8, this Manual.)

--Moneys received for the transmission of private dispatches over telegraph lines owed or operated by the Government. 31 U.S.C. § 485.

--Proceeds from the sale of public property. 31 U.S.C. § 487; 40 U.S.C. § 485. (Exceptions are noted in the statutes.)

--Moneys received by the military departments from authorized leases. 10 U.S.C. § 2667.

To understand the significance of 31 U.S.C. § 484 and related statutes, it is necessary to recall the provision in Article I, section 9 of the Constitution directing that "No money shall be drawn from the Treasury but in consequence of appropriations made by law." Once money is deposited into a "miscellaneous receipts" account, it takes an appropriation to get it back out. E.g., 3 Comp. Gen. 296 (1923); 2 Comp. Gen. 599, 600 (1923). Thus, the effect of 31 U.S.C. § 484 is to ensure that the executive branch remains dependent upon the congressional appropriation process. Viewed from this perspective, 31 U.S.C. § 484 emerges as another element in the statutory pattern by which Congress retains control of the public purse under the separation-of-powers doctrine. See 51 Comp. Gen. 506, 507 (1972).

Accordingly, for an agency to retain and credit to its own appropriation moneys which it should have deposited into the general fund of the Treasury is an improper augmentation of the agency's appropriation. This applies even though the appropriation is a no-year appropriation. 46 Comp. Gen. 31 (1966).

Having said this, it is now necessary to point out that there are exceptions to the "miscellaneous receipts" requirement. The exceptions fall into two broad categories:

1. An agency may retain moneys it receives if it has statutory authority to do so. In other words, 31 U.S.C. § 484 will not apply if there is specific statutory authority for the agency to retain the funds.

2. Receipts that qualify as "repayments" to an appropriation may be retained to the credit of that appropriation and are not required to be deposited into the General Fund. 5 Comp. Gen. 734, 736 (1926); 6 Comp. Gen. 337 (1926); B-138942-O.M., August 26, 1976.

These exceptions are embodied in Treasury Department-GAO Joint Regulation No. 1 (issued pursuant to 31 U.S.C. § 66c and included as an appendix to Title 7 of the GAO Policy and Procedures Manual), which defines authorized repayments in terms of two general classes, reimbursements and refunds, as follows:

"a. Reimbursements to appropriations which represent amounts collected from outside sources for commodities or services furnished, or to be furnished, and which by law may be credited directly to appropriations.

"b. Refunds to appropriations which represent amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, including returns of authorized advances."

A "refund" as used in this definition must be directly related to a previously recorded expenditure. 7 GAO § 13.2. Thus, the recovery of an erroneous payment or overpayment which was erroneous at the time it was made qualifies as a refund to the appropriation originally charged. B-138942-O.M., August 26, 1976 (collections resulting from disallowances by GAO under 49 U.S.C. § 1517, the "Fly America Act"). Also, the return of an authorized advance, such as a travel advance, is a "refund."

Moneys collected to reimburse the Government for expenditures previously made must generally, absent statutory authority to the contrary, be deposited as miscellaneous receipts. The mere fact that the reimbursement is related to the prior expenditure--although this is an indispensable element of an authorized "refund"--is not in itself sufficient to remove the transaction from the scope of 31 U.S.C. § 484. While this

rule is specifically written into the "user charge" statute cited above, it applies with equal force in other situations where reimbursement is authorized or required by law. 16 Comp. Gen. 195 (1936); 24 Comp. Dec. 694 (1918); 22 Comp. Dec. 253 (1915); 22 Comp. Dec. 60 (1915).

However, in very limited circumstances, a reimbursement may qualify as an authorized repayment even without specific statutory authority. An example is 23 Comp. Gen. 652 (1944). The Agriculture Department was authorized to enter into cooperative agreements with States for soil conservation projects. Some States were prohibited by State law from making advances and were limited to making reimbursements after the work was performed. In these cases, Agriculture initially put up the State's share and was later reimbursed. The Comptroller General held that Agriculture could credit the reimbursements to the appropriation charged for the project. The distinction between this type of situation and the general rule is apparent. Here, Agriculture was not required to contribute the State's share; it could simply have foregone the projects in those States which could not advance the funds. This is different from a situation in which the agency is required to make a given expenditure in any event, subject to later reimbursement.

If the appropriation to which the repayment is to be credited is still current, then the funds remain available for further obligation within the time and purpose limits of the appropriation. However, a repayment to an expired appropriation must, absent statutory authority to the contrary, be credited to the obligated appropriation balance, not to current funds. If the expired appropriation has lapsed into the successor ("M") account, the repayment must be credited to the applicable "M" account. B-138942-O.M., supra; 6 Comp. Gen. 337 (1926). 9/ (For further discussion of these concepts, see Chapter 4, this Manual.)

As might be expected, there have been a great many decisions involving the "miscellaneous receipts" requirement. It is virtually impossible to draw further generalizations from the decisions other than to restate the basic

9/ From 1945 to 1956, there was a statute on the books that required repayments to lapsed appropriations to be deposited to miscellaneous receipts. The statute was repealed in 1956. Statements in decisions during this time period at variance with the proposition set forth in the text should therefore be disregarded. See, e.g., 34 Comp. Gen. 145, 146 (1954).

rule: An agency must deposit into the General Fund of the Treasury any funds it receives from sources outside of the agency unless the receipt constitutes an authorized repayment or unless the agency has statutory authority to retain the funds for credit to its own appropriations. The remainder of this Section will summarize a number of the cases, grouped into subject categories where feasible. The editors emphasize that the cases below represent a sampling and not an exhaustive compilation.

Contract matters

Moneys received as the excess costs of replacement contracts incident to the default of a contractor or his surety are for deposit into the general fund of the Treasury rather than the appropriation from which the contract payments were made. 46 Comp. Gen. 554 (1966). See also 44 Comp. Gen. 623 (1965); 40 Comp. Gen. 590 (1961); 14 Comp. Gen. 729 (1935); 14 Comp. Gen. 106 (1934); 10 Comp. Gen. 510 (1931); 8 Comp. Gen. 284 (1928). This is true regardless of whether the funds were actually collected or merely withheld from contract payments due. 52 Comp. Gen. 45 (1972).

Compensation paid by an insurance firm to a contractor to cover damages sustained by Government property under the contract may not be used to augment the agency's appropriation used for the contract, absent specific statutory authority, and the moneys, even if paid to the prime contractor, are for deposit into the Treasury as miscellaneous receipts. 48 Comp. Gen. 209 (1968).

However, refunds by a contractor for supplies which are found upon inspection to be unsatisfactory for use, that is, not in accordance with the terms of the contract, may be credited to the appropriation originally charged. The theory is that the payment was improperly made from the appropriation in the first instance. 8 Comp. Gen. 103 (1928). Similarly, the amount recovered from a contractor's surety because the work failed to meet specifications after the contractor received final payment is in the nature of a reduction in contract price representing the value of unfinished work. It is, therefore, the recovery of an unauthorized overpayment and may be deposited to the appropriation which was charged with the contract, and expended for completion of the work. 34 Comp. Gen. 577 (1955). See also 44 Comp. Gen. 623 (1965).

Refunds received by the Government under a price redetermination clause may be credited to the appropriation from which the contract was funded. 33 Comp. Gen. 176 (1953).

However, if the refund is entirely voluntary on the part of the contractor, the money goes to miscellaneous receipts. 24 Comp. Gen. 847, 851 (1945).

Refunds received by the Government under a warranty clause may be considered as an adjustment in the contract price and therefore credited to the appropriation originally charged under the contract. 34 Comp. Gen. 145 (1954).

Under a contract for the exchange of Government property for private property, when the Government delivers its property but the contractor defaults, moneys received from sureties in the amount of the performance bond, which presumably represents the value of the Government goods delivered, may be regarded as in recoupment of the advance payment and may be used for replacement purchase; however, any moneys recoverable in excess of the amount of the bond constitute compensation for loss and damage and must be deposited as miscellaneous receipts. 27 Comp. Gen. 117 (1947).

If a contract requires the Government to pay a deposit on containers and provides for a refund by the contractor of the deposit upon return of the empty containers by the Government, the refund may be credited to the appropriation from which the deposit was paid. B-8121, January 30, 1940. However, if the contract establishes a time limit for the Government to return the empty containers and provides further that thereafter title to the containers shall be deemed to pass to the Government, a refund received from the contractor after expiration of the time limit is treated as a sale of surplus property and must be deposited as miscellaneous receipts. 23 Comp. Gen. 462 (1943).

The traditional rule for liquidated damages is that they may be retained in the appropriation originally charged. 44 Comp. Gen. 623 (1965); 23 Comp. Gen. 365 (1943); 9 Comp. Gen. 398 (1930); 18 Comp. Dec. 430 (1911). The rationale for retaining liquidated damages in the appropriation account rather than depositing them in the Treasury as miscellaneous receipts is that they effect an authorized reduction in the price of the individual contract concerned, and also that this would make them available for return to the contractor should he subsequently be relieved of his liability. However, where this rationale does not apply--for example, in a case where the contractor did nothing and therefore earned nothing and the Comptroller General had denied the remission of liquidated damages under 41 U.S.C. § 256a--the Comptroller General has held that the liquidated damages should be deposited in the Treasury as miscellaneous receipts. 46 Comp. Gen. 554 (1966).

Damage to Government property and other tort liability

As a general proposition, amounts recovered by the Government for loss or damage to Government property cannot be credited to the appropriation available to repair or replace the property, but must be deposited in the Treasury as miscellaneous receipts. 26 Comp. Gen. 618 (1947) (recovery from insurance company for damage to Government vehicle); 3 Comp. Gen. 808 (1924) (damage to Coast Guard vessel resulting from collision). See also 48 Comp. Gen. 209 (1968) (discussed above under "Contract matters"); 35 Comp. Gen. 393 (1956); 28 Comp. Gen. 476 (1949); 15 Comp. Gen. 683 (1936); 5 Comp. Gen. 928 (1926); 20 Comp. Dec. 349 (1913); 14 Comp. Dec. 87 (1907).

However, property purchased and maintained by the General Services Administration from the General Supply Fund, a revolving fund established by 40 U.S.C. § 756, is treated differently. Recoveries for loss or damage to General Supply Fund property are credited to the General Supply Fund. 40 U.S.C. § 756(c). This includes recoveries from other Federal agencies for damage to GSA motor pool vehicles. 59 Comp. Gen. 515 (1980).

Also, where an agency has statutory authority to retain income derived from the use or sale of certain property, it may also retain recoveries for loss or damage to that property. 22 Comp. Gen. 1133 (1943); 24 Comp. Gen. 847 (1945). While the two cited decisions involve recoveries from insurers, the principle applies equally to recoveries directly from the party responsible for the loss or damage. 27 Comp. Gen. 352 (1947).

Where a private party responsible for loss or damage to Government property agrees to replace it in kind or to have it repaired to the satisfaction of the proper Government officials and to make payment directly to the party making the repairs, the arrangement is permissible and the agency is not required to transfer an amount equal to the cost of the repair or replacement to miscellaneous receipts. 14 Comp. Dec. 310 (1907); B-87636, August 4, 1949; B-128209-O.M., July 12, 1956. This is true even though the money would have to go to miscellaneous receipts if the responsible party paid it directly to the Government. See B-87636, supra, and cases cited in the first paragraph under this heading. However, the result would probably be different if the agency had a specific appropriation for repairing or replacing the property (as opposed to a lump-sum appropriation under which repair or replacement was merely one available object). 22 Comp. Gen. 1133, 1137 (1943). For an apparent exception

based on the specific legislation involved, see 28 Comp. Gen. 476 (1949). The relationship between 28 Comp. Gen. 476 and 14 Comp. Dec. 310 was addressed in B-128209-O.M., July 12, 1956, in which GAO stated "14 Comp. Dec. 310 has been followed for almost 50 years and we have never expressed disagreement with the conclusion reached therein."

Where Government property is lost or damaged in transit, recoveries from common carriers are for deposit in the Treasury as miscellaneous receipts. 46 Comp. Gen. 31 (1966). See also 28 Comp. Gen. 666 (1949); 2 Comp. Gen. 599 (1923); 22 Comp. Dec. 703 (1916); 22 Comp. Dec. 379 (1916). There is a narrow exception in cases where a single appropriation is involved and the freight bill on the shipment of the property lost or damaged exceeds the amounts paid for repairs. 21 Comp. Dec. 632 (1915), as amplified in 8 Comp. Gen. 615 (1929) and 28 Comp. Gen. 666 (1949). (The rule and exception are discussed in 46 Comp. Gen. 31, supra.) Also, as with receipts in general, the miscellaneous receipts requirement does not apply if the appropriation or fund involved is made reimbursable by statute. 46 Comp. Gen. 31, supra, at 33.

The requirement to deposit as miscellaneous receipts recoveries from carriers for property lost or damaged in transit does not apply to operating funds of the National Credit Union Administration since, even though the funds are treated as appropriated funds for most other purposes, they are technically not direct appropriations but fees and assessments collected from member credit unions. 50 Comp. Gen. 545 (1971).

While the preceding cases have all involved loss or damage to property, the United States may also recover amounts resulting from tortious injury to persons, for example, under the Federal Medical Care Recovery Act, 42 U.S.C. § 2651. See, e.g., 57 Comp. Gen. 781 (1978). Such recoveries must be deposited in the Treasury as miscellaneous receipts. 52 Comp. Gen. 125 (1972).

Fees and commissions

Fees and commissions paid either to the Government itself or to a Government employee for activities relating to official duties must be deposited in the Treasury as miscellaneous receipts absent statutory authority to the contrary.

In the case of fees paid to the Government, the result is a simple application of 31 U.S.C. § 484. Thus, the Comptroller General has held that the following items must go into miscellaneous receipts:

--Commissions from the use of pay telephones in Government buildings. 59 Comp. Gen. 213 (1980); 44 Comp. Gen. 449 (1965); 23 Comp. Gen. 873 (1944); 14 Comp. Gen. 203 (1934); 5 Comp. Gen. 354 (1925); B-4906, October 11, 1951.

--Attendance fees paid by non-Government employees permitted to attend a training course conducted by the Patent Office primarily for Government trainees. 42 Comp. Gen. 673 (1963).

--Fees paid by non-Government employees to attend a Government-sponsored conference. B-190244, November 28, 1977.

--Fees and related reimbursable incidental expenses paid to the Department of Agriculture in connection with the investigation of and issuance of certifications of quality on certain farm products. 2 Comp. Gen. 677 (1923).

Parking fees assessed by Federal agencies under the authority of 40 U.S.C. § 490(k) are to be credited to the appropriation or fund originally charged for providing the service. However, any amounts collected in excess of the actual cost of providing the service must be deposited as miscellaneous receipts. 55 Comp. Gen. 897 (1976). Parking fees may be authorized by statutes other than 40 U.S.C. § 490(k), in which event the terms of the particular statute must be examined. For example, under 38 U.S.C. § 5004, the Veterans Administration may assess fees for the use of parking facilities at VA hospitals. Originally, the fees had to go to miscellaneous receipts under 31 U.S.C. § 484. 45 Comp. Gen. 27 (1965). However, 38 U.S.C. § 5004 was amended in 1966 and is now essentially the same as 40 U.S.C. § 490(k).

Income derived from the installation and operation of vending machines on Government-owned or controlled property is generally for deposit as miscellaneous receipts. 32 Comp. Gen. 124 (1952). However, there are two major exceptions. First, if the contractual arrangement with the vendor is made by an employee association with administrative approval, the employee group may retain the income. 32 Comp. Gen. 282 (1952); B-112840, February 2, 1953. Second, under the Randolph-Sheppard Act, 20 U.S.C. § 107d-3, vending machine income in certain cases must go to blind licensee-operators or State agencies for the blind. See B-199132, September 10, 1980 (non-decision letter).

Fees paid to individual employees require a two-step analysis. The first step is the principle that the earnings of a Government employee in excess of his regular compensation gained in the course of or in connection with his services belong to the Government and not to the individual employee. The second step is then the application of 31 U.S.C. § 484. Using this analysis, GAO has held that fees were required to be deposited as miscellaneous receipts in the following instances:

--An honorarium paid to an Army officer for delivering a lecture at a university in his capacity as an officer of the United States. 37 Comp. Gen. 29 (1957).

--Fees collected from private individuals by Government employees for their services as notaries public. 16 Comp. Gen. 306 (1936).

--Witness fees and any allowances for travel and subsistence, over and above actual expenses, paid to Federal employees for testifying in certain State court proceedings. 15 Comp. Gen. 196 (1935); 23 Comp. Gen. 628 (1944); 36 Comp. Gen. 591 (1957); B-160343, November 23, 1966.

Applying the same analysis, a proposal under which a nonprofit corporation funded entirely by private industry would pay monthly "bonuses" to Army enlistees to encourage enlistment and satisfactory service, even if otherwise proper, could not be implemented without specific statutory authority because the payments could not be retained by the enlistees but would have to be deposited in the Treasury under 31 U.S.C. § 484. B-200013, April 15, 1981.

Economy Act

The Economy Act, 31 U.S.C. § 686 (covered in Chapter 8, this Manual), authorizes the inter- and intra-departmental furnishing of materials or performance of work or services on a reimbursable basis. It is a statutory exception to 31 U.S.C. § 484 in that it authorizes the performing agency to credit reimbursements to the appropriation or fund charged in executing its performance. However, this is not mandatory. The performing agency may, at its discretion, deposit reimbursements for both direct and indirect costs in the Treasury as miscellaneous receipts. 57 Comp. Gen. 674, 685 (1978), modifying 56 Comp. Gen. 275 (1977).

There is one area in which the agency has no discretion. Reimbursements may not be credited to an appropriation against which no charges have been made in executing the order. This would constitute an improper augmentation. Such reimbursements must therefore be deposited into the General Fund as miscellaneous receipts. An example would be depreciation in some cases. 57 Comp. Gen. 674, supra, at 685-86.

Setoff

Collections by setoff may be factually distinguishable from direct collections, but the effect on the appropriation is the same. If crediting an agency appropriation with a direct collection in a particular instance would result in an improper augmentation, then retaining an amount collected by setoff would equally constitute an improper augmentation. Thus, setoffs must be treated the same as direct collections. If an agency could retain a direct collection in a given situation, it can retain the setoff. However, if a direct collection would have to go to miscellaneous receipts, the setoff also has to go to miscellaneous receipts. In this latter situation, the agency must take the amount of the setoff from its own appropriation and transfer it to the General Fund of the Treasury.

A hypothetical situation will illustrate. Suppose a contractor defaults and becomes liable to the Government for the excess cost of reprocurement in the amount of $500. Suppose further that an employee of the contracting agency, in a separate transaction, negligently damages property of the contractor. The contractor files a claim under the Federal Tort Claims Act (Chapter 11, Part I, this Manual) and the agency settles the claim for $600. As it should, the agency sets the contract debt off against the tort claim and makes a net payment to the contractor of $100. However, if the agency stops here, it has augmented its appropriation to the tune of $500. If the tort claim had never occurred and the agency collected the $500 excess cost debt from the contractor, the $500 would have to go to miscellaneous receipts (see "Contract matters," above). Conversely, if the contract claim did not exist, the agency would end up paying $600 on the tort claim. Now, combining both claims, if both were paid without setoff, the net result would be that the agency is out $600. The setoff cannot operate to put the agency's appropriation in a better position than it would have been in had the agency and contractor simply exchanged checks. Thus, in addition to paying the contractor $100, the agency must deposit $500 from its own appropriation into the Treasury as miscellaneous receipts.

For further discussion of the treatment of setoffs, with case citations, see Section entitled "Disposition of Amounts Set Off" in Chapter 11 (Part II) of this Manual.

Revolving funds

A major exception to the requirements of 31 U.S.C. § 484 is the revolving fund. Under the revolving fund concept, receipts are credited directly to the fund and are available, without further appropriation by Congress, for expenditures to carry out the purposes of the fund. An agency must have statutory authority to establish a revolving fund. The enabling statute will specify the receipts that may be credited to the fund and the purposes for which they may be expended. An example is the General Services Administration's "General Supply Fund," noted above under "Damage to Government property." Revolving funds are covered generally in Chapter 15, this Manual.

However, the existence of a revolving fund does not automatically signal that 31 U.S.C. § 484 will never apply. Thus, where the statute establishing the fund does not authorize the crediting of receipts of a given type back into the fund, those receipts must be deposited in the Treasury as miscellaneous receipts. See 40 Comp. Gen. 356 (1960); 23 Comp. Gen. 986 (1944); 20 Comp. Gen. 280 (1940).

Legislation providing merely that recipients of certain assistance shall reimburse the United States does not create a revolving fund and the reimbursements are for deposit as miscellaneous receipts. 22 Comp. Dec. 60 (1915).

Miscellaneous cases: money to miscellaneous receipts

In addition to the categories discussed above, there have been numerous other decisions involving the disposition of receipts in various contexts. Some cases in which the Comptroller General held that receipts of a particular type must be deposited in the Treasury as miscellaneous receipts under 31 U.S.C. § 484 or related statutes are set forth below.

--Costs awarded to the United States by a court under 28 U.S.C. § 2412. 47 Comp. Gen. 70 (1967).

--Moneys collected under a general law or statute as a penalty. 47 Comp. Gen. 674 (1968) (dishonored checks); 23 Comp. Dec. 352 (1916). See also 39 Comp. Gen. 647, 649 (1960).

--Interest earned on grant advances by grantees other than States. (For case citations, see Chapter 13, this Manual, section entitled "Interest on Grant Advances.")

--Proceeds from silver and gold sold as excess property by the Interior Department as successor to the American Revolutionary Bicentennial Administration. (The silver and gold had been obtained by melting down unsold commemorative medals which had been struck by the Treasury Department for sale by the ARBA.) B-200962, May 26, 1981.

--Income derived from oil and gas leases on "acquired lands" (as distinguished from "public domain lands") of the United States used for military purposes. B-203504, July 22, 1981.

Miscellaneous cases: money retained by agency

Most cases in which an agency may credit receipts to its own appropriation or fund involve the areas previously discussed: authorized repayments, Economy Act transactions, revolving funds, or the other specific situations noted.

Cases not falling into one of these categories may be divided into two broad groupings. One group, not susceptible of further generalization, consists of cases in which an agency simply has specific statutory authority to retain certain receipts. Examples are:

--Forest Service may retain moneys paid by permittees on national forest lands representing their pro rata share under cooperative agreements for the operation and maintenance of waste disposal systems under the Granger-Thye Act. 55 Comp. Gen. 1142 (1976).

--Customs Service may, under 19 U.S.C. § 1524, retain charges collected from airlines for preclearance of passengers and baggage at airports in Canada, for credit to the appropriation originally charged with providing the service. 48 Comp. Gen. 24 (1968).

--Overseas Private Investment Corporation may retain interest on loans of excess foreign currencies made under the Foreign Assistance Act of 1961, as amended. 52 Comp. Gen. 54 (1972).

--Payroll deductions for Government-furnished quarters under 5 U.S.C. § 5911 are retained in the appropriation(s) or fund(s) from which the employee's salary is paid. 59 Comp. Gen. 235 (1980), as modified by 60 Comp. Gen. 659 (1981). (However, if the employee pays directly rather than by payroll deduction, the direct payments must go to miscellaneous receipts unless the agency has specific statutory authority to retain them. 59 Comp. Gen. at 236.)

The second group consists of a few cases in which GAO has approved agency retention of certain receipts even though there was no specific statutory authority to do so and the receipts were not authorized repayments. These cases are best viewed as exceptions to the rule.

For example, in B-166059, July 10, 1969, the Comptroller General held that the (then) Civil Service Commission could retain, for deposit in the Employees Health Benefits Fund, a trust fund, insurance proceeds recovered as a result of a fire which destroyed a quantity of health benefits brochures which had been purchased from the Fund. Discerning a statutory design to preserve the Fund intact for the advancement of the Health Benefits Program, GAO found retention of the insurance proceeds to be consistent with the legislative purpose and concluded that the proceeds were not "for the use of the United States" within the meaning of 31 U.S.C. § 484.

The retention of insurance proceeds was also involved in B-93322, April 19, 1950. In that case, the General Services Administration had entered into a contract for renovation of the Executive Mansion. The contract required the contractor to carry adequate fire and hazard insurance. The renovation project had been undertaken under a specific appropriation which was enough for the initial cost but would not have been sufficient for repairs in the event of a fire or other hazard. Since the renovation was a "particular job of temporary nature," and since a contrary result would defeat the purpose of the appropriation, the Comptroller General held that insurance proceeds received in the event a covered risk occurred could be retained and used for the cost of repairs.

Somewhat similarly, it was held in 39 Comp. Gen. 647 (1960) that to require amounts refunded to the United States for contract violations under the Great Plains Conservation Program to be deposited as miscellaneous receipts would deplete the appropriation to that extent and would thereby defeat the statutory purpose. However, the exception was permitted only for the refund of "unearned payments," that

is, violations which amounted to a failure of consideration such that the payments did not result in any benefit to the program. Refunds of "earned payments," that is, where the payments had resulted in some benefit to the program, would have to go to miscellaneous receipts since their retention would constitute an improper augmentation. In recognizing the limited exception, the Comptroller General noted that the terms of 31 U.S.C. § 484 "are general in nature and should receive a reasonable construction with respect to any particular form of income or receipt." 39 Comp. Gen. at 649.

In another case, GAO held that misconduct fines levied on Job Corps participants by the Labor Department could be viewed as "reductions of allowances," which were specifically authorized by statute, and therefore credited to Job Corps appropriations. GAO found a legislative intent to confer broad discretion in matters of enrollee discipline, and to require the fines to be deposited as miscellaneous receipts would have effectively removed a significant element of that discretion. B-130515, August 18, 1970.

The final exception is 24 Comp. Gen. 514 (1945), a case dealing with certain Government corporations which did not receive regular appropriations but instead received annual authorizations for expenditures from their capital funds for administrative expenses. An appropriation act had imposed a limit on certain communication expenditures and provided that savings resulting from the limit "shall not be diverted to other use but shall be covered into the Treasury as miscellaneous receipts." The Comptroller General construed this as meaning returned to the source from which made available. In the case of the corporations in question, this meant that the savings could be returned to their capital funds.

Money not received "for the use of the United States"

The requirement of 31 U.S.C. § 484 applies by its terms to money received "for the use of the United States." Although the Comptroller General has not attempted to define the phrase "for the use of the United States" in any detail, its scope, consistent with the statutory purpose, is broad. There is no distinction between money received for the use of the United States and money received for the use of a particular agency; such a distinction would largely nullify the statute.

Money properly held by a Federal agency in a trust capacity is not money received "for the use of the United States" for purposes of 31 U.S.C. § 484. Thus, money

received by the Department of Energy from an oil company under a consent order for violation of Federal oil price and allocation regulations was not received "for the use of the United States" to the extent the Department intended to refund it to overcharged customers. However, to the extent the Department sought to use the funds for any other purpose, such as distributing them to individuals other than the overcharged customers, the Department would not be holding the funds in trust and must deposit them as miscellaneous receipts. 60 Comp. Gen. 15, 26-27 (1980).

In B-205901, May 19, 1982, a railroad had furnished 15,000 gallons of fuel to the Federal Bureau of Investigation for use in an undercover investigation of thefts of diesel fuel from the railroad. The railroad and FBI agreed that the fuel or the proceeds from its sale would be returned upon completion of the investigation. In view of 31 U.S.C. § 484, the FBI then asked whether money generated from the sale of the fuel had to be deposited in the Treasury as miscellaneous receipts.

In one sense, it could be argued that the money was received "for the use of the United States," in that the FBI planned to use it as evidence. However, the Comptroller General pointed out, this is not the kind of receipt contemplated by 31 U.S.C. § 484. Citing 33 Op. Atty. Gen. 316, 321 (1922), the decision concluded that "Funds are received for the use of the United States only if they are to be used to bear the expenses of the Government or to pay the obligations of the United States." Therefore, there was no legal barrier to returning the funds to the railroad.

See also B-166059, July 10, 1969 (supra, this Section), for another case in which money was viewed as not having been received "for the use of the United States" for purposes of 31 U.S.C. § 484.

Money erroneously deposited as miscellaneous receipts

The various accounts that comprise the heading "miscellaneous receipts" are just that--they are receipt accounts, not expenditure or appropriation accounts. As noted earlier, by virtue of the Constitution, once money is deposited into miscellaneous receipts, it takes an appropriation to get it back out. What, therefore, can be done if an agency deposits some money into miscellaneous receipts by mistake?

This question really involves two separate situations. In the first situation, an agency receives funds which it is authorized, under the principles discussed above, to credit to its own appropriation or fund, but erroneously deposits them as miscellaneous receipts. The decisions have always recognized that the agency can make an appropriate adjustment to correct the error. In an early case, the Interior Department sold some property and deposited the proceeds as miscellaneous receipts when in fact it was statutorily authorized to credit the proceeds to its reclamation fund. The Interior Department then requested a transfer of the funds back to the reclamation fund, and the Secretary of the Treasury asked the Comptroller of the Treasury if it was authorized. Of course it was, replied the Comptroller:

> "This is not taking money out of the Treasury in violation of paragraph 7, section 9, Article I of the Constitution * * *.
>
> "The proceeds of the sale * * * have been appropriated by law. Taking it from the Treasury and placing it to the credit in the Treasury of the appropriation to which it belongs violates neither the Constitution nor any other law, but simply corrects an error by which it was placed to the unappropriated surplus instead of to the appropriation to which it belongs." 12 Comp. Dec. 733, 735 (1906).

This concept has consistently been followed. See 2 Comp. Gen. 599 (1923); 3 Comp. Gen. 762 (1924); and 45 Comp. Gen. 724 (1966).

In the second situation, a private party pays money to a Federal agency, the agency deposits it as miscellaneous receipts, and it is subsequently determined that the party is entitled to a refund. Here, in contrast to the first situation, an appropriation is necessary to get the money out.

There is a permanent indefinite appropriation for refunding collections "erroneously received and covered which are not properly chargeable to any other appropriation." 31 U.S.C. § 725q-1. The availability of this appropriation depends on exactly where the receipts were deposited. If the amount subject to refund was credited to some specific appropriation account, the refund is chargeable to the same account. If, however, the receipt was deposited in the general fund as miscellaneous receipts, then the appropriation made by

31 U.S.C. § 725q-1 is available for the refund, provided that the amount in question was "erroneously received and covered." 55 Comp. Gen. 625 (1976); 17 Comp. Gen. 859 (1938).

In cases where the "Moneys Erroneously Received and Covered" appropriation is otherwise available, it is available without regard to whether the original payment was made under protest. 55 Comp. Gen. 243 (1975). Payments under 31 U.S.C. § 725q-1 are made by the Treasury Department without the need for settlement action by GAO, except in doubtful cases. B-142380, March 24, 1960 (circular letter).

One case, 53 Comp. Gen. 580 (1974), combined elements of both situations. The Army Corps of Engineers had been authorized to issue discharge permits under the Refuse Act Permit Program. The program was statutorily transferred in 1972 to the Environmental Protection Agency. Under the User Charge Statute, 31 U.S.C. § 483a, both the Corps and EPA had charged applicants a fee. In some cases, the fees had been deposited as miscellaneous receipts before the applications were processed. The legislation that transferred the program to EPA also provided that EPA could authorize States to issue the permits. However, there was no provision that authorized EPA to transfer to the States any fees already paid. Thus, some applicants found that they had paid a fee to the Corps or EPA, received nothing for it, and were now being charged a second fee by the State for the same application. EPA felt that the original fees should be refunded. So did the applicants.

GAO noted that the User Charge Statute contemplates that the Federal agency will furnish something in exchange for the fee. Since this had not been done, the fees were erroneously deposited in miscellaneous receipts. However, the fees were not erroneously received--the Corps and EPA had been entirely correct in charging the fees in the first place--so the appropriation made by 31 U.S.C. § 725q-1 could not be used. GAO managed to find a way out, but the refunds would require a two-step process. The Corps and EPA should have deposited the fees in a trust account and kept them there until the applications were processed, at which time depositing as miscellaneous receipts would have been proper. Thus, EPA could first transfer the funds from miscellaneous receipts to its suspense account, and then make the refunds directly from the suspense account.

The subject of refunds is discussed further in Chapter 15, this Manual.

(3) Gifts and Donations to the Government

(a) Donations to the Government

It has long been recognized that the United States (as opposed to a particular agency) may receive and accept gifts. No particular statutory authority is necessary. As the Supreme Court has said, "Uninterrupted usage from the foundation of the Government has sanctioned it." United States v. Burnison, 339 U.S. 87, 90 (1950). The gifts may be of real property or personal property, and they may be testamentary (made by will) or inter vivos (made by persons who are not dead yet). Since gifts to the United States go to the general fund of the Treasury, there is no augmentation problem. However, as the Supreme Court held in the Burnison case, a State may prohibit testamentary gifts by its domiciliaries to the United States.

Gifts to an individual Federal agency stand on a different footing. The rule is that a Government agency may not accept for its own use (i.e., for retention by the agency or credit to its own appropriations) gifts of money or other property in the absence of specific statutory authority. 16 Comp. Gen. 911 (1937). As the Comptroller General said in that decision, "When the Congress has considered desirable the receipt of donations * * * it has generally made specific provision therefor * * *." See also B-13378, November 20, 1940; A-44015, March 17, 1937.

Thus, acceptance of a gift by an agency lacking statutory authority to do so is an improper augmentation. If an agency does not have statutory authority to accept donations, it must turn the money in to the Treasury as miscellaneous receipts. E.g., B-139992, August 31, 1959 (proceeds of life insurance policy designating Federal agency as beneficiary).

For purposes of this discussion, the term "gifts" may be defined as "gratuitous conveyances or transfers of ownership in property without any consideration." 25 Comp. Gen. 637, 639 (1946). A receipt that does not meet this definition does not become a gift merely because the agency characterizes it as one. For example, a fee paid for the privilege of filming a motion picture in a national park is not a gift and must be deposited as miscellaneous receipts rather than in the agency's trust fund. 25 Comp. Gen. 637, supra. Similarly, a reduction of accrued liability in fulfillment of a contractual obligation is not a donation for purposes of a statute authorizing appropriations to match "donations." B-183442, October 21, 1975.

A number of departments and agencies have statutory authority to accept gifts. A partial listing is contained in B-149711, August 20, 1963. The statutory authorizations contain varying degrees of specificity.

In addition, there is a statute tailor-made for the philanthropist desiring to make a donation for the express purpose of reducing the national debt. (Some people think they already do this in April of each year.) The Secretary of the Treasury may accept gifts of money, obligations of the United States, or other intangible personal property made for the express purpose of reducing the public debt. Gifts of other real or personal property for the same purpose may be made to the Administrator of the General Services Administration. 31 U.S.C. § 901.

Assuming the existence of the requisite statutory authority, it is quite easy to make a gift to the Government. There are no particular forms required. A simple letter to the appropriate agency head transmitting the funds for the stated purpose will suffice. See B-157469, July 24, 1974 (non-decision letter).

A 1980 GAO study found that, during fiscal year 1979, 41 Government agencies received a total of $21.6 million classified as gift revenue. See report entitled "Review of Federal Agencies' Gift Funds," FGMSD-80-77, September 24, 1980. The report pointed out that the use of gift funds dilutes congressional oversight because the funds do not go through the appropriation process. The report recommended that agencies be required to more fully disclose gift fund operations in their budget submissions.

The issue raised in most gift cases is the purpose for which gift funds may be used. This ultimately depends on the scope of the agency's statutory authority and the terms of the gift. Gift funds are accounted for as trust funds. They must be deposited in the Treasury as trust funds under 31 U.S.C. § 725s, to be disbursed in accordance with the terms of the trust. In 16 Comp. Gen. 650, 655 (1937), the Comptroller General stated:

> "Where the Congress authorizes Federal officers to accept private gifts or bequests for a specific purpose, often subject to certain prescribed conditions as to administration, authority must of necessity be reposed in the custodians of the trust fund to make expenditures for administration in such a manner as to carry out

> the purposes of the trust and to comply with the prescribed conditions thereof without reference to general regulatory and prohibitory statutes applicable to public funds."

While this passage correctly states the trust theory, agencies have sometimes misconstrued it to mean that they have free and unrestricted use of donated funds. This is not the case. On the one hand, donated funds are not subject to all of the restrictions applicable to direct appropriations. Yet on the other hand, they are still "public funds" in a very real sense. They can be used only in furtherance of authorized agency purposes and incident to the terms of the trust. See B-195492, March 18, 1980.

In evaluating the propriety of a proposed use of gift funds, it is first necessary to examine the precise terms of the statute authorizing the agency to accept the gift. Limitations imposed by that statute must be followed. Thus, under a statute which authorized the Forest Service to accept donations "for the purpose of establishing or operating any forest research facility," the Forest Service could not turn over unconditional gift funds to a private foundation under a cooperative agreement, with the foundation to invest the funds and use the proceeds for purposes other than establishing or operating forest research facilities. 55 Comp. Gen. 1059 (1976).

Under a statute authorizing the Federal Board for Vocational Education to accept donations to be used "in connection with the appropriations hereby made or hereafter to be made, to defray the expenses of providing and maintaining courses of vocational rehabilitation," the funds could be used only to supplement the Board's regular appropriations and could not be used for any expense not legally payable from the regular appropriation. The statute here conferred no discretion. 27 Comp. Dec. 1068 (1921).

Once it is determined that the proposed use will not contravene the terms of the agency's authorizing statute, the agency will have some discretion under the trust theory. The area in which this discretion has most often manifested itself in the decisions is entertainment. Appropriated funds are generally not available for entertainment. See Chapter 3, this Manual. However, a number of decisions have established the proposition that donated funds may be used for entertainment. This does not mean any entertainment agency officials may desire. Donated funds may be used for entertainment only if the entertainment will further a valid function of the

agency, if the function could not be accomplished as effectively from the Government's standpoint without the expenditure, and if the expenditure does not violate any restrictions imposed by the donor on the use of the funds. 46 Comp. Gen. 379 (1966); B-142538, February 8, 1961; B-170938, October 30, 1972. See also B-195492, March 18, 1980; B-152331, November 19, 1975. (B-152331 involved a trust fund which included both gift and non-gift funds.) It follows that donated funds may not be used for entertainment which is primarily social and which does not have a legitimate connection with official agency purposes. 61 Comp. Gen. ___ (B-206173, February 23, 1982) (donated funds improperly used for breakfast for Cabinet wives and Secretary's Christmas party).

The trust fund concept was also applied in 36 Comp. Gen. 771 (1957). The Alexander Hamilton Bicentennial Commission had been given statutory authority to accept gifts and wanted to use the donations to award Alexander Hamilton Commemorative Scholarships. The Commission was to have a brief existence and would not have sufficient time to administer the scholarship awards. The Comptroller General held that the Commission could, prior to the date of its expiration, transfer the funds to a responsible private organization for the purpose of enabling proper administration of the scholarship awards. The distinction between this case and 55 Comp. Gen. 1059, mentioned above, should be readily apparent. Here, the objective of transferring the funds to a private organization was to better carry out an authorized purpose. In 55 Comp. Gen. 1059, the objective was to enable the funds to be used for unauthorized purposes.

Another case illustrating permissible administrative discretion under the trust theory is B-131278, September 9, 1957. A number of persons had made donations to St. Elizabeth's Hospital to enable it to buy an organ for its chapel. The donors had made the gifts on the condition that the Hospital purchase a high-quality (expensive) organ. When the Hospital issued its invitation for bids on the organ, the specifications were sufficiently restrictive so as to preclude offers on lower quality organs. The decision found this to be entirely within the Hospital's discretion in using the gift funds in accordance with their terms.

As noted above, however, the agency's discretion in administering its gift funds is not unlimited. Thus, for example, an agency may not use gift funds for purely personal items such as greeting cards. 47 Comp. Gen. 314 (1967); B-195492, March 18, 1980.

Gifts which involve continuing expense present special problems. Although there are no recent cases, indications are that the agency may need specific statutory authority--not merely general authority to accept gifts--since the agency's appropriations would not otherwise be available to make the continuing expenses. For example, an individual made a testamentary gift to a United States naval hospital. The will provided that the money was to be invested in the form if a memorial fund, with the income to be used for specified purposes. The Comptroller General found this objectionable in that "the United States would become, in effect, a trustee for charitable uses, would never gain a legal title to the money, but would have the burden and obligation of administering in perpetuity a trust fund * * *." Also, absent specific authorization by Congress, appropriations would not be available for the expenses of administering the trust. Therefore, absent congressional authorization to accept the donation "as made," it could not be accepted either by the naval hospital, 11 Comp. Gen. 355 (1932), or by the Treasury Department, A-40707, December 15, 1936. See also 10 Comp. Gen. 395 (1931); 22 Comp. Dec. 465 (1916).

Finally, if an agency is authorized to accept gifts, it may also accept a loan of equipment by a private party without charge to be used in connection with particular Government work. The agency's appropriations for the work will be available for repairs to the equipment, but only to the extent necessary for the continued use of the equipment on the Government work, and not after the Government's use has terminated. 20 Comp. Gen. 617 (1941). In one case, GAO approved the loan of private property to a Federal agency by one of its employees, without charge and apparently without statutory authority, where the agency administratively determined that the equipment was necessary to the discharge of agency functions and the loan was in the interest of the United States. 22 Comp. Gen. 153 (1942). The decision stressed, however, that the practice should not be encouraged. The decision seems to have been based in part on wartime needs and its precedent value would therefore seem minimal. See, e.g., B-168717, February 12, 1970.

(b) Donations to Individual Employees

Private contributions to the salary or expenses of a Federal employee are improper for two reasons. First, they are prohibited by 18 U.S.C. § 209, noted at the outset of this Section. For purposes of 18 U.S.C. § 209, the proverb that it is better to give than to receive doesn't work. Both the giving and the receiving are criminal offenses under the statute.

Second, they are improper as unauthorized augmentations. To the extent the private contribution replaces the employee's Government salary, it is a direct augmentation of the employing agency's appropriations. To the extent the contribution supplements the Government salary, it is an augmentation in an indirect sense, the theory being that when Congress appropriates money for an activity, all expenses of that activity must be borne by that appropriation unless Congress specifically provides otherwise.

An early case in point is 2 Comp. Gen. 775 (1923). The American Jewelers' Protective Association offered to pay the salary and expenses of a customs agent for one year on the condition that the agent be assigned exclusively for that year to investigate jewelry smuggling. The Comptroller General found the arrangement improper, for the two reasons noted above. Whether the payments were to be made directly to the employee or to the agency by way of reimbursement was immaterial.

Most cases in this area involve schemes for private entities to pay official travel expenses. From the sheer number of these cases, one cannot help feeling that the bureaucrat must indeed be a beloved creature. Be that as it may, it is still an augmentation.

One of the earliest augmentation cases dealt with precisely this situation. Certain commercial organizations wanted to pay the travel expenses of Commerce Department investigators. Can't be done, ruled the Comptroller of the Treasury. It would be both an unauthorized augmentation and a violation of the criminal statute. 26 Comp. Dec. 43 (1919).

A series of later cases developed the current rules. There is a general rule, more accurately a set of rules, and one significant exception. The summary below has been compiled from several cases: 36 Comp. Gen. 268 (1956); 46 Comp. Gen. 689 (1967); 49 Comp. Gen. 572 (1970); 59 Comp. Gen. 415 (1980); B-128527, September 13, 1957; B-134573, December 24, 1957; B-128527, August 11, 1967; B-166850, June 13, 1969.

General rules. Donations from private sources, either in cash or in kind, for official travel to conduct Government business constitute an unlawful augmentation, unless the employing agency has statutory authority to accept gifts.

If the agency has statutory authority to accept gifts, the donation must be made to the agency, not to the individual employee. The employee, as in any other travel situation, will then be reimbursed by his agency in accordance with applicable travel laws and regulations. The employee may receive no more by virtue of the donation than he is entitled to under the travel laws and regulations.

Although donated funds are usually accounted for as trust funds, donations in the form of reimbursement for employee travel should be credited to the agency's appropriation that initially funded the travel. 46 Comp. Gen. 689, 690-91, supra. To credit these donations to the agency's gift account would amount to supplementing gift funds with appropriated funds, thereby avoiding the restrictions applicable to appropriated funds such as expiration at the end of the fiscal year. Since the funds are donated for the express purpose of augmenting travel appropriations, they may be used only for that purpose, i.e., for official employee travel. 36 Comp. Gen. 268, supra. Of course, the donations may be credited to the agency's gift account if the travel was initially funded from that account.

If the donation is in kind, obviously the employee can't ship his ham sandwich back to Washington. Therefore, again assuming the employing agency is authorized to accept gifts, the employee may accept the services. However, it is still treated as a donation to the agency, so the employee's per diem must be reduced or eliminated as appropriate.

If the agency does not have statutory authority to accept gifts, a donation of cash must be deposited in the Treasury as miscellaneous receipts. An offer of a contribution in kind would have to be rejected. (Theoretically, it would seem possible to accept the offer, with the agency to then transfer the employee's per diem to miscellaneous receipts, but there are no cases discussing this.)

Exception. Under 5 U.S.C. § 4111, enacted as part of the Government Employees Training Act, an employee may accept (1) contributions and awards incident to training in non-Government facilities, and (2) payment of travel, subsistence, and other expenses incident to attendance at meetings, but only if the donor is a tax-exempt nonprofit organization. If an employee receives a contribution in cash or in kind under this section, his travel and subsistence allowances must be appropriately reduced.

If a donation by a tax-exempt organization does not involve either of the two situations specified in 5 U.S.C. § 4111 (training and attendance at meetings), then the general rules apply. 49 Comp. Gen. 572, 575 (1970).

5 U.S.C. § 4111 authorizes the employee to accept the donation. It does not authorize the agency to accept the donation for credit to its appropriations and then reimburse the employee. 55 Comp. Gen. 1293 (1976). If an employee receives an authorized donation after the Government has already paid his travel expenses, he cannot keep everything. He must refund to the Government the amount by which his allowances would have been reduced had he received the donation before the allowances were paid. The agency may then credit this refund to its travel appropriation as an authorized repayment. Id.

Donations made under the express condition that they be used for some unauthorized purpose should be returned to the donor. 47 Comp. Gen. 319 (1967). The cited decision involved a donation to pay the cost of air insurance, an expense the agency was not authorized to incur. See also B-166850, June 13, 1969.

Although the principles discussed above arise most often in connection with employee travel, they occasionally arise in other contexts as well. For example, an employee may not retain "discount coupons" or similar items of value received from a commercial airline incident to the purchase of an airline ticket for official travel. 59 Comp. Gen. 203, 206 (1980); B-199656, July 15, 1981. However, the employee may keep a prize won in a contest or lottery sponsored by an air carrier if the contest was open to the general public and not limited to ticket-holding passengers. B-199656, supra.

Similarly, denied boarding compensation is payable to the Government and not to the individual employee. 59 Comp. Gen. 95 (1979). Since this is not a gift, but is more in the nature of damages, it must be deposited into miscellaneous receipts. 41 Comp. Gen. 806 (1962). However, where the employee voluntarily vacates his seat and takes a later flight, he may retain overbooking compensation received from the airline, subject to offset for any additional travel expenses caused by his voluntary action. 59 Comp. Gen. 203 (1980).

(4) Miscellaneous Augmentation Cases

As pointed out earlier in the introductory comments, the augmentation theory is relevant in a wide variety of contexts. The most common applications are the areas previously discussed--the spectrum of situations involving the miscellaneous receipts statutes and the acceptance of gifts. This portion of the discussion will present a sampling of cases to illustrate other applications of the theory.

Another way of stating the augmentation rule is that when Congress appropriates funds for an activity, the appropriation represents a limitation Congress has fixed for that activity, and all expenditures for that activity must come from that appropriation absent express authority to the contrary. Thus, a Federal institution is normally not eligible to receive grant funds from another Federal institution. It is not neccessary for the grant statute to expressly exclude Federal institutions as eligible grantees; the rule will apply based on the augmentation theory unless the grant statute expressly includes Federal institutions. For example:

--Federal grant funds for nurse training programs could not be allotted to St. Elizabeths Hospital since it was already receiving appropriations to maintain and operate its nursing school. 23 Comp. Gen. 694 (1944).

--Haskell Indian Junior Colllege, fully funded by the Bureau of Indian Affairs, was not eligible to receive grant funds from Federal agencies other than the Bureau of Indian Affairs, since Congress had already provided for its needs by direct appropriations. B-114868, April 11, 1975.

--The Office of Education could not make a library support grant to the National Commission on Libraries and Information Science as it would be an improper augmentation of the Commission's appropriations. 57 Comp. Gen. 662 (1978).

The improper treatment of reimbursable transactions may result in an augmentation. Thus, if a given reimbursement must be credited to the appropriation that "earned" it, i.e., that financed the transaction, and that appropriation has expired, crediting the reimbursement to current funds is an improper augmentation. An example of this type of transaction is the Economy Act. See 31 U.S.C. § 686(b) and Chapter 8, this Manual.

An agency may have the option of crediting reimbursements either to current funds or to the appropriation which financed the transaction. An example here is the Arms Export Control Act (Foreign Military Sales Act), discussed in Chapter 8, this Manual. Even here, however, crediting a reimbursement to an account which bears no relationship to the transaction would be an unauthorized augmentation. B-132900-O.M., November 1, 1977. Several statutes applicable to the Defense Department provide similar options. For a detailed discussion of these statutes, see B-179708-O.M., July 21, 1975, and B-179708-O.M., December 1, 1975.

Failure to recover all required costs in a reimbursable Economy Act transaction improperly augments the appropriations of the ordering agency. 57 Comp. Gen. 674, 682 (1978).

Similarly, interdepartmental loans of personnel may be handled under the Economy Act. Absent an Economy Act agreement, the employee's normal salary is not reimbursable. 59 Comp. Gen. 366 (1980). Violation of these principles may result in an improper augmentation. See 13 Comp. Gen. 234 (1934); A-27784, July 15, 1931.

Reimbursement by one agency to another in situations which are not the proper subject of an Economy Act agreement or where reimbursement is not otherwise statutorily authorized is improper for several reasons: it is an unauthorized transfer of appropriations (Chapter 2, this Manual); it violates 31 U.S.C. § 628 by using the reimbursing agency's appropriations for other than their intended purpose (Chapter 3, this Manual); and it is an improper augmentation of the appropriations of the agency receiving the reimbursement. (The cases do not always cite all of these theories; they again illustrate the close interrelationship of the various concepts discussed throughout this Manual.) The situation arises, for example, when agencies attempt to use the Economy Act for a "service" which is a normal part of the providing agency's mission and for which it receives appropriations.

To illustrate, an agency acquiring land cannot reimburse the Justice Department for the legal expenses incurred incident to the acquisition because these are regular administrative expenses of the Justice Department for which it receives appropriations. 16 Comp. Gen. 333 (1936). Similarly, an agency cannot reimburse the Division of Disbursements, Treasury Department, for the administrative expenses incurred in making disbursements on its account. 17 Comp. Gen. 728 (1938).

Federal agencies may not reimburse the Patent Office for services performed in administering the patent and trademark laws since the Patent Office is required by law to furnish these services and receives appropriations for them. 33 Comp. Gen. 27 (1953). Nor may they reimburse the Library of Congress for recording assignments of copyrights to the United States. 31 Comp. Gen. 14 (1951). Similarly, the Interior Department could not charge other agencies for the cost of conducting hearings incident to the validation of unpatented mining claims, although it could charge for other services in connection with the validation which it was not required to furnish. 40 Comp. Gen. 369 (1960).

The Merit Systems Protection Board may not accept reimbursement from other Federal agencies for travel expenses of hearing officers to hearing sites away from the Board's regular field offices. Holding the hearings is not a service to the other agency, but is a Board function for which it receives appropriations. The inadequacy of the Board's appropriations to permit sufficient travel is legally irrelevant. 59 Comp. Gen. 415 (1980), affirmed upon reconsideration, 61 Comp. Gen. ___ (B-195347/B-195348, May 26, 1982). Where an agency provides personnel to act as hearing officers for another agency, it may be reimbursed if it is not required to provide the officers (B-192875, January 15, 1980), but may not be reimbursed if it is required to provide them (32 Comp. Gen. 534 (1953)).

The following cases illustrate other situations which GAO found would result in unauthorized augmentations:

--The Customs Service may not charge the party-in-interest for travel expenses of customs employees incurred incident to official duties performed at night or on a Sunday or holiday. 43 Comp. Gen. 101 (1963); 3 Comp. Gen. 960 (1924).

--Agency "A" desires to consolidate several local offices in one building, but part of the building is occupied by Agency "B". Agency A may not pay moving and commercial rent expenses incident to Agency B's relocation. 33 Comp. Gen. 423 (1954). For conceptually related cases, see 27 Comp. Gen. 391 (1948) and 22 Comp. Gen. 462 (1942).

--Department of Energy may not use overcharge refunds collected from oil companies to pay the administrative expenses of its Office of Hearings and Appeals. B-200170, April 1, 1981.

--Department of Agriculture could not apply savings in the form of credits accrued under a contract for the handling of food stamp sales receipts to offset the cost of a separate data collection contract, even though both contracts were necessary to the same program objective. A-51604, May 31, 1977.

--Proposal for airlines to reimburse Treasury to permit Customs Service to hire additional staff to reduce clearance delays at Miami airport was unauthorized in that it would augment appropriations made by Congress for that service. 59 Comp. Gen. 294 (1980).

D. LUMP-SUM APPROPRIATIONS

A lump-sum appropriation is one that is made to cover a number of specific projects or items. The term is used to contrast a line-item appropriation, which is available only for the specific object described.

Lump-sum appropriations come in many forms. Many smaller agencies receive only a single appropriation, usually termed "Salaries and Expenses" or "Operating Expenses." All of the agency's operations must be funded from this single appropriation. Cabinet-level departments and larger agencies receive several appropriations, often based on broad object categories such as "operations and maintenance" or "research and development." For purposes of this discussion, a lump-sum appropriation is simply one that is available for more than one specific object.

In earlier times when the Federal Government was much smaller and Federal programs were (or at least seemed) much simpler, very specific line-item appropriations were more common. In recent decades, however, as the Federal budget has grown in both size and complexity, a lump-sum approach has become a virtual necessity. For example, an appropriation act for an establishment the size of the Defense Department structured solely on a line-item basis would rival the telephone directory in bulk.

As discussed in Chapter 2 of this Manual, the amount of a lump-sum appropriation is not derived through guesswork. It is the result of a lengthy budget and appropriation process. The agency first submits its appropriation request to Congress through the Office of Management and Budget, supported by detailed budget justifications. Congress then reviews the request and enacts an appropriation which may be more, less, or the same as the amount requested. Variations from the amount requested are usually explained in the appropriation act's legislative history, most often in committee reports. (The process is explained in more detail in Chapter 2, Section E, this Manual.)

All of this leads logically to a question which can be phrased in various ways: How much flexibility does an agency have in spending a lump-sum appropriation? Is it legally bound by its original budget estimate or by expressions of intent in legislative history? How is the agency's legitimate need for administrative flexibility balanced against the Constitutional role of the Congress as controller of the public purse?

The answer to these questions is one of the most important principles of appropriations law. The rule, simply stated, is this: Restrictions on a lump-sum appropriation contained in the agency's budget request or in legislative history are not legally binding on the department or agency unless they are carried into (specified in) the appropriation act itself. The rule carries with it two unstated premises: The agency cannot exceed the total amount of the lump-sum appropriation and its spending must not violate other applicable statutory restrictions. The rule applies equally whether the legislative history is mere acquiescence in the agency's budget request or an affirmative expression of intent.

The rule recognizes the agency's need for flexibility to meet changing or unforeseen circumstances yet preserves congressional control in several ways. First, the rule merely says that the restrictions are not legally binding. The practical wisdom of making the expenditure is an entirely separate question. An agency that disregards the wishes of its oversight or appropriations committees will most likely be called upon to answer for its digressions before those committees next year. An agency that fails to "keep faith" with the Congress may find its next appropriation reduced or limited by line-item restrictions. (That Congress is fully aware of this relationship is evidenced by a 1973 House Appropriations Committee report, quoted in Chapter 2, Section F(2) of this Manual, "Effect of Budget Estimates.") Second, reprogramming arrangements with the various committees (see Chapter 2, Section F(3), this Manual) provide another safeguard against abuse. Finally, Congress always holds the ultimate trump card. It has the power to make any restriction legally binding simply by including it in the appropriation act.

Perhaps the easiest case is the effect of the agency's own budget estimate. The rule here was stated in 17 Comp. Gen. 147 (1937) as follows:

> "The amounts of individual items in the estimates presented to the Congress on the basis of which a lump sum appropriation is enacted are not binding on administrative officers unless carried into the appropriation act itself." Id., at 150.

See also B-55277, January 23, 1946; B-35335, July, 17, 1943.

It follows that the lack of a specific budget request will not preclude an expenditure from a lump-sum appropriation which is otherwise legally available for the item in question. To illustrate, the Administrative Office of the U.S. Courts asked for a supplemental appropriation of $11,000 in 1962 for necessary salaries and expenses of the Judicial Conference in revising and improving the Federal rules of practice and procedure. The House of Representatives did not allow the increase but the Senate included the full amount. The bill went to conference but the conference was delayed and the agency needed the money. The Administrative Office then asked whether it could take the $11,000 out of its regular 1962 appropriation even though it had not specifically included this item in its 1962 budget request. Citing 17 Comp. Gen. 147, supra, and noting that the study of the Federal Rules was a continuing statutory function of the Judicial Conference, the Comptroller General concluded as follows:

> "Thus, in the absence of a specific limitation or prohibition in the appropriation under consideration as to the amount which may be expended for revising and improving the Federal Rules of practice and procedure, you would not be legally bound by your budget estimates or absence thereof.
>
> "If the Congress desires to restrict the availability of a particular appropriation to the several items and amounts thereof submitted in the budget estimates, such control may be effected by limiting such items in the appropriation act itself. Or, by a general provistion of law, the availability of appropriations could be limited to the items and the amounts contained in the budget estimates. In the absence of such limitations an agency's lump-sum appropriation is legally available to carry out the functions of the agency."

This decision is B-149163, June 27, 1962. See also 20 Comp. Gen. 631 (1941); B-198234, March 25, 1981.

The issue raised in most of the decisions results from changes to or restrictions on a lump-sum appropriation imposed during the legislative process. The "leading case" in this area is 55 Comp. Gen. 307 (1975), the so-called "LTV case." The Department of the Navy had selected the McDonnell Douglas Corporation to develop a new fighter aircraft. LTV Aerospace Corporation protested the selection, arguing that the aircraft McDonnell Douglas proposed violated the 1975

Defense Department Appropriation Act. The appropriation in question was a lump-sum appropriation of slightly over $3 billion under the heading "Research, Development, Test, and Evaluation, Navy." This appropriation covered a large number of projects, including the fighter aircraft in question. The conference report on the appropriation act had stated that $20 million was being provided for a Navy combat fighter, but that "Adaptation of the selected Air Force Air Combat Fighter to be capable of carrier operations is the prerequisite for use of the funds provided." It was conceded that the McDonnell Douglas aircraft was not a derivative of the Air Force fighter and that the Navy's selection was not in accord with the instructions in the conference report. The issue, therefore, was whether the conference report was legally binding on the Navy. In other words, did Navy act illegally in choosing not to follow the conference report?

The ensuing decision is GAO's most comprehensive statement on the legal availability of lump-sum appropriations. Pertinent excerpts are set forth below:

> "[C]ongress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for 'unforeseen developments, changing requirements, * * * and legislation enacted subsequent to appropriations.' [Citation omitted.] This is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in Committee reports. However, in order to preserve spending flexibility, it may choose not to impose these particular restrictions as a matter of law, but rather to leave it to the agencies to 'keep faith' with the Congress. * * *
>
> "On the other hand, when Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on an agency's use of funds, it does so by means of explicit statutory language. * * *

"Accordingly, it is our view that when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies. * * *

"We further point out that Congress itself has often recognized the reprogramming flexibility of executive agencies, and we think it is at least implicit in such [recognition] that Congress is well aware that agencies are not legally bound to follow what is expressed in Committee reports when those expressions are not explicitly carried over into the statutory language. * * *

"We think it follows from the above discussion that, as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there." 55 Comp. Gen. at 318, 319, 321, 325.

Accordingly, GAO concluded that Navy's award did not violate the appropriation act and the contract therefore was not illegal.

The same volume of the Comptroller General's decisions contains another often-cited case, 55 Comp. Gen. 812 (1976), the "Newport News" case (sometimes called "son of LTV," especially by the authors of the LTV decision). This case also involved the Navy. This time, Navy wanted to exercise a contract option for construction of a nuclear powered guided missile frigate, designated DLGN 41. The contractor, Newport News Shipbuilding and Dry Dock Company, argued that exercising the contract option would violate the Antideficiency Act by obligating more money than Navy had in its appropriation.

The appropriation in question, Navy's "Shipbuilding and Conversion" appropriation, provided "for the DLGN nuclear powered guided missile frigate program, $244,300,000, which shall be available only for construction of DLGN 41 and for advance procurement funding for DLGN 42 * * *." The

committee reports on the appropriation act and the related authorization act indicated that, out of the $244 million appropriated, $152 million was for construction of the DLGN 41 and the remaining $92 million was for long lead time activity on the DLGN 42. It was clear that, if the $152 million specified in the committee reports for the DLGN 41 was legally binding, obligations resulting from exercise of the contract option would exceed the available appropriation.

The Comptroller General applied the "LTV principle" and held that the $152 million was not a legally binding limit on obligations for the DLGN 41. As a matter of law, the entire $244 million was legally available for the DLGN 41 because the appropriation act did not include any restriction. Therefore, in evaluating potential violations of the Antideficiency Act, the relevant appropriation amount is the total amount of the lump-sum appropriation minus sums already obligated, not the lower figure derived from the legislative history. As the decision recognized, Congress could have imposed a legally binding limit by the very simple device of appropriating a specific amount only for the DLGN 41, or by incorporating the committee reports in the appropriation language.

This decision illustrates another important point: the terms "lump-sum" and "line-item" are relative concepts. The $244 million appropriation in the Newport News case could be viewed as a line-item appropriation in relation to the broader "Shipbuilding and Conversion" category, but it was also a lump-sum appropriation in relation to the two specific vessels included. This factual distinction does not affect the applicable legal principle. As the decision explained:

> "Contractor urges that LTV is inapplicable here since LTV involved a lump-sum appropriation whereas the DLGN appropriation is a more specific "line item" appropriation. While we recognize the factual distinction drawn by Contractor, we nevertheless believe that the principles set forth in LTV are equally applicable and controlling here. * * * [I]mplicit in our holding in LTV and in the other authorities cited is the view that dollar amounts in appropriation acts are to be interpreted differently from statutory words in general. This view, in our opinion, pertains whether the dollar amount is a lump-sum appropriation available for a large number of items, as in LTV, or, as here, a more specific appropriation available for only two items." 55 Comp. Gen. at 821-22.

A precursor of LTV and Newport News provides another interesting illustration. In 1974, controversy and funding uncertainties surrounded the Navy's "Project Sanguine," a communications system for sending command and control messages to submerged submarines from a single transmitting location in the United States. The Navy had requested $16.6 million for Project Sanguine for FY 1974. The House deleted the request, the Senate restored it, the conference committee compromised and approved $8.3 million. The Sanguine funds were included in a $2.6 billion lump-sum Research and Development appropriation. Navy spent more than $11 million for Project Sanguine in FY 1974. The question was whether Navy violated the Antideficiency Act by spending more than the $8.3 million provided in the conference report. GAO found that it did not, because the conference committee's action was not specified in the appropriation act and was therefore not legally binding. Significantly, the appropriation act did include a proviso prohibiting use of the funds for "full scale development" of Project Sanguine (not involved in the $11 million expenditure), illustrating that Congress knows perfectly well how to impose a legally binding restriction when it desires to do so. "Legality of the Navy's Expenditures for Project Sanguine During Fiscal Year 1974," LCD-75-315, January 20, 1975; B-168482-O.M., August 15, 1974.

Similarly, the Department of Health, Education, and Welfare received a $12 billion lump-sum appropriation for public assistance in 1975. Committee reports indicated that $9.2 million of this amount was being provided for research and development activities of the Social and Rehabilitation Service. Since this "earmarking" of the $9.2 million was not carried into the appropriation act itself, it did not constitute a statutory limit on the amount available for the program. B-164031(3), April 16, 1975. The decision stated the principle this way:

> "[I]n a strict legal sense, the total amount of a line item appropriation may be applied to any of the programs or activities for which it is available in any amount absent further restrictions provided by the appropriation act or another statute."

GAO has applied the rule of the LTV and Newport News decisions in a number of additional cases. Several of these applications, many of which involve variations on the basic theme, are summarized below:

--The 1975 Labor Department appropriation included $2.4 billion for "Comprehensive Manpower Assistance." A committee report "directing" a specific minimum funding level out of this appropriation for the Opportunities Industrialization Centers--but not carried into the appropriation act itself--was not legally binding on the Labor Department. B-163922, October 3, 1975.

--Agencies are required to pay "rent"--called Standard Level User Charges (SLUC)--to the General Services Administration for the public buildings they occupy. Agencies budget and receive appropriations for SLUC payments just as any other expenditures. Several appropriation acts for 1976 included provisions limiting SLUC payments to 90 percent of the amount charged by GSA. In addition, committee reports on the appropriations for the Department of Agriculture and the Food and Drug Administration specified further reductions in SLUC payments. Since the reductions in the committee reports were not carried into the appropriation acts themselves, the agencies were required to pay the full SLUC assessments, subject only to the 90 percent statutory limitation. B-177610, September 3, 1976; B-186818, September 22, 1976. Applying the rationale of these cases, GAO held in B-204270, October 13, 1981, that an agency was bound to observe a specific dollar limitation on its SLUC payments included in its appropriation act.

--A FY 1978 appropriation act appropriated $748 million for "Operating Expenses, Fossil Fuels" with no further statutory breakdowns. One of the programs funded from this appropriation was research and development under the Electric and Hybrid Vehicle Research, Development, and Demonstration Act of 1976. The Appropriations Committees had reduced the electric vehicle budget request from $47 million to $30 million. However, $30 million would not have been enough to carry out the statutorily mandated functions under the electric vehicle statute. Applying the general rule, GAO concluded that the lump-sum appropriation was available for obligation in excess of the $30 million specified in the committee reports for the required functions. B-159993, September 1, 1977. Of course, an agency cannot be expected to do the impossible. If appropriations are insufficient to carry out all programs, the agency must allocate its funds in some reasonable pattern of priorities. Mandatory programs take precedence over discretionary ones. Within the group

of mandatory programs, more specific requirements should be funded first, such as those with specific time schedules, with remaining funds then applied to the more general requirements. Id.; see also B-177806, February 24, 1978 (non-decision letter).

--The Department of Agriculture wanted to use its 1978 lump-sum Resource Conservation and Development appropriation to fund existing projects rather than starting any new ones. Instructions from the Appropriations Committees restoring funds for new projects were contained in committee reports but not in the appropriation act itself. The Department's action therefore was legally permissible. B-114833, July 21, 1978.

--The Department of Health, Education, and Welfare wanted to make what it termed "cross-cutting" grants from its 1978 lump-sum Human Development appropriation. The various offices within HEW funded by the Human Development appropriation would contribute a portion of their allocated funds to form a pool to be used to fund projects benefiting more than one target population. Since there were no statutory restrictions on how the lump-sum appropriation could be allocated, the proposal was legally unobjectionable. B-157356, August 17, 1978.

--The Nuclear Regulatory Commission could use its 1980 lump-sum appropriation to provide assistance to intervenors in certain NRC proceedings. (See Chapter 3, this Manual, section on Attorney's Fees.) Although committee reports on NRC's appropriation act expressed a desire that funds not be used for this purpose, the restriction was not written into the statute and the appropriation was otherwise available for the desired expenditure. 59 Comp. Gen. 228 (1980). The decision stressed an important point made earlier in this Section: The "legal availability" of funds for a given expenditure and the practical wisdom of making that expenditure in the face of contrary expressions from congressional committees are two very different questions.

--The Department of Energy had used no-year appropriations to initiate the construction of an authorized facility but subsequently terminated the project for the convenience of the Government. The Department

> then wanted to use remaining unobligated funds from the no-year appropriation to establish a different facility, also within the scope of its organic authority. GAO found the expenditure legally permissible. Unobligated funds from a lump-sum appropriation may be used if otherwise proper--within the period of obligational availability or, if no-year funds are involved, without regard to fiscal year--for one project even though the funds were originally earmarked in the budget request or the legislative history for another project. B-202992, May 15, 1981.

Other cases in this "family" are B-44205, September 8, 1944, and B-204449, November 18, 1981.

Finally, the availability of a lump-sum appropriation may be restricted by provisions appearing in statutes other than appropriation acts, such as appropriations authorization acts. For example, if an agency receives a line-item authorization and a lump-sum appropriation to be spent "as authorized by law," the line-item restrictions in the authorization act will apply just as if they appeared in the appropriation act itself. The relationship between appropriation acts and authorization acts is covered in Chapter 2, this Manual.

E. SUPPLEMENTAL AND DEFICIENCY APPROPRIATIONS

Supplemental appropriations and deficiency appropriations, although closely related, are two different things.

A supplemental appropriation may be defined as "an act appropriating funds in addition to those in an annual appropriation act." 10/ The purpose of a supplemental appropriation is to fund projects and activities not included in the budget request for the current annual appropriation and which cannot be postponed until the next regular appropriation. Factors generating the need for supplemental appropriations include the following:

--Enactment of legislation adding new or increased functions.

--Unanticipated surge in workload.

--Inflation higher than that projected for the fiscal year.

--Emergency situations involving unforeseen expenditures.

--Pay increases not previously budgeted.

--Items not included in regular appropriation for lack of timely authorization.

--Poor program planning.

A deficiency appropriation is an appropriation made to provide funds for the payment of an obligation legally created but for which sufficient funds are not available in the appropriation originally made for that purpose to liquidate the obligation. 4 Comp. Dec. 61, 62 (1897); 25 Comp. Gen. 601, 604 (1946); 27 Comp. Gen. 96 (1947). 11/

10/ Glossary of Terms Used in the Federal Budget Process, PAD-81-27, p. 79.

11/ The "Glossary of Terms," at p. 56, defines "deficiency appropriation" as "an appropriation made to an expired account to cover obligations that have been incurred in excess of available funds." However, the account does not have to be expired. Deficiency appropriations can be made in the same fiscal year as the overobligated appropriation. See 25 Comp. Gen. 601 (1946); 27 Comp. Gen. 96 (1947).

Deficiency appropriations are necessitated by violations of the Antideficiency Act.

At one time, supplemental appropriations and deficiency appropriations were enacted separately. Since approximately the 1960's, Congress stopped enacting separate "deficiency appropriation acts." Now, supplemental appropriations and deficiency appropriations are combined in "supplemental appropriation acts." The rules governing the availability of supplemental and deficiency appropriations are essentially the same. Thus, the term "supplemental appropriation" for purposes of the following discussion should be construed as including both types.

A supplemental or deficiency appropriation "supplements the original appropriation, partakes of its nature, and is subject to the same limitations as to the expenses for which it can be used as attach by law to the original appropriation" unless otherwise provided. 4 Comp. Dec. 61 (1897). See also 20 Comp. Gen. 769 (1941); 25 Comp. Gen. 601 (1946); 27 Comp. Gen. 96 (1947). This means that a supplemental appropriation is subject to the purpose and time limitations, plus any other applicable restrictions, of the appropriation being supplemented.

Thus, an appropriation made to supplement the regular annual appropriation of a given fiscal year is available beyond the expiration of that fiscal year only to liquidate obligations incurred within the fiscal year. The unobligated balance of a supplemental appropriation will expire and revert to the Treasury at the end of the fiscal year in the same manner as the regular annual appropriation. See 3 Comp. Dec. 72 (1896); 4 Comp. Dec. 61 (1897); 27 Comp. Gen. 96 (1947). Of course, a supplemental appropriation, just like any other appropriation, can be made available until expended (no-year).

Unless otherwise provided, a restriction contained in an annual appropriation act will apply to funds provided in a supplemental appropriation act even though the restriction is not repeated in the supplemental. For example, a restriction in a foreign assistance appropriation act prohibiting the use of funds for assistance to certain countries would apply equally to funds provided in a supplemental appropriation for the same fiscal year. B-158575, February 24, 1966. Similarly, a provision in an annual appropriation act that "no part of any appropriation for the Bureau of Reclamation contained in this Act shall be used for the salaries and expenses" of certain officials who were not qualified engineers would

apply as well to funds appropriated in supplemental appropriation acts for the same fiscal year. B-86056, May 11, 1949. The rule applies to supplemental authorizations as well as supplemental appropriations. B-106323, November 27, 1951.

The rule that supplemental appropriations are subject to restrictions contained in the regular appropriation act being supplemented applies equally to specific dollar limitations. Thus, if a regular annual appropriation act specifies a maximum limitation for a particular object, either by using the words "not to exceed" or otherwise, a more general supplemental appropriation for the same fiscal year does not authorize an increase in that limitation. 19 Comp. Gen. 324 (1939); 4 Comp. Gen. 642 (1925); B-71583, February 20, 1948; B-66030, May 9, 1947. Naturally, this principle will not apply if the supplemental appropriation specifically provides for the object in question. 19 Comp. Gen. 832 (1940).

At one time, supplemental appropriation acts specified that the funds were for the same objects and subject to the same limitations as the appropriations being supplemented. The (then) Bureau of the Budget wanted to delete this language pursuant to its mandate in 31 U.S.C. § 623 to eliminate unnecessary words in appropriations. The Comptroller General agreed that the appropriation language was unnecessary, pointing out that these conditions would apply even without being explicitly stated in the supplemental appropriation acts themselves. B-13900, December 17, 1940.

In addition to supplementing prior appropriations, a supplemental appropriation act may make entirely new appropriations which are separate and distinct from those made by an earlier appropriation act. Where a supplemental appropriation act contains new legislation, whether permanent or temporary, the new legislation will take effect on the date the supplemental is enacted absent a clear intent to make it retroactive. 20 Comp. Gen. 769 (1941). In the cited decision, an appropriation included in a supplemental appropriation act enacted late in FY 1941 which for the first time permitted payment of transportation expenses of certain military dependents was held effective on the date of enactment of the supplemental act and not on the first day of FY 1941.

If a supplemental appropriation act includes a new appropriation which is separate and distinct from the appropriations being supplemented, restrictions contained in the original appropriation act will not apply to the new appropriation unless specifically provided. B-106323, November 27, 1951. The fiscal year limitations of the original appropriation, however, would still apply.

CHAPTER 6

OBLIGATION OF APPROPRIATIONS

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CHAPTER 6

OBLIGATION OF APPROPRIATIONS

A. INTRODUCTION: NATURE OF AN OBLIGATION

You, as an individual, use a variety of procedures to spend your money. Consider the following transactions:

(1) You walk into a store, make a purchase, and pay at the counter with cash or check.

(2) You move to another counter and make another purchase with a credit card. No money changes hands at the time, but you sign a credit form which states that you promise to pay upon being billed.

(3) You call the local tree surgeon to remove some ailing limbs from your favorite sycamore. He quotes an estimate and you arrange to have the work done. The tree doctor arrives while you are not at home, does the work, and slips his bill under your front door.

(4) You visit your family dentist to relieve a toothache. The work is done and you go home. No mention is made of money. Of course, you know that the work wasn't free and that the dentist will bill you.

(5) You now visit your family lawyer to sue the dentist and the tree surgeon. The lawyer takes your case and you sign a contingent fee contract in which you agree that the lawyer's fee will be one-third of any amounts recovered.

Numerous other variations could be added to the list but these are sufficient to make the point. Case (1) is a simple cash transaction. The legal liability to pay and the actual disbursement of money occur simultaneously. Cases (2) through (5) all have one essential thing in common: you first take some action which creates the legal liability to pay--that is, you "obligate" yourself to pay--and the actual disbursement of money follows at some later time. The obligation occurs in a variety of ways, such as placing an order or signing a contract.

The Government spends money in much the same fashion except that it is subject to many more statutory restrictions. The simple "cash transaction" or "direct outlay" involves a simultaneous obligation and disbursement and

represents a minor portion of Government expenditures. The major portion of appropriated funds are first obligated and then expended. The subsequent disbursement "liquidates" the obligation. Thus, an agency "uses" appropriations in two basic ways-direct expenditures (disbursements) and obligations. There is no legal requirement for you as an individual to keep track of your "obligations." Not so for the Government.

The concept of "obligation" is central to appropriations law. This is because of the principle, one of the most fundamental bases of appropriations law, that an obligation must be charged against the relevant appropriation in accordance with the rules relating to purpose, time, and amount. The term "available for obligation" is used throughout this Manual. Chapter 3 discusses the purposes for which appropriated funds may (and may not) be obligated; Chapter 4 presents the rules relating to the timing of obligations; and Chapter 5 covers the restrictions relating to amount. This Chapter will explore exactly what an obligation is.

It would be nice to start with an all-inclusive and universally applicable definition of "obligation." Unfortunately, because of the immense variety of transactions in which the Government is involved, such a definition does not exist. In fact, the Comptroller General has noted that formulating an all-inclusive definition would be impracticable if not impossible. B-116795, June 18, 1954. As stated in B-192282, April 18, 1979, GAO--

> "has generally avoided a universally applicable legal definition of the term 'obligation,' and has instead analyzed the nature of the particular transaction at issue to determine whether an obligation has been incurred."

At first glance, this passage appears to beg the question. (How can you determine whether an obligation has been incurred if you don't first define what an obligation is?) It is perhaps more accurate to say that GAO has defined "obligation" only in the most general terms, and has applied the concept to individual transactions on a case-by-case basis.

The most one finds in the decisions are general statements referring to an obligation in such terms as "a definite commitment which creates a legal liability of the Government for the payment of appropriated funds for goods and services ordered or received." B-116795, June 18, 1954.

See also B-82368, July 20, 1954; B-24827, April 3, 1942; B-190, June 12, 1939. From the earliest days, the Comptroller General has cautioned that the obligating of appropriations must be "definite and certain." A-5894, December 3, 1924.

Thus, as a starting point, we may state, in very general and simplified terms, that an "obligation" is some action that creates a liability or definite commitment on the part of the Government to make a disbursement at some later time.

The typical question on obligations is framed in terms of when the obligation may or must be "recorded," that is, officially charged against the spending agency's appropriations. Restated, what action is necessary or sufficient to create an obligation? This is essential in determining what fiscal year to charge. It is also essential to the broader concern of congressional control over the public purse.

Before proceeding with the specifics, a few general points should be noted:

--For appropriations accounting purposes, the term "obligation" includes both obligations which have matured (legal liabilities) and those which are contingent upon some future performance such as the rendition of services or the furnishing of materials. A-97205, February 3, 1944.

--The obligation takes place when the definite commitment is made, even though the actual payment may not take place until the following fiscal year. 23 Comp. Gen. 862 (1944); 56 Comp. Gen. 351 (1977). See also Chapter 4, this Manual.

--The precise amount of the Government's liability should be recorded as the obligation where that amount is known. However, where the precise amount is not known at the time the obligation is incurred, the obligation should be recorded on the basis of the agency's best estimate. E.g., 21 Comp. Gen. 574 (1941); 56 Comp. Gen. 414, 418 (1977) and cases cited therein. See also OMB Circular No. A-34, para. 25.2. Where an estimate is used, the basis for the estimate must be shown on the obligating document. As more precise data on the liability becomes available, the obligation must be periodically adjusted. 7 GAO § 17.1.

Further procedural guidance may be found in OMB Circular No. A-34 (Instructions for Budget Execution); the Treasury Department's Fiscal Requirements Manual; and the GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 7 (7 GAO).

B. CRITERIA FOR RECORDING OBLIGATIONS (31 U.S.C. § 200)

The overrecording and the underrecording of obligations are equally improper. Overrecording (recording as obligations items which are not) is usually done to prevent appropriations from expiring at the end of a fiscal year. Underrecording (failing to record legitimate obligations) makes it impossible to determine the precise status of the appropriation and may result in violating the Antideficiency Act (Chapter 5, this Manual).

The standards for the proper recording of obligations are found in 31 U.S.C. § 200, originally enacted as section 1311 of the Supplemental Appropriation Act of 1955 (68 Stat. 830). A Senate committee has described the origin of the statute as follows:

> "Section 1311 of the Supplemental Appropriation Act of 1955 resulted from the difficulty encountered by the House Appropriations Committee in obtaining reliable figures on obligations from the executive agencies in connection with the budget review. It was not uncommon for the committees to receive two or three different sets of figures as of the same date. This situation, together with rather vague explanations of certain types of obligations particularly in the military departments, caused the House Committee on Appropriations to institute studies of agency obligating practices.
>
> * * * * *
>
> "The result of these examinations laid the foundation for the committee's conclusion that loose practices had grown up in various agencies, particularly in the recording of obligations in situations where no real obligation existed, and that by reason of these practices the Congress did not have reliable information in the form of accurate obligations on which to determine an agency's future requirements. To correct this situation, the committee, with the cooperation of the General Accounting Office and the Bureau of the Budget, developed what has become the statutory criterion by which the validity of an obligation is determined. * * *" 1/

1/ Senate Committee on Government Operations, Financial Management in the Federal Government, S. Doc. No. 11, 87th Cong., 1st Sess. 85 (1961).

Thus, the primary purpose of 31 U.S.C. § 200 is to insure that agencies record only those transactions which meet specified standards for legitimate obligations. 51 Comp. Gen. 631, 633 (1972); 54 Comp. Gen. 962, 964 (1975); B-192036, September 11, 1978.

Subsection (a) of 31 U.S.C. § 200 prescribes specific criteria for recording obligations. The subsection begins by stating that:

> "[N]o amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of * * *."

Subsection (a) then goes on to list eight criteria for recording obligations. Note that the statute requires "documentary evidence" to support the recording in each instance. In one sense, these eight criteria taken together may be said to comprise the "definition" of an obligation. 2/

If a given transaction does not meet any of the criteria, then it is not a proper obligation and may not be recorded as one. Once one of the criteria is met, however, the agency not only may but must record the transaction as an obligation.

Although 31 U.S.C. § 200 does not expressly apply to the Government of the District of Columbia, GAO has expressed the view that the same criteria should be followed. B-180578-O.M., September 26, 1978.

For the most part, the statutory criteria in 31 U.S.C. § 200(a) reflect standards that had been developed in prior decisions of the Comptroller General. See, e.g., 18 Comp. Gen. 363 (1938); 16 Comp. Gen. 37 (1936). The remainder of this Section will explore the eight specific recording criteria.

2/ Financial Management in the Federal Government, supra, note (1), at 86.

(1) Subsection (a)(1): Contracts

31 U.S.C. § 200(a)(1) requires recording of an obligation in the case of--

> "a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed."

As seen in Chapter 4 of this Manual, the general rule for obligating fiscal year appropriations by contract is that the contract imposing the obligation must be made within the fiscal year sought to be charged and must meet a bona fide need of that fiscal year. E.g., 33 Comp. Gen. 57, 61 (1953). The bona fide need concept has been discussed in detail in Chapter 4. This discussion will center on the first part of the rule as it relates to 31 U.S.C. § 200(a)(1).

Subsection (a)(1) actually imposes several different requirements: (1) a binding agreement; (2) in writing; (3) for a purpose authorized by law (see Chapter 3, this Manual); (4) executed before the expiration of the period of obligational availability; and (5) the contract must call for specific goods, real property, work, or services.

Binding agreement

The "binding agreement" does not have to be the final formal contract. The legislative history of subsection (a)(1) makes this clear. The following excerpt is taken from the conference report:

> "Section 1311(a)(1) precludes the recording of an obligation unless it is supported by documentary evidence of a binding agreement between the parties as specified therein. It is not necessary, however, that the binding agreement be the final formal contract on any specified form. The primary purpose is to require that there be an offer and an acceptance imposing liability on both parties. For example, an authorized order by one agency on another agency of the Government, if accepted by the latter and meeting the requirement of specificity, etc., is sufficient. Likewise, a letter of intent accepted by a

contractor, if sufficiently specific and definitive to show the purposes and scope of the contract finally to be executed, would constitute the binding agreement required." 3/

In 35 Comp. Gen. 319 (1955) and more recently in 59 Comp. Gen. 431 (1980), the Comptroller General set forth the factors that must be present in order for a binding agreement to exist for purposes of 31 U.S.C. § 200(a)(1):

1. Each bid must have been in writing.

2. The acceptance of each bid must have been communicated to the bidder in the same manner as the bid was made. If the bid was mailed, the contract must have been placed in the mails before the close of the fiscal year. If the bid was delivered other than by mail, the contract must have been delivered in like manner before the end of the fiscal year.

3. Each contract must have incorporated the terms and conditions of the respective bid without qualification. Otherwise, it must be viewed as a counter-offer and there would be no binding agreement until accepted by the contractor.

To illustrate, where the agency notified the successful bidder of the award by telephone near the end of FY 1979 but did not mail the contract document until FY 1980, there was no valid obligation of FY 1979 funds. 59 Comp. Gen. 431, supra. See also 35 Comp. Gen. 319, supra. A document is considered "mailed" when it is placed in the custody of the Postal Service (given to postman or dropped in mailbox or letter chute in office building); merely delivering the document to an agency messenger with instructions to mail it is insufficient. 59 Comp. Gen. 431, 433.

Similarly, there was no recordable obligation of FY 1960 funds where the agency erroneously mailed the notice of award to the wrong bidder and did not notify the successful bidder until the first day of FY 1961. 40 Comp. Gen. 147 (1960).

3/ H.R. Rep. No. 2663, 83d Cong., 2d Sess. 18 (1954), quoted in B-118654, August 10, 1965.

It is important to note that, in the above cases, the obligation was invalid only with respect to the fiscal year the agency wanted to charge. The agency could still proceed to finalize the obligation but would have to charge current fiscal year funds. 59 Comp. Gen. at 433; 40 Comp. Gen. at 148.

A mere request for an additional allocation with no indication of acceptance does not create a recordable obligation. 39 Comp. Gen. 829 (1960). Similarly, a work order or purchase order may be recorded as an obligation only where it constitutes a binding agreement for specific work or services. 34 Comp. Gen. 459 (1955).

As indicated in the legislative history quoted above, a "letter of intent" accepted by the contractor may form the basis of an obligation if it is sufficiently specific and definitive to show the purpose and scope of the contract. B-127518, May 10, 1956; 21 Comp. Gen. 574 (1941). Letters of intent should be used "only under conditions of the utmost urgency." 33 Comp. Gen. 291, 293 (1954).

Oral contract/modification

Under the plain terms of the statute, an oral agreement may not be recorded as an obligation. In United States v. American Renaissance Lines, Inc., 494 F.2d 1059 (D.C. Cir. 1974), the Court found that 31 U.S.C. § 200(a)(1) "establishes virtually a statute of frauds" for the Government 4/ and held that neither party can judicially enforce an oral contract in violation of the statute. However, the Court of Claims subsequently held that subsection (a)(1) does not bar recovery "outside of the contract" and therefore quantum meruit recovery might be possible where sufficient additional facts exist for the court to infer the necessary "meeting of minds" Narva Harris Construction Corp. v. United States, 574 F.2d 508 (Ct. Cl. 1978).

In B-118654, August 10, 1965, GAO concluded that a notice of award signed by the contracting officer and issued before the close of the fiscal year did not satisfy the requirements of 31 U.S.C. § 200(a)(1) where it incorporated modifications of the offer as to price and other terms which had been agreed to orally during negotiations. The reason is that there was no evidence in writing that the contractor

4/ Strictly speaking, as the Comptroller General has noted, there is no Federal statute of frauds. 39 Comp. Gen. 829, 831 (1960). See also 55 Comp. Gen. 833 (1976).

had agreed to the modifications. GAO conceded, however, that the agency's argument that there was documentary evidence of a binding agreement for purposes of section 200(a)(1) was "not wholly without merit." A similar issue arose in a 1977 case. While the decision implies (without mention of B-118654, supra) that an obligation based on an award letter which incorporated telephone conversations relating to pricing might not be defeated if otherwise sufficient to satisfy 31 U.S.C. § 200(a)(1), the potential defect in any event would not afford a basis for a third party (in this case a protesting unsuccessful offeror) to object to the contract's legality. 56 Comp. Gen. 768, 775 (1977).

Requirement of specificity

The statute requires documentary evidence of a binding agreement for specific goods or services. An agreement that fails this test is not a valid obligation.

For example, a State Department contract under the Migration and Refugee Assistance Program establishing a contingency fund "to provide funds for refugee assistance by any means, organization or other voluntary agency as determined by the Supervising Officer" did not meet the requirement of specificity and therefore was not a valid obligation. B-147196, April 5, 1965.

Similarly, a purchase order which lacks a description of the products to be provided is not sufficient to create a recordable obligation. B-196109, October 23, 1979. In the cited decision, a purchase order for "regulatory, warning, and guide signs based on information supplied" on requisitions to be issued did not validly obligate FY 1978 funds where the requisitions were not sent to the supplier until after the close of FY 1978.

Invalid award

Where the award of a contract is determined to be invalid--for example, by the sustaining of a bid protest at GAO--the effect is that no binding agreement ever existed as required by 31 U.S.C. § 200(a)(1) and therefore there was no valid obligation of funds. 38 Comp. Gen. 190 (1958) (defective specifications in invitation); B-157360, August 11, 1965.

However, this result will not apply in all cases. In B-152033, May 27, 1964, GAO had recommended that a contract be cancelled and awarded to the next lowest bidder if that bidder were still willing to accept an award at its original

bid price. Finding that the contract had been "legally defective in such a way as to render it voidable at the election of the Government" rather than "void," GAO concluded that a valid obligation had been created and the funds could therefore be used for the award to the second-low bidder in the following fiscal year.

Even in cases where there was no valid obligation, it may be possible in limited circumstances to pay the contractor on a quantum meruit basis, for example, where the contractor has made partial delivery operating under what he believed to be a valid contract. B-118428, September 21, 1954.

For a related discussion, see "Replacement Contracts," Section F, this Chapter.

Variations in quantity to be furnished

In some types of contracts, the quantity of goods to be furnished or services to be performed may vary. The quantity may be indefinite or it may be stated in terms of a definite minimum with permissible variation. Variations may be at the option of the Government or the contractor. The obligational treatment of this type of contract depends on the exact nature of the contractual liability imposed on the Government.

An indefinite-quantity requirements contract where the Government does not guarantee purchase of any minimum amount does not create a recordable obligation at the time of award. 34 Comp. Gen. 459, 462 (1955). To illustrate, in B-124901, October 26, 1955, GAO considered a type of requirements contract known as a "call contract." The Air Force had contracted in FY 1955 to purchase fuses. The quantities specified in the invitation represented only estimates of requirements. The Government did not agree to purchase any minimum amount and the contractor agreed to furnish only such fuses, at the prices specified in the bid, as and when called for by the contracting officer. This contract itself was not sufficient to obligate FY 1955 funds. In this type of situation, the obligation occurs when a work order or purchase order is placed, and is chargeable to the fiscal year in which the order is placed.

The same result applies to a contract for a fixed quantity in which the Government reserves an option to purchase an additional quantity. The contract price for the fixed quantity is an obligation at the time the contract is

entered into; the reservation of the option ripens into an obligation only if and when the Government exercises the option. 19 Comp. Gen. 980 (1940).

A more recent application of these concepts is B-192036, September 11, 1978. The National Park Service entered into a construction contract for the development of a national historic site. Part of the contract price was a "contingent sum" of $25,000 for "Force Account Work," described in the contract as miscellaneous items of a minor nature not included in the bid schedule. No "Force Account Work" was to be done except under written orders issued by the contracting officer. Since a written order was required for the performance of work, no part of the $25,000 could be recorded as an obligation unless and until such orders were issued and accepted by the contractor. That portion of the master contract itself which provided for the Force Account Work was not sufficiently specific to create an obligation.

In another 1955 case, the Army entered into a contract for the procurement of lumber. The contract contained a clause permitting a ten-percent overshipment or undershipment of the quantity ordered. This type of clause was standard in lumber procurement contracts. The Comptroller General held that the Army could obligate the amount necessary to pay for the maximum quantities deliverable under the contract. 34 Comp. Gen. 596 (1955). Here, the quantity was definite and the Government was required to accept the permissible variation.

In still another 1955 case, the General Services Administration had published in the Federal Register an offer to purchase chrome ore up to a stated maximum quantity. Formal agreements would not be executed until producers made actual tenders of the ore. The program published in the Federal Register was a mere offer to purchase and GSA could not obligate funds to cover the total quantity authorized. Reason: there was no mutual assent and therefore no binding agreement in writing until a producer responded to the offer and a formal contract was executed. B-125644, November 21, 1955.

So-called "level of effort" contracts are conceptually related to the "variation in quantity" cases. In one case, the Environmental Protection Agency entered into a cost-plus-fixed-fee contract for various services at an EPA facility. The contractor's contractual obligation was expressed as a "level of effort" in terms of manhours. The contractor was to provide up to a stated maximum number of

direct manhours, to be applied on the basis of work orders issued during the course of the contract. Since the Government was obligated under the contract to order specific tasks, the Comptroller General concluded that the contract was sufficiently definitive to justify recording the full estimated contract amount at the time of award. B-183184, May 30, 1975. See also 58 Comp. Gen. 471, 474 (1979); B-199422, June 22, 1981 (non-decision letter).

Amount to be recorded

In the simple firm fixed-price contract, the amount to be recorded presents no problem. The contract price is the recordable obligation. However, in many types of contracts, the final contract price cannot be known at the time of award and an estimate must be recorded. (See Section A, supra, this Chapter.)

This situation arises, for example, in the variable quantity and level-of-effort contracts discussed above. Here, the agency records the proper amount as determined under the various decisions cited, and adjusts the obligation up or down as work or purchase orders are issued or more precise data becomes available.

Under a fixed-price contract with escalation, price redetermination, or incentive provisions, the amount to be obligated initially is the fixed price stated in the contract or the target price in the case, for example, of a contract with an incentive clause. 34 Comp. Gen. 418 (1955); B-133170, January 29, 1975. Thus, in an incentive contract with a target price of $85 million and a ceiling price of $100 million, the proper amount to record initially as an obligation is the target price of $85 million. 55 Comp. Gen. 812, 824 (1976).

A claim under the "Changed Conditions" clause should be reflected as a contingent liability and is not a recordable obligation. 37 Comp. Gen. 691 (1958).

When obligations are recorded based on a target price, the agency should establish appropriate safeguards to guard against violations of the Antideficiency Act (Chapter 5, this Manual). This usually means the administrative reservation of sufficient funds to cover potential liability. 34 Comp. Gen. 418, supra, at 420-21.

Administrative approval of payment

In some cases, the contractual arrangement or related statutory or regulatory requirements may provide a process for administrative review and approval as a prerequisite to payment. This may or may not affect the obligational process, depending on the purpose of the review. (The review and approval here refers to a process in addition to the normal review and approval of the voucher by a certifying officer which is always required.)

To illustrate, in 46 Comp. Gen. 895 (1967), GAO approved a Veterans Administration procedure under which charges for fee-basis outpatient treatment of eligible veterans would be recorded as obligations at the time VA administratively approved the vouchers. Since the review and approval process was necessary to determine whether the Government should accept liability, no contractual obligation arose until that time. Similar earlier holdings, cited in 46 Comp. Gen. 895, are B-92697, July 24, 1950, and B-133944, January 31, 1958.

A 1977 case, B-137762.32, July 11, 1977, will further illustrate the concept. The case concerned a contract between the Internal Revenue Service and an informant. Under IRS regulations, there is no liability to make payment until IRS has evaluated the worth of the information and has assessed and collected any underpaid taxes and penalties. It is at this point that an appropriate IRS official determines that a reward should be paid and its amount, and it is at this point that a recordable obligation arises. (This case is also discussed in the section on "Rewards," Chapter 3, this Manual.)

By way of contrast, the obligation for a court-appointed attorney under the Criminal Justice Act (see Chapter 3, this Manual, section on "Attorney's Fees") occurs at the time of appointment and not when the court approves the payment voucher, even though the exact amount of the obligation is not determinable until the voucher is approved. This is because the Government becomes contractually liable by the order of appointment, with subsequent court review of the voucher intended only to insure the reasonableness of the expenses incurred. Thus, payment must be charged to the fiscal year in which the appointment was made. 50 Comp. Gen. 589 (1971).

Miscellaneous contractual obligations

The core issue in many of the previously discussed cases has been when a given transaction ripens into a recordable obligation; that is, precisely when the "definite commitment" occurs. Many of the cases do not fit neatly into categories. Rather, the answer must be derived by analyzing the nature of the contractual or statutory commitments in the particular case. Some of these "miscellaneous" cases are summarized below.

A 1979 case dealt with a lease arrangement entered into by the Peace Corps in Korea. Under a particular type of lease recognized by Korean law, the lessee does not make installment rental payments. Instead, the lessee makes an initial payment of approximately 50 percent of the assessed valuation of the property. At the end of the lease, the lessor is required to return the entire initial payment. The lessor makes his profit by investing the initial payment at the local interest rate. Since the lease is a binding contractual commitment and since the entire amount of the initial payment may not be recoverable for a number of reasons, GAO found it improper to treat the initial payment as a mere advance or an account receivable (as in the case of travel advances) and thus not reflected as an obligation. Rather, the amount of the initial payment must be recorded as an obligation chargeable to the fiscal year in which the lease is entered into, with subsequent returns to be deposited in the Treasury as miscellaneous receipts. B-192282, April 18, 1979.

Several cases deal with court-related obligations. For example, the obligation for jury fees--including retroactive increases authorized by 28 U.S.C. § 1871--occurs at the time the jury service is performed. 54 Comp. Gen. 472 (1974). (This case involved the so-called "Watergate Grand Jury.") Another case in this "family" is 50 Comp. Gen. 589 (1971), dealing with obligations under the Criminal Justice Act, discussed above under "Administrative approval of payment."

The recording of obligations for land commissioners appointed to determine just compensation in land condemnation cases was discussed in B-184782, February 26, 1976, and 56 Comp. Gen. 414 (1977). The rules derived from these decisions are as follows:

--The obligation occurs at the time of appointment and is chargeable to the fiscal year of appointment if a specific case is referred to the commission in that fiscal year.

--Pendency of an action will satisfy the bona fide need rule and will be sufficient to support the obligation even though services are not actually performed until the following fiscal year.

--Appointment of a "continuous" land commission creates no obligation until a particular action is referred to it.

--An amended court order increasing the compensation of a particular commissioner amounts to a new obligation and the full compensation is chargeable to the appropriation current at the time of the amended order.

--A valid obligation occurs under the above principles even though the order of appointment does not expressly charge the costs to the United States because, under the Constitution, the costs cannot be assessed against the condemnee.

(Beginning with fiscal year 1978, the appropriation to compensate land commissioners was switched from the Justice Department to the Judiciary and since then has been a no-year appropriation.)

Interagency transactions

31 U.S.C. § 200(a)(1) expressly applies to interagency transactions. Thus, the recording criteria are the same whether the contract is with a private party or another Government agency.

A major source of authority for interagency agreements is the Economy Act, 31 U.S.C. § 686. 5/ An Economy Act agreement is recorded as an obligation the same as any other contract. However, Economy Act agreements are subject to one additional requirement. Under 31 U.S.C. § 686-1, the period of availability of funds transferred pursuant to an Economy Act agreement may not exceed the period of availability of the source appropriation. Thus, appropriations obligated by an Economy Act agreement must be deobligated at the end of the fiscal year charged to the extent that the performing agency has not incurred valid obligations under the agreement. 39 Comp. Gen. 317 (1959); 34 Comp. Gen. 418, 421-22 (1955).

5/ The Economy Act is covered in more detail in Chapter 8, this Manual.

However, where the agreement is based on some statutory authority other than the Economy Act, 31 U.S.C. § 686-1 does not apply. In this situation, the obligation will remain payable in full from the appropriation initially charged, regardless of when performance occurs, in the same manner as contractual obligations generally, subject, of course, to any restrictions in the legislation authorizing the agreement. Thus, it is necessary to determine the correct statutory authority for any interagency agreement. The following cases will illustrate:

--Agreement under which funds were transferred from Department of Health, Education, and Welfare to Federal Aviation Administration to provide training for air traffic control trainees was found authorized by Manpower Development and Training Act of 1962 rather than Economy Act. Therefore, while initial recording of obligation was governed by 31 U.S.C. § 200(a)(1), funds remained available for further obligation by FAA subject to time limits of Manpower Act rather than deobligation requirement of 31 U.S.C. § 686-1. 51 Comp. Gen. 766 (1972).

--Agreement entered into in FY 1976 between Administrative Office of U.S. Courts and General Services Administration for design and implementation of automated payroll system was authorized by Federal Property and Administrative Services Act rather than Economy Act. Since agreement met requirements of 31 U.S.C. § 200(a)(1), it was properly recordable as a valid obligation against FY 1976 funds and remained available for liquidation notwithstanding 31 U.S.C. § 686-1. 55 Comp. Gen. 1497 (1976).

--Army Corps of Engineers entered into agreement with Department of Housing and Urban Development to perform flood insurance studies pursuant to orders placed by HUD. Recordable obligations would arise when HUD placed an order under the agreement. Since agreement was authorized by National Flood Insurance Act rather than Economy Act, funds obligated by order would remain obligated even though Corps did not complete performance (or contract out for it) until following fiscal year. B-167790, September 22, 1977.

--Military Interdepartmental Procurement Requests (MIPR) are viewed as authorized by the Economy Act. Therefore, while a MIPR may be initially recorded as an obligation under 31 U.S.C. § 200(a)(1), it is subject

to the deobligation requirement of 31 U.S.C. § 686-1 and is thus ultimately chargeable to appropriations current when the "performing" component incurs valid obligations. 34 Comp. Gen. 418, 422 (1955); 59 Comp. Gen. 563 (1980).

The deobligation requirement of 31 U.S.C. § 686-1 does not apply to obligations against no-year appropriations. 39 Comp. Gen. 317, 319 (1959).

When an agency places an order with another agency, the obligational treatment of the transaction depends on whether or not the order is "required by law" to be placed with the other agency. If it is "required by law," the transaction is governed by subsection (a)(3) of 31 U.S.C. § 200, discussed later in this Section. If it is not "required by law," subsection (a)(1) applies. Interagency orders not required by law are termed "voluntary orders."

A voluntary interagency order, just as other types of interagency transactions, may or may not be governed by the Economy Act. If the order is governed by the Economy Act, it is recordable as an obligation when the order is placed but is subject to the deobligation requirement of 31 U.S.C. § 686-1. If the order is not governed by the Economy Act, it constitutes an obligation only to the extent that the performing agency has completed the work or has awarded contracts to fill the order. An order for an item not stocked by the requisitioned agency (or, if out of stock, not routinely on order) is not a recordable obligation until the requisitioned agency purchases the item or executes a contract for it. The reason is that the order is not a binding agreement. It is merely an offer which is accepted by the requisitioned agency's performance. The basic rules in this area were established by 34 Comp. Gen. 705 (1955).

To illustrate, in 59 Comp. Gen. 602 (1980), GAO considered the procedure by which the Bureau of Alcohol, Tobacco, and Firearms ordered "strip stamps" from the Bureau of Engraving. (These are the excise tax stamps one sees pasted across the caps of liquor bottles.) GAO reviewed pertinent legislation and concluded that ATF was not "required by law" to procure its strip stamps from the Bureau of Engraving. Thus, in one important respect, it was essentially immaterial whether the order was governed by the Economy Act or some other law, since in neither event could ATF's funds remain obligated beyond the last day of a fiscal year to the extent an order remained unfilled. Funds could be considered obligated at the end of a fiscal year only to

the extent that stamps were printed or in process or that the Bureau of Engraving had entered into a contract with a third party to provide them.

In B-193005, October 2, 1978, GAO considered the procurement of crude oil for the Strategic Petroleum Reserve. Under the Federal Property and Administrative Services Act, the General Services Administration may procure materials for other Federal agencies, and may delegate this authority. GSA had delegated the authority to procure fuel commodities to the Secretary of Defense. Thus, the Department of Energy could procure the oil through the Defense Fuel Supply Center in a non-Economy Act transaction. An order placed by the Department of Energy could be recorded as an obligation under 31 U.S.C. § 200(a)(1) if it constituted a "binding agreement," and the funds would remain available for contracts awarded by Defense beyond the original period of obligational availability. 6/ This result would have been precluded by 31 U.S.C. § 686-1 had the transaction been governed by the Economy Act. (It is the "binding agreement" aspect that distinguishes this case and the HUD flood insurance study case, B-167790, supra, from cases like the ATF strip stamp case, 59 Comp. Gen. 602. See also 39 Comp. Gen. 829 (1960) and B-180578-O.M., September 26, 1978.)

Interagency transactions: orders from stock

The obligational treatment of orders from stock derives from 32 Comp. Gen. 436 (1953). An order for items to be delivered from stock is a recordable obligation if (1) it is intended to meet a bona fide need of the fiscal year in which the order is placed (for example, to replace stock used in that fiscal year, even though the replacement stock will not be used until the following year), and (2) the order is firm and complete. To be firm and complete, the order must request prompt delivery of specific available stock items for a stated consideration and must be accepted by the supplying agency in writing. "Available" means on hand or routinely on order. However, acceptance is not required for common-use stock items which are on hand or on order and will be delivered promptly.

6/ In a subsequent letter to the Senate Committee on Energy and Natural Resources, the Comptroller General pointed out that the 1978 decision would not affect the applicability of the Impoundment Control Act to the Strategic Petroleum Reserve program since the statutory definition of "deferral" applies to expenditures as well as obligations. B-200685, December 23, 1980.

Although these rules were developed prior to the enactment of 31 U.S.C. § 200(a)(1), they continue to govern the recording of obligations under that statute. 34 Comp. Gen. 418, 422 (1955); 34 Comp. Gen. 705 (1955). Materials which are specially created for a particular purpose are not "stock." 44 Comp. Gen. 695 (1965).

Interagency transactions: project orders

"Project orders" are authorized by 41 U.S.C. § 23, which provides:

> "All orders or contracts for work or material or for the manufacture of material pertaining to approved projects heretofore or hereafter placed with Government-owned establishments shall be considered as obligations in the same manner as provided for similar orders or contracts placed with commercial manufacturers or private contractors, and the appropriations shall remain available for the payment of the obligations so created as in the case of contracts or orders with commercial manufacturers or private contractors."

This statute, derived from earlier appropriation act provisions, applies only to the military departments, although the orders may be placed with any "Government-owned establishment." B-95760, June 27, 1950. The Coast Guard has virtually identical authority in 14 U.S.C. § 151.

A project order is a valid and recordable obligation when the order is issued and accepted, regardless of the fact that performance may not be accomplished until after the expiration of the fiscal year. B-135037-O.M., June 19, 1958; 1 Comp. Gen. 175 (1921). 41 U.S.C. § 23 does not, however, authorize the use of the appropriations so obligated for the purpose of replenishing stock used in connection with the order. A-25603, May 15, 1929. The requirement of specificity applies to project orders just as any other recordable obligations under 31 U.S.C. § 200(a)(1). B-126405, May 21, 1957.

Since a project order is not an Economy Act transaction, the deobligation requirement of 31 U.S.C. § 686-1 does not apply. 34 Comp. Gen. 418, 422 (1955). Also, unlike Economy Act transactions, advance payment is not authorized unless permitted by some other statute. B-95760, June 27, 1950. (Advance payments are covered in Chapter 4, this Manual.)

The term "approved projects" as used in 41 U.S.C. § 23 has no special meaning. It refers simply to "projects that have been approved by officials having legal authority to do so." B-171049-O.M., February 17, 1972.

(2) Subsection (a)(2): Loans

31 U.S.C. § 200(a)(2) requires recording an obligation in the case of--

> "a valid loan agreement, showing the amount of the loan to be made and the terms of repayment thereof."

A loan agreement is essentially contractual in nature. Thus, to have a valid obligation, there must be a proposal by one party and an acceptance by another. Approval of the loan application must be communicated to the applicant within the fiscal year sought to be charged, and there must be documentary evidence of that communication. B-159999-O.M., March 16, 1967. Where a loan application is made in one fiscal year and approval is not communicated to the applicant until the following fiscal year, the obligation is chargeable to the later year. Id.; B-159999-O.M., December 14, 1966.

Telegraphic notification of approval of a loan application where the amount of the loan and terms of repayment are thereby agreed upon is legally acceptable. B-159999-O.M., December 14, 1966.

To support a recordable obligation under subsection (a)(2), the agreement must be sufficiently definite and specific, just as in the case of subsection (a)(1) obligations. To illustrate, the United States and the Government of Brazil entered into a loan agreement in 1964. As a condition precedent to any disbursement under the agreement, Brazil was to furnish a statement covering utilization of the funds. The funds were to be used for various economic and social development projects "as may, from time to time, be agreed upon in writing" by the Governments of the United States and Brazil. While the loan agreement constituted a valid binding contract, it was not sufficiently definite or specific to validly obligate FY 1964 funds. The basic agreement was little more than an "agreement to agree" and an obligation of funds could arise only when a particular "utilization statement" was submitted and approved. B-155708-O.M., April 26, 1965.

The concepts of obligation under 31 U.S.C. § 200(a)(2) apply more readily to fiscal year or multiple-year appropriations. Thus, the Comptroller General has permitted the Small Business Administration to adopt a reporting system that departs from an "exact obligation" basis for certain

transactions involving revolving funds (Disaster Loan Fund and Business Loan and Investment Fund), apppropriations to which remain available until expended. However, SBA must clearly disclose the specific nature of any such reporting system to all appropriate budgetary authorities. 51 Comp. Gen. 631 (1972).

In contrast with a direct loan, a loan guarantee agreement does not obligate funds at the time the agreement is made. The obligational treatment of loan guarantees is discussed in 60 Comp. Gen. 700 (1981) and in Chapter 14, this Manual.

(3) Subsection (a)(3): Interagency Orders Required by Law

The third standard for recording obligations, 31 U.S.C. § 200(a)(3), is "an order required by law to be placed with a Government agency."

Subsection (a)(3) means exactly what it says. An order placed with another Government agency is a recordable obligation if it is required by statute or statutory regulation to be placed with the other agency. The subsection does not apply to orders which are merely authorized rather than required. 34 Comp. Gen. 705 (1955).

An order required by law to be placed with another agency is not an Economy Act transaction. Therefore, the deobligation requirement of 31 U.S.C. § 686-1 does not apply. 35 Comp. Gen. 3, 5 (1955).

The fact that the work will be performed in the next fiscal year does not defeat the obligation as long as the bona fide need test is met. 59 Comp. Gen. 386 (1980); 35 Comp. Gen. 3 (1955). Also, the fact that the work is to be accomplished and reimbursement made through use of a revolving fund is immaterial. 35 Comp. Gen. 3, supra; 34 Comp. Gen. 705, supra.

A common example of "orders required by law" is printing and binding to be done by the Government Printing Office. The rule for printing by GPO is this: A requisition for printing services may be recorded as an obligation when placed if (1) there is a present need for the printing, and (2) the requisition is accompanied by copy or specifications sufficient for GPO to proceed with the job.

Thus, a requisition by the Commission on Fine Arts for the printing of "Sixteenth Street Architecture, Volume I" placed with GPO in FY 1977 and accompanied by manuscript and specifications obligated FY 1977 funds and was chargeable in its entirety to FY 1977, notwithstanding that the printing would be done in the following fiscal year. 59 Comp. Gen. 386 (1980). However, a requisition for U.S. Travel Service sales promotional literature placed with GPO near the end of FY 1964 did not obligate FY 1964 funds where no copy or manuscript was furnished to GPO until FY 1965. 44 Comp. Gen. 695 (1965). For other printing cases, see 29 Comp. Gen. 489 (1950); 23 Comp. Gen. 82 (1943); B-154277, June 5, 1964; B-123964, August 23, 1955; B-114619, April 17, 1953; B-35807, August 10, 1943; B-35967, August 4, 1943.

An agency may use a printing estimate furnished by GPO to establish the level of funds to be obligated pending receipt of a bill reflecting actual cost. However, the printing estimate alone, even if written, unaccompanied by the placement of an order, is not sufficient to create a valid and recordable obligation. B-182081, January 26, 1977, affirmed in B-182081, February 14, 1979. In the cited decision, there was no valid obligation before the ordering commission went out of existence and its appropriations ceased to be available for further obligation. Therefore, there was no appropriation available to reimburse GPO for work done under the invalid purported obligation. (For related discussion, see "Claims After Expiration of Agency or Commission," Chapter 11 (Part I), this Manual.)

GPO is required by law to print certain congressional materials such as the Congressional Record, and receives a "Printing and Binding" appropriation for this purpose. For such items where no further request or authorization is required, a copy of the basic law authorizing the printing plus a copy of the appropriation constitute the obligating documents. B-123964, August 23, 1955.

Another common "order required by law" situation is building alteration, management, and related services to be performed by the General Services Administration. For example, a job order by the Social Security Administration for building repairs validly obligated funds of the fiscal year in which the order was placed, by virtue of subsection (a)(3), notwithstanding that GSA was unable to perform the work until the following fiscal year. 35 Comp. Gen. 3 (1955). See also B-158374, February 21, 1966. However, this result assumes compliance with the bona fide need concept. Thus, an agreement for work incident to the relocation of Federal Power Commission employees placed in FY 1971 did not validly obligate FY 1971 funds where it was clear that the relocation was not required to, and would not, take place, nor would the space in question be made tenantable, until the following fiscal year. B-95136-O.M., August 11, 1972. Orders placed with GSA are further discussed in 34 Comp. Gen. 705 (1955).

As noted earlier in this Section, GAO has expressed the view that the recording criteria of 31 U.S.C. § 200(a) should be followed in evaluating obligations of the Government of the District of Columbia. Thus, orders by a department of the D.C. Government for repairs and improvements which are required by statute or statutory regulation to be placed with the D.C. Department of General Services and performed through use of the Repairs and Improvements Working Fund create valid obligations when the orders are placed. B-180578-O.M., September 26, 1978.

(4) Subsection (a)(4): Orders Without Advertising

The fourth recording standard in 31 U.S.C. § 200(a) is:

> "an order issued pursuant to a law authorizing purchases without advertising when necessitated by public exigency or for perishable subsistence supplies or within specific monetary limitations."

Subsection (a)(4) is limited to statutorily authorized purchases without advertising in the three situations specified. The subsection must be self-explanatory as there appear to be no Comptroller General decisions under it.

(5) Subsection (a)(5): Grants and Subsidies

Under 31 U.S.C. § 200(a)(5), a recordable obligation arises in the case of--

> "a grant or subsidy payable (i) from appropriations made for payment of or contributions toward, sums required to be paid in specific amounts fixed by law or in accord with formulae prescribed by law, or (ii) pursuant to agreement authorized by, or plans approved in accord with and authorized by, law."

The obligation of appropriations for grants is covered in detail in Chapter 13, Section C, this Manual.

There have been very few cases dealing with the obligational treatment of subsidies. In one case, GAO considered legislation authorizing the Federal Home Loan Bank Board to make "interest adjustment" payments to member banks. The payments were designed to adjust the effective rates of interest charged by member banks on short- and long-term borrowing, the objective being to stimulate residential construction for low- and middle-income families. Funds were appropriated to the Board for this purpose on a fiscal year basis. GAO concluded that an obligation arose for purposes of 31 U.S.C. § 200(a)(5) when a Federal Home Loan Bank made a firm and unconditional commitment in writing to a member institution, provided that the commitment letter included a reasonable expiration date. The funds would have to be deobligated to the extent that a member institution failed to execute loans prior to the specified expiration date. 50 Comp. Gen. 857 (1971).

An earlier decision dealt with mail rate subsidies to air carriers. Under the governing legislation, air carriers were entitled to subsidy payments by the Civil Aeronautics Board for mail carried under temporary or final mail rate orders. The CAB received no-year appropriations to make the payments, but the Government became obligated when the carrier conducted its operations, so the appropriation was not a dollar limitation on obligational authority. In these circumstances, the Comptroller General did not object to the CAB's procedure of recording an obligation and expenditure simultaneously when a voucher was certified to the disbursing officer for payment. The documentary evidence would consist of the program statute, the temporary or final rate orders, and written evidence reasonably establishing the amount of subsidy payments earned. B-126372, September 18, 1956.

(6) Subsection (a)(6): Pending Litigation

An obligation may be recorded when supported by documentary evidence of "a liability which may result from pending litigation brought under authority of law." 31 U.S.C. § 200(a)(6).

Despite its seemingly broad language, subsection (a)(6) has very limited application. Most judgments against the United States are paid from a permanent indefinite appropriation, 31 U.S.C. § 724a. Accordingly, they have no obligational impact on the respondent agency. Thus far, the Comptroller General has applied subsection (a)(6) to only two situations--land condemnation (35 Comp. Gen. 185 (1955)) and certain impoundment litigation (54 Comp. Gen. 962 (1975)). The payment of judgments against the United States is covered in Chapter 12 of this Manual; 31 U.S.C. § 200(a)(6) and the two cited decisions are discussed further in Section B of that Chapter.

In land condemnation proceedings, the appropriation is obligated when the request is made to the Attorney General to institute the proceedings. 34 Comp. Gen. 418, 423 (1955); 34 Comp. Gen. 67 (1954); 17 Comp. Gen. 664 (1938); 4 Comp. Gen. 206 (1924). Earlier decisions such as 21 Comp. Dec. 870 (1915) and 1 Comp. Gen. 735 (1922) intimated that the obligation occurred when the proceedings were actually instituted. These cases must be viewed as modified effectively although not expressly by the later decisions.

As discussed in Chapter 12, not all judgments against the United States are paid from the permanent judgment appropriation. However, it does not follow that judgments payable from agency funds are subject to subsection (a)(6). As stated in 35 Comp. Gen. 185, 187, subsection (a)(6) requires recording an obligation only in cases where the Government is definitely liable for the payment of money out of available appropriations and the pending litigation is for the purpose of determining the amount of the Government's liability. Thus, for judgments payable from agency appropriations, the standard of 35 Comp. Gen. 185 should be applied to determine whether an obligation must be recorded. For cases where a judgment will be payable from agency funds but recording is not required, the agency should administratively reserve sufficient funds to cover the contingent liability to avoid a possible violation of the Antideficiency Act. 35 Comp. Gen. 185, 187, supra.

A related statute is 31 U.S.C. § 665b, which provides:

> "Any provision of law which requires unexpended funds to return to the general fund of the Treasury at the end of the fiscal year shall not be held to affect the status of any lawsuit or right of action involving the right to those funds."

This provision was enacted as part of a continuing resolution in 1973 (87 Stat. 134). Its miniscule legislative history indicates that it was generated by certain impoundment litigation then in process. 119 Cong. Rec. 22326 (June 29, 1973). As of early 1982, there have been no Comptroller General decisions involving this statute.

(7) Subsection (a)(7): Employment, Travel, Public Utilities

Under 31 U.S.C. § 200(a)(7), obligations are recordable when supported by documentary evidence of--

> "employment or services of persons or expenses of travel in accord with law, and services performed by public utilities."

This subsection covers a variety of loosely related obligations.

Travel and transportation

The obligation of appropriations for expenses relating to travel and transportation was an extremely fertile area and generated a large number of decisions before 31 U.S.C. § 200 was enacted. The cases seem to involve every conceivable permutation of facts involving trips or transactions covering more than one fiscal year. The enactment of 31 U.S.C. § 200 logically prompted the question of how the new statute affected the prior decisions. It did not, replied the Comptroller General. Thus, the starting point is that subsection (a)(7) incorporates prior GAO decisions on obligations for travel and transportation. 34 Comp. Gen. 459 (1955); 35 Comp. Gen. 183 (1955).

The "leading case" in this area is 35 Comp. Gen. 183 (1955), which states the pertinent rules. The rule for travel may be summarized as follows: The issuance of a travel order in itself does not constitute a contractual obligation. The travel order is merely an authorization for the person specified to incur the obligation. The obligation is not incurred until the travel is actually performed or until a ticket is purchased, provided in the latter case the travel is to be performed in the same fiscal year the ticket is purchased. 35 Comp. Gen. at 185.

Some of the earlier cases in this evolutionary process are as follows:

--Where tickets are purchased in one fiscal year and the travel is performed in the following fiscal year, the obligation is chargeable to the year in which the travel is performed, even though early purchase of the tickets may have been necessary to assure reservations. 26 Comp. Gen. 131 (1946); 27 Comp. Gen. 764 (1948).

--A "continuous journey" involving more than one segment obligates funds of the year in which the ticket was purchased, as long as the trip starts in that same fiscal year. However, procurement of transportation en route is a new obligation. Similarly, a round-trip ticket obligates funds at the time of purchase as long as the trip starts in the same fiscal year. However, if the return portion of the ticket cannot be used and a separate return ticket must be purchased, a new obligation is created. 26 Comp. Gen. 961 (1947); A-36450, May 27, 1931.

--Per diem incident to official travel accrues from day to day. Per diem allowances are chargeable to appropriations current when the allowances accrue (i.e., when the expenditures are made). Thus, where travel begins in one fiscal year and extends into the next fiscal year, the per diem obligation must be split along fiscal year lines, even though the cost of the travel itself may have been chargeable in its entirety to the prior fiscal year. 23 Comp. Gen. 197 (1943).

--Reimbursement on a mileage basis is chargeable to the fiscal year in which the major portion of the travel occurred. If travel is begun sufficiently prior to the end of a fiscal year to enable the employee to complete a continuous journey before the close of the fiscal year, the obligation is chargeable entirely to that year. However, if the travel is begun so late in the fiscal year that the major portion of it is performed in the succeeding fiscal year, it is chargeable to appropriations for the succeeding year. 2 Comp. Dec. 14 (1895); 9 Comp. Gen. 458, 460 (1930).

--Where (1) an employee is authorized to travel by privately-owned vehicle at not to exceed the constructive cost of similar travel by rail, (2) the trip starts in one fiscal year and extends into the following fiscal year, and (3) the journey would have been completed in the prior year had rail travel been used, the travel expense is chargeable to the fiscal year in which the travel began. 30 Comp. Gen. 147 (1950).

Other cases involving obligations for travel expenses are: 16 Comp. Gen. 926 (1937); 16 Comp. Gen. 858 (1937); 5 Comp. Gen. 1 (1925); 26 Comp. Dec. 86 (1919); B-134099, December 13, 1957; A-30477, April 20, 1939; A-75086, July 29, 1936; A-69370, April 10, 1936.

The obligational treatment of the transportation of household goods is similar. The mere issuance of permanent change-of-station orders does not create an obligation. If the Government ships the goods, the obligation occurs when a carrier picks up the goods pursuant to a Government bill of lading. If separate bills of lading are issued covering different segments of the shipment, each bill of lading is a separate and distinct obligation. If the employee ships the goods and is reimbursed on a commuted basis, the obligation arises when the employee pays the expenses and thereby becomes entitled to reimbursement. Again, this summary is a distillation of numerous cases: 35 Comp. Gen. 183, supra; 31 Comp. Gen. 471 (1952); 27 Comp. Gen. 25 (1947); 20 Comp. Gen. 436 (1941); 1 Comp. Gen. 655 (1922).

Storage expenses are treated similarly. The Government's obligation arises when the employee pays the expenses and becomes entitled to reimbursement. Thus, where an employee paid storage charges in July 1948 covering the last month of FY 1948 and the first month of FY 1949, the obligation was chargeable to FY 1949 appropriations. 28 Comp. Gen. 337 (1948).

Relocation expenses

Legislation enacted in 1967, now found at 5 U.S.C. § 5724a, authorized several new types of relocation expenses for transferred employees. Specifically, they are: (1) per diem allowance for employee's immediate family en route between old and new duty station; (2) expenses of one house-hunting trip to new duty station; (3) temporary quarters allowance incident to relocation; (4) certain expenses of real estate transactions incurred as a result of the transfer; and (5) a miscellaneous expense allowance. In response to a request by the Justice Department, the Comptroller General held that the obligational concept of 35 Comp. Gen. 183, supra, applied to these expenses as well. The appropriation obligation occurs at the same time as the employee's entitlement to reimbursement, that is, when the employee incurs the expenses. B-122358, August 4, 1976.

State Department: travel outside continental United States

By virtue of 22 U.S.C. § 2677, appropriations available to the State Department for travel and transportation outside the continental United States "shall be available for such expenses when any part of such travel or transportation begins in one fiscal year pursuant to travel orders issued in

that year, notwithstanding the fact that such travel or transportation may not be completed during that same fiscal year." This provision appeared in appropriation acts starting in 1948 and was subsequently made permanent and codified. It has the effect of relaxing some of the earlier decisions but only for the State Department and only for travel or transportation outside the continental United States. The authority is permissive rather than mandatory. 42 Comp. Gen. 699 (1963).

The statute permits charging the prior year for expenses incurred under amended travel orders issued in the subsequent fiscal year as long as some part of the travel or transportation began in the prior fiscal year. 29 Comp. Gen. 142 (1949). It also applies to miscellaneous incidental expenses such as inoculations and passports as long as they are not incurred at a time so far removed from the actual travel as to question their legitimacy as incident to the travel. 30 Comp. Gen. 25 (1950).

The statute does not permit retroactive charging of an expired appropriation. Thus, the Comptroller General found it improper to issue a travel authorization in one fiscal year designating the succeeding fiscal year as the appropriation to be charged, and then, at the start of the succeeding fiscal year, to cancel the authorization and replace it with a new authorization retroactively designating the prior year. 42 Comp. Gen. 699 (1963).

Uniform allowance

The Federal Employees Uniform Act, 5 U.S.C. § 5901, authorizes a uniform allowance for each employee required by statute or regulation to wear a uniform. The agency may furnish the uniform or pay a cash allowance. (See "Personal Expenses and Furnishings," Chapter 3, this Manual.) Where an agency elects to pay an allowance, the obligation arises when the employee incurs the expense and becomes entitled to reimbursement. Thus, the appropriation chargeable is the one currently available at the time the employee makes the expenditure or incurs the debt. 38 Comp. Gen. 81 (1958). In reaching this decision, GAO followed the household goods cases discussed above.

Wages and salaries

Salaries of Government employees, as well as related items that flow from those salaries such as retirement fund contributions, are obligations at the time the salaries are

earned, that is, when the services are rendered. For example, in 38 Comp. Gen. 316 (1958), the Commerce Department wanted to treat the salaries of employees performing administrative and engineering services on highway construction projects as part of the construction contract costs. Under this procedure, the anticipated expenses of the employees, salaries included, would be recorded as an obligation at the time a contract was awarded. However, the Comptroller General held that this would not constitute a valid obligation under 31 U.S.C. § 200. The employee expenses were not part of the contract costs and could not be obligated before the services were performed.

When a pay increase is granted to wage board employees, the effective date of the increase is governed by 5 U.S.C. § 5344. This effective date determines the Government's liability to pay the additional compensation. Therefore, the increase is chargeable to appropriations currently available for payment of the wages for the period to which the increases apply. 39 Comp. Gen. 422 (1959). This is true regardless of the fact that appropriations may be insufficient to discharge the obligation and the agency may not yet have had time to obtain a supplemental appropriation. The obligation in this situation is considered "authorized by law" and therefore does not violate the Antideficiency Act. Id., at 426.

Annual leave obligates appropriations current at the time the leave is taken. 17 Comp. Gen. 641 (1938); 50 Comp. Gen. 863, 865 (1971). Normally, this will have no special effect on the obligational process since it is automatically included as part of the salary obligation. With certain exceptions, a separate obligation for annual leave is necessary only when it becomes due and payable as terminal leave. OMB Circular No. A-34, para. 25.1.

Employees terminated by a reduction-in-force (RIF) are entitled by statute to severance pay. Severance pay is obligated on a pay period by pay period basis. Thus, where a RIF occurs near the end of a fiscal year and severance payments will extend into the following fiscal year, it is improper to charge the entire amount of severance pay to the fiscal year in which the RIF occurs. B-200170, July 28, 1981; OMB Circular No. A-34, para. 25.1.

Compensation plans in foreign countries

By statute, the State Department is authorized to establish compensation plans for alien employees of the Foreign Service in foreign countries. The plans are to be "based upon prevailing wage rates and compensation practices

for corresponding types of positions in the locality, to the extent consistent with the public interest." 22 U.S.C. § 889(a)(1).

To the extent the Department exercises this authority in a given country, the obligational treatment of various elements of compensation may vary from what would otherwise be required. For example, Colombian law provides for the advance payment of accrued severance pay to help the employee purchase or make improvements on a home. Thus, under a compensation plan for alien employees in Colombia, severance pay would be recorded as an obligation against the fiscal year appropriation current at the time of accrual. B-192511, February 5, 1979.

While 22 U.S.C. § 889 authorizes compensation plans based on local practice, it does not permit automatic disregard of all other laws of the United States. Thus, under the Colombian severance pay program noted above, if the employee subsequently is terminated for cause or otherwise loses eligibility, the Department must proceed with collection action under the Federal Claims Collection Act (Chapter 11, Part II, this Manual), local practice to the contrary notwithstanding. B-192511, June 8, 1979. Similarly, accrued severance pay retains its status as United States funds up to actual disbursement and is therefore subject to applicable fiscal and fund control requirements. B-199722, September 15, 1981 (severance pay plan in Jordan).

Under subsection (b) of 22 U.S.C. § 889, other Government agencies "are authorized to administer alien employee programs in accordance with the applicable provisions of" the Foreign Service Act. This provision, for example, authorized the Defense Department to establish a pension and life insurance program for alien employees in Bermuda, provided that it corresponded to prevailing local practice. The statute does not require that a plan established by another agency conform to the State Department's plan, although naturally the agency should coordinate with other agencies operating in the locality. 40 Comp. Gen. 650 (1961). (As a practical matter, two agencies operating in the same locality should not develop substantially different plans, assuming both legitimately reflect prevailing local practice.)

Public utilities

31 U.S.C. § 200(a)(7) also covers "services performed by public utilities." Although there are no decisions discussing the public utility clause of subsection (a)(7), there is

a relevant statute. Under 31 U.S.C. § 668a, in making payments for telephone services and for services like gas or electricity where the quantity is based on metered readings, the entire payment for a billing period which begins in one fiscal year and ends in another is chargeable to appropriations current at the end of the billing period. If the charge covers several fiscal years, 31 U.S.C. § 668a does not apply. A charge covering several fiscal years must be prorated so that the charge to any one fiscal year appropriation will not exceed the cost of service for a one-year period ending in that fiscal year. 19 Comp. Gen. 365 (1939). GAO has construed this statute as applicable to teletypewriter services as well. 34 Comp. Gen. 414 (1955).

(8) Subsection (a)(8): Other Legal Liabilities

The final standard for recording obligations, 31 U.S.C. § 200(a)(8), is--

> "any other legal liability of the United States against an appropriation or fund legally available therefor."

This is sort of a catch-all category designed to pick up valid obligations which are not covered by subsections (a)(1) through (a)(7). 34 Comp. Gen. 418, 424 (1955).

Thus far, the decisions provide very little guidance on the types of situations that might be covered by subsection (a)(8). The few decisions that mention subsection (a)(8) generally cite it in conjunction with one of the other subsections and stop short of a definitive statement as to its independent applicability. See, e.g., 54 Comp. Gen. 962 (1975) (impoundment litigation); B-192511, February 5, 1979 (severance pay plan under 22 U.S.C. § 889). These two cases have been discussed under subsections (a)(6) and (a)(7) respectively.

Another case, although not specifically citing subsection (a)(8), pointed out a situation that would seemingly qualify under that subsection: estimates of municipal tax liabilities on United States property located in foreign countries, based on tax bills received in prior years. 35 Comp. Gen. 319 (1955).

Thus, subsection (a)(8) must be applied on a case-by-case basis. If a given item is a legal liability of the United States, if appropriations are legally available for the item in terms of purpose and time, and if the item does not fit under any of the other seven subsections, then subsection (a)(8) should be considered.

As a final note, an advance of funds to a working fund does not in itself serve to obligate the funds. See B-180578-O.M., September 26, 1978; 23 Comp. Gen. 668 (1944). The same result holds for funds transferred to a special "holding account" established for administrative convenience. B-118638, November 4, 1974 (appropriations for District of Columbia Public Defender Service under control of the Administrative Office of the U.S. Courts are not obligated by transfer to a "Judicial Trust Fund" established by the Administrative Office).

C. REPORTING REQUIREMENTS

When 31 U.S.C. § 200 was originally enacted in 1954, it required each agency to prepare a report each year on the unliquidated obligations and unobligated balance for each appropriation or fund under the agency's control. The reports were to be submitted to the Senate and House Appropriations Committees, the (then) Bureau of the Budget, and GAO. GAO was often asked by the appropriations committees to review these reports.

After several years of reviewing reports, the appropriations committees determined that the requirement had served its purpose, and Congress amended the law in 1959 to revise the reporting procedures. The current reporting requirements are found at 31 U.S.C. §§ 200(b), (c), and (e).

31 U.S.C. § 200(b) provides that each agency, when submitting requests for appropriations to the Office of Management and Budget, shall report that "any statement of obligations furnished therewith consists of valid obligations as defined in" 31 U.S.C. § 200(a). See 39 Comp. Gen. 422, 425 (1959). Implementing instructions are contained in OMB Circular No. A-11 (Preparation and Submission of Budget Estimates), para. 11.5.

31 U.S.C. § 200(c), unchanged from the original legislation, provides that reports submitted under subsection (b) must be certified by officials designated by the agency head. The certification must be supported by adequate records, and the agency must retain the records and certifications "in such form as to facilitate audit and reconciliation." Officials designated to make the certifications may not redelegate the responsibility.

The conference report on the original enactment of 31 U.S.C. § 200 specified that the officials designated to make the certifications should be persons with overall responsibility for the recording of obligations and "in no event should the designation be below the level of the chief accounting officer of a major bureau, service, or constituent organizational unit." 7/

7/ H.R. Rep. No. 2663, 83d Cong., 2d Sess., quoted in Financial Management in the Federal Government, supra, note (1), at 88.

The person who makes certifications under subsection 200(c) is not a "certifying officer" for purposes of personal accountability for the funds in question. (See Chapter 10, this Manual.) Although he may be coincidentally an "authorized certifying officer," the two functions are legally separate and distinct. B-197559-O.M., May 13, 1980.

The statute does not require 100 percent verification of unliquidated obligations prior to certification. Agencies may use statistical sampling. B-199967-O.M., December 3, 1980.

In the case of transfer appropriation accounts under interagency agreements, the certification official of the spending agency must make his certifications to the head of the advancing agency and not to the head of the spending agency. 7 GAO § 17.5.

The format of the certification official's reports is up to the individual agency but should be compatible with any reports required by the Treasury Department and OMB. 7 GAO § 17.5. For a sample format, see OMB Circular No. A-11 para. 11.5.

Finally, 31 U.S.C. § 200(e), also unchanged from the original legislation, provides that any statement of obligations furnished by any agency to the Congress or to any congressional committee "shall include only such amounts as may be valid obligations as defined in subsection (a)."

D. CONTINGENT LIABILITIES: AGREEMENTS TO INDEMNIFY

A "contingent liability" is a potential liability which may become an actual liability if some particular event happens or does not happen. A more formal definition is:

> "An existing condition, situation, or set of circumstances involving uncertainty as to a possible loss to an agency that will ultimately be resolved when one or more future events occur or fail to occur." 8/

For example, a loan guarantee (Chapter 14, this Manual) is a contingent liability. If the borrower defaults, it becomes an obligation.

From the accounting perspective, an important concern is whether the contingent liability should be reflected in financial statements. In this context, the question is whether a given situation is sufficiently probable to justify recognition or is little more than a mere possibility. For guidance on this question, see GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 2 (2 GAO), sec. 13.3. See also 37 Comp. Gen. 691 (1958).

Questions on contingent liabilities arise most frequently in connection with indemnification schemes. Under an indemnification agreement, one party promises, in effect, to cover another party's losses. It is no surprise that the Government is often asked to enter into indemnification agreements.

The rule is that, absent express statutory authority to the contrary, the Government may not enter into an agreement to indemnify where the amount of the Government's liability is indefinite, indeterminate, or potentially unlimited. Such an agreement would violate both the Antideficiency Act, 31 U.S.C. § 665 (Chapter 5, this Manual) and the Adequacy of Appropriations Act, 41 U.S.C. § 11 (Chapter 8, this Manual) since it can never be said that sufficient funds have been appropriated to cover the contingency. In plain English, you cannot purport to bind the Government to unlimited liability. The rule is not some arcane GAO concoction. The Court of Claims stated in California-Pacific Utilities Co. v. United States, 194 Ct. Cl. 703, 715 (1971):

8/ Glossary of Terms Used in the Federal Budget Process, PAD-81-27, p. 86.

"The United States Supreme Court, the Court of Claims, and the Comptroller General have consistently held that absent an express provision in an appropriation for reimbursement adequate to make such payment, [the Antideficiency Act] proscribes indemnification on the grounds that it would constitute the obligation of funds not yet appropriated. [Citations omitted.]"

For example, in an early case, the Interior Department, as licensee, entered into an agreement with the Southern Pacific Company under which the Department was to lay telephone and telegraph wires on property owned by the licensor in New Mexico. The agreement included a provision that the Department was to indemnify the Company against any liability resulting from the operation. Upon reviewing the indemnity provision, the Comptroller General found that it purported to impose indeterminate contingent liability on the Government. By including the indemnity provision, the contracting officer had exceeded his authority, and the provision was held void. 16 Comp. Gen. 803 (1937).

Similarly, an indefinite and unlimited indemnification provision in a lease entered into by the General Services Administration without statutory authority was held to impose no legal liability on the Government. 35 Comp. Gen. 85 (1955).

More recently, in 59 Comp. Gen. 369 (1980), the National Oceanic and Atmospheric Administration desired to undertake a series of hurricane seeding experiments off the coast of Australia in cooperation with its Australian counterpart. The State Department, as negotiator, asked GAO to rule on an Australian proposal under which the United States would agree to indemnify Australia against all damages arising from the activities. State recognized that an unlimited agreement would violate the Antideficiency Act and asked whether the proposal would be acceptable if it specified that the Government's liability would be subject to the appropriation of funds by Congress for that purpose. GAO conceded that an agreement expressly providing that the United States would not be obligated unless Congress chooses to appropriate the funds would not violate the letter of the law. However, it would violate the spirit of the law because, even though it would impose no legal obligation, it would impose a moral obligation on the United States to make good on its promise. This is the so-called "coercive deficiency." There was a way out, however. GAO concluded that the Government's policy of self-insurance (covered in Chapter 3, this Manual) did not

apply here. NOAA could therefore purchase private insurance, with the premiums hopefully to be shared by the Government of Australia. NOAA's share of the insurance premium would simply be a necessary expense of the project.

In another recent decision applying the general rule, the Comptroller General held that the Federal Emergency Management Agency could not agree to provide indeterminate indemnification to agents and brokers under the National Flood Insurance Act. B-201394, April 23, 1981. If FEMA considered indemnification necessary to the success of its program, it could either insert a provision limiting the Government's liability to available appropriations or seek broader authority from Congress.

For other cases applying the general rule, see 15 Comp. Dec. 405 (1909); 7 Comp. Gen. 507 (1928); 20 Comp. Gen. 95, 100 (1940); A-95749, October 14, 1938.

In some of the earlier cases--for example, 7 Comp. Gen. 507 and 16 Comp. Gen. 803--GAO noted as further support for the prohibition the then-existing principle that the United States was not liable for the tortious conduct of its employees. Of course, since the enactment of the Federal Tort Claims Act (covered in Chapter 11, Part I, this Manual), this is no longer true. Thus, the reader should disregard any discussion of the Government's lack of tort liability appearing in the earlier cases. The thrust of those cases, however, the prohibition against indefinite contingent liabilities, remains valid.

A limited exception to the rule was recognized in 59 Comp. Gen. 705 (1980). In that case, the Comptroller General held that the General Services Administration could agree to certain indemnity provisions in procuring public utility services for Government agencies under the Federal Property and Administrative Services Act.

The extent of the exception carved out by 59 Comp. Gen. 705 was discussed in a later decision, B-197583, January 19, 1981. There, GAO once again applied the general rule and held that the Architect of the Capitol could not agree to indemnify the Potomac Electric Power Company for loss or damages resulting from PEPCO's performance of tests on equipment installed in Government buildings or from certain other equipment owned by PEPCO which could be installed in Government buildings to monitor electricity use for conservation purposes. GAO pointed to two distinguishing factors that justified -- and limited -- the exception

in 59 Comp. Gen. 705. First, in 59 Comp. Gen. 705, there was no other source from which the Government could obtain the needed utility services. Here, the testing and monitoring could be performed by Government employees. The second factor is summarized in the following excerpt from B-197583:

> "An even more important distinction, though, is that unlike the situation in the GSA case [59 Comp. Gen. 705], the Architect has not previously been accepting the testing services or using the impulse device from PEPCO and has therefore not previously agreed to the liability represented by the proposed indemnity agreements. In the GSA case, GSA merely sought to enter a contract accepting the same service and attendant liability, previously secured under a non-negotiable tariff, at a rate more advantageous to the Government. Here, however, the Government has other means available to provide the testing and monitoring desired."

Thus, the case did not fall within the "narrow exception created by the GSA decision" and the proposed indemnity agreement was improper. Citing 59 Comp. Gen. 369, supra, however, GAO suggested that the Architect consider the possibility of obtaining private insurance.

As discussed below, indemnification agreements may be proper if they are limited to available appropriations and are otherwise authorized.

Before ever getting to the question of amount, for an indemnity agreement to be permissible in the first place, it must be authorized either expressly or under a necessary expense theory (see Chapter 3, this Manual). For example, in 1958, the National Gallery of Art asked if it could enter into an agreement to indemnify a corporation which was providing air conditioning equipment maintenance training to members of the Gallery's engineering staff. Under the proposal, the Gallery would indemnify the corporation for losses resulting from death or injury to Gallery employees caused by the negligence of the corporation or its employees. In reviewing the proposal, GAO did not find it necessary to address the definite vs. indefinite issue. There was simply no authority for the Gallery to use appropriated funds to pay claims of this type, nor could they be considered authorized training expenses under the Government Employees Training Act. B-137976, December 4, 1958. See also B-201394, April 23, 1981, supra; 59 Comp. Gen. 369, supra.

The limitation of an indemnity agreement to available appropriations may come about in either of two ways: it may follow necessarily from the nature of the agreement itself coupled with an appropriate obligation or administrative reservation of funds, or it may be expressly written into the agreement. The latter alternative is the only acceptable one where the Government's liability would otherwise be potentially unlimited.

For example, under a contract for the lease of aircraft, the Federal Aviation Administration could agree to indemnify the owner for loss or damage to the aircraft in order to eliminate the need to reimburse the owner for the cost of "hull insurance" and thereby secure a lower rental rate. The liability could properly be viewed as a necessary expense incident to hiring the aircraft, FAA had no-year appropriations available to pay for any such liability, and the agreement was not indefinite because maximum liability was measurable by the fair market value of the aircraft. 42 Comp. Gen. 708 (1963).

Similarly, where the Government rented buses to transport Selective Service registrants for physical examination or induction, there was no objection to the inclusion of an indemnity provision which was a standard provision in the applicable motor carrier charter coach tariff. 48 Comp. Gen. 361 (1968). As in the FAA case, potential liability was not indefinite since it was necessarily limited to the value of the motor carrier's equipment.

In B-114860, December 19, 1979, the Farmers Home Administration asked whether it could purchase surety bonds or enter into an indemnity agreement in order to obtain the release of deeds of trust for borrowers in Colorado where the original promissory notes had been lost while in FmHA's custody. Colorado law required one or the other where the cancelled original note could not be delivered to the Colorado public trustee. GAO concluded that the indemnity agreement was permissible as long as it was limited to an amount not to exceed the original principal amount of the trust deed. The decision further advised that FmHA should administratively reserve sufficient funds to cover its potential liability. This aspect of the decision was reconsidered in B-198161, November 25, 1980. Reviewing the particular circumstances involved, GAO was unable to foresee situations in which the Government might be required to indemnify the public trustee, and accordingly advised FmHA that the administrative reservation of funds would not be necessary.

In cases like 42 Comp. Gen. 708 and 48 Comp. Gen. 361, discussed above, even though the Government's potential liability is limited and determinable, this fact alone does not guarantee that the agency will have sufficient funds available should the contingency ripen into an obligation. This concern is met in one of two ways. The first is the obligation or administrative reservation of sufficient funds to cover the potential liability. In particular cases, reservation may be determined unnecessary, as in B-198161, supra. Also, naturally, a specific directive from Congress will render reservation of funds unnecessary. See B-159141, August 18, 1967. The second way is for the agreement to expressly limit the Government's liability to appropriations available at the time of the loss with no implication that Congress will appropriate funds to make up any deficiency.

This second device -- the express limitation of the Government's liability to available appropriations -- is sufficient to cure an otherwise fatally defective (i.e., unlimited) indemnity proposal. GAO has considered this type of provision in several contexts.

For example, the Government may in limited circumstances assume the risk of loss to contractor-owned property. While the maximum potential liability would be determinable, it could be very large. Thus, without some form of limitation, such an agreement could result in obligations in excess of available appropriations. The rules concerning the Government's assumption of risk on property owned by contractors and used in the performance of their contracts are set forth in 54 Comp. Gen. 824 (1975), modifying B-168106, July 3, 1974. The rules are summarized below: 9/

--If administratively determined to be in the best interest of the Government, the Government may assume the risk for contractor-owned property which is used solely in the performance of Government contracts.

--The Government may not assume the risk for contractor-owned property which is used solely for non-Government work. If the property is used for both Government and

9/ 54 Comp. Gen. 824 overruled a portion of 42 Comp. Gen. 708, discussed in the text, to the extent it held that there was no need to either obligate or reserve funds. Thus, in a situation like 42 Comp. Gen. 708, the agency would presumably have to either obligate or administratively reserve funds or include a provision like the one described in 54 Comp. Gen. 824.

non-Government work and the non-Government portion is separable, the Government may not assume the risk relating to the non-Government work.

--Where the amount of a contractor's commercial work is so insignificant when compared to the amount of the contractor's Government work that the Government is effectively bearing the entire risk of loss by in essence paying the full insurance premiums, the Government may assume the risk if administratively determined to be in the best interest of the Government.

--Any agreement for the assumption of risk by the Government under the above rules must clearly provide that, in the event the Government has to pay for losses, payments may not exceed appropriations available at the time of the losses, and that nothing in the contract may be considered as implying that Congress will at a later date appropriate funds sufficient to meet deficiencies.

A somewhat different situation was discussed in 60 Comp. Gen. 584 (1981), involving an "installment purchase plan" for automatic data processing equipment. Under the plan, the General Services Administration would make monthly payments until the entire purchase price was paid, at which time GSA would acquire unencumbered ownership of the equipment. GSA's obligation was conditioned on its exercising an option at the end of each fiscal year to continue payments for the next year. The contract contained a risk of loss provision under which GSA would be required to pay the full price for any equipment lost or damaged during the term. GAO concluded that the equipment should be treated as contractor-owned property for purposes of the risk of loss provision, and that the provision would be improper unless one of the following conditions were met:

1. The contract must include the provisions specified in 54 Comp. Gen. 824, supra, limiting GSA's liability to appropriations available at the time of the loss and expressly precluding any inference that Congress would appropriate sufficient funds to meet any deficiency; or

2. If the contract does not include these provisions, then GSA must obligate sufficient funds to cover its possible liability under the risk of loss provision.

If neither of these conditions are met, the assumption of risk clause could potentially violate the Antidificiency Act by creating an obligation in excess of available appropriations if the contingency occurs.

In another recent case, the Defense Department and the State of New York entered into a contract for New York to provide certain support functions for the 1980 Winter Olympic Games at Lake Placid, New York. The contract provided for Federal reimbursement of any disability benefits which New York might be required to pay in case of death or injury of persons participating in the operation. The contract specified that the Government's liability could not exceed appropriations for assistance to the Games available at the time of a disabling event, and that the contract did not imply that Congress would appropriate funds sufficient to meet any deficiencies. Since these provisions satisfied the test of 54 Comp. Gen. 824, the indemnity agreement was not legally objectionable. B-202518, January 8, 1982. Under this type of arrangement, the time to record an obligation would be when the agency is notified that a disabling event has occurred. The initial recording of course would have to be based on an estimate.

Also, the decision in the National Flood Insurance Act case mentioned above (B-201394, April 23, 1981) noted that the defect could have been cured by inserting a clause along the lines of 54 Comp. Gen. 824.

In B-201072, May 3, 1982, the Department of Health and Human Services questioned the use of a contract clause entitled "Insurance--Liability to Third Persons," found in the Federal Procurement Regulations. The clause purported to permit Federal agencies to agree to reimburse contractors, without limit, for liabilities to third persons for death, personal injury, or property damage, arising out of performance of the contract and not compensated by insurance, whether or not caused by the contractor's negligence. Since the clause purported to commit the Government to an indefinite liability which could exceed available appropriations, the Comptroller General found it in violation of the Antideficiency Act and the Adequacy of Appropriations Act. Once again, the decision suggested that use of the clause described in 54 Comp. Gen. 824 would be acceptable.

A statutory exception to the indemnification rules exists for certain defense-related contracts by virtue of 50 U.S.C. § 1431, often referred to by its Public Law designation, Public Law 85-804. The statute evolved from

a temporary wartime measure, section 201 of the First War Powers Act, 1941, 55 Stat. 838, 839. The implementing details on indemnification are found in Executive Order No. 10789, as amended.

The prohibition against incurring indefinite contingent liabilities is not limited to indemnification agreements. It applies as well to other types of contingent liabilities such as contract termination charges. For example, a contract giving the Government a renewal option contained a provision for the payment of "separate charges" in the event the Government failed to exercise the option. The separate charges were based in part on a percentage of the company's "then current commercial catalog" prices. Since the catalog prices were subject to change at any time solely at the company's discretion, the "separate charges" clause imposed an indeterminate contingent liability on the Government and was therefore invalid. 56 Comp. Gen. 142, 156-57 (1976). (This case is also discussed in the section on the bona fide need rule, Chapter 4, this Manual.)

To summarize:

The Government may not enter into an indemnification agreement which would impose an indefinite or potentially unlimited liability on the Government, with the exception of the narrowly limited situation in 59 Comp. Gen. 705. Since the obligation or administrative reservation of funds is not a feasible option in the indefinite liability situation, the only cure is for the agreement to expressly limit the Government's liability to available appropriations with no implication that Congress will appropriate the money to meet any deficiencies. If the Government's potential liability is limited and determinable, an agreement to indemnify will be acceptable if it is otherwise authorized and if appropriate safeguards are taken to protect against violation of the Antideficiency Act. These safeguards may be either the obligation or administrative reservation of sufficient funds to cover the potential liability, or the inclusion in the agreement of a clause expressly limiting the Government's liability to available appropriations.

While the preceding discussion reflects the GAO decisions as of mid-1982, GAO is aware and remains concerned that the guidance provided in those decisions does not solve all problems. For example, limiting an indemnification agreement to appropriations available at the time of the loss, as in B-202518 (discussed above), may remove the "unlimited liability" objection, but it remains entirely

possible that liabilities incurred under such an agreement could exhaust the agency's appropriation and produce further Antideficiency Act complications. If an agency thinks that indemnification agreements in a particular context are sufficiently in the Government's interests, GAO's preference is for the agency to go to Congress and seek specific statutory authority. The indemnification area is a troublesome one, and GAO will continue to evaluate it with other concerned agencies.

E. DEOBLIGATION

The definition of the term "deobligation" is a "downward adjustment of previously recorded obligations." 10/

Deobligations occur for a variety of reasons. Examples are:

--Liquidation in amount less than amount of original obligation.

--Initial obligation determined to be invalid.

--Reduction of previously recorded estimate.

--Correction of bookkeeping errors or duplicate obligations.

In addition, deobligation may be statutorily required in some instances. An example is 31 U.S.C. § 686-1, discussed in Section B of this Chapter and Chapter 8, this Manual, requiring deobligation of appropriations obligated under an Economy Act agreement to the extent the performing agency has not incurred valid obligations under the agreement by the end of the fiscal year.

For the most part, there are no "special" rules relating to deobligation. Rather, the treatment of deobligations follows logically from the principles previously discussed in this and preceding Chapters. Thus--

--Funds deobligated within the original period of obligational availability are once again available for new obligations just as if they had never been obligated in the first place. Naturally, any new obligations are subject to the purpose, time, and amount restrictions governing the source appropriation.

--Funds deobligated after the expiration of the original period of obligational availability revert to the Treasury and are not available for further obligation. 52 Comp. Gen. 179 (1972).

10/ Glossary of Terms Used in the Federal Budget Process, PAD-81-27, p. 56.

A proper and unliquidated obligation should not be deobligated unless there is some valid reason for doing so. Absent a valid reason, it is improper to deobligate funds solely to "free them up" for new obligations. To do so risks violating the Antideficiency Act. For example, where a Government check issued in payment of some valid obligation cannot be promptly negotiated (if, for example, it is returned as undeliverable), it is improper to deobligate the funds and use them for new obligations. 15 Comp. Gen. 489 (1935); A-44024, September 21, 1942. (The two cited decisions deal with provisions of law which have since changed, but the thrust of the decisions remains the same. For current law, see 31 U.S.C. § 132, discussed in Chapter 11, Part I, this Manual.) The Antideficiency Act violation would occur if the payee of the original check subsequently shows up and demands payment but the funds are no longer available because they have been reobligated and the account contains insufficient funds.

Congress may occasionally by statute authorize an agency to reobligate deobligated funds after expiration of the original period of availability. This is called "deobligation-reobligation" (or "deob-reob") authority. Such authority exists only when expressly granted by statute. Deobligation-reobligation authority generally contemplates that funds will be deobligated only when the original obligation ceases to exist and not as a device to effectively augment the appropriation. See B-173240-O.M., January 23, 1973. Also, absent statutory authority to the contrary, "deob-reob" authority applies only to obligations and not to expenditures. Thus, repayments to an appropriation after expiration of the original period of obligational availability are not available for reobligation. B-121836, April 22, 1955. "Deob-reob" authority is not necessary in the case of a no-year appropriation. B-200519, November 28, 1980.

For a related discussion, see Chapter 4, Section D, this Manual (Disposition of Appropriation Balances).

F. REPLACEMENT CONTRACTS AND GRANTS

As discussed in Chapter 4 of this Manual, an obligation validly incurred in one fiscal year remains available for liquidation beyond the end of that fiscal year. Suppose a contract or grant is validly awarded in a given fiscal year and for one reason or another the contractor or grantee is unable to perform. As long as the need continues, a new contract or grant can be awarded in the same fiscal year without problem. However, the situation becomes more complex if the process is interrupted by a change in fiscal year. The question then becomes when a "replacement" contract or grant may be awarded in the subsequent fiscal year under the original obligation, i.e., chargeable to the prior fiscal year's appropriation.

A considerable body of case law has developed in this area and there are clear rules for both contracts and grants. The rules define when a change in contractor or grantee remains chargeable to the prior year's appropriation and when it must be considered a new obligation and therefore chargeable to current fiscal year funds. These rules are discussed in detail elsewhere in this Manual and the purpose of this Section is merely to provide appropriate cross-references. The rules for contracts are covered in Chapter 4, Section B. The rules for grants are covered in Chapter 13, Section C.

G. MULTI-YEAR CONTRACTS

[This Section will be added in a future revision. Some discussion of multi-year contracting may be found in Chapter 4 of this Manual from the perspective of the bona fide need concept, and in Chapter 5 from the perspective of the Antideficiency Act.]

CHAPTER 7

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CHAPTER 7

CONTINUING RESOLUTIONS

A. DEFINITION AND GENERAL CONSIDERATIONS

The term "continuing resolution" may be defined as follows:

> "Legislation enacted by Congress to provide budget authority for Federal agencies and/or specific activities to continue in operation until the regular appropriations are enacted. Continuing resolutions are enacted when action on appropriations is not completed by the beginning of a fiscal year. The continuing resolution usually specifies a maximum rate at which the obligations may be incurred, based on the rate of the prior year, the President's budget request, or an appropriation bill passed by either or both Houses of the Congress." 1/

Continuing resolutions are temporary appropriation acts. They are intended by Congress to be stop-gap measures enacted to keep existing Federal programs functioning after the expiration of previous budget authority and until regular appropriation acts can be enacted. The Congress resorts to the continuing resolution when there is no regular appropriation for a program, perhaps because the two Houses have not yet agreed on common language, because authorizing legislation has not yet been enacted, or because the President has vetoed an appropriation act passed by the Congress. 58 Comp. Gen. 530, 532 (1979). 2/

1/ U.S. General Accounting Office, Glossary of Terms Used in the Federal Budget Process, PAD-81-27, p. 44.

2/ Continuing resolutions were formerly called "temporary resolutions." The term "continuing resolution" came into widespread use in the early 1960's. For a brief historical sketch, see Library of Congress, Congressional Research Service, Budget Concepts and Terminology: The Appropriations Phase, by Louis Fisher, GGR 74-210 (1974), Chapter V.

In the 20 years from FY 1962 to FY 1981, 85 percent of the appropriation bills for Federal agencies were enacted after the start of the fiscal year and thus necessitated continuing resolutions. The problems inherent in this situation are discussed in a GAO report entitled "Funding Gaps Jeopardize Federal Government Operations," PAD-81-31, March 3, 1981. In that report, GAO recommended that Congress enact permanent legislation to allow all agencies to incur obligations, but not expend funds, when appropriations expire, except when program authorization has also expired or Congress wants a given program suspended.

There is a clear indication that in enacting continuing resolutions Congress intends and expects that the normal authorization and appropriation process will eventually produce appropriation acts which will replace or terminate the budget authority contained in the resolution. Thus, a continuing resolution generally provides that funds appropriated for an activity by the resolution will no longer be available for obligation if the activity is later funded by a regular appropriation act, or Congress indicates its intent to end the activity by enacting an applicable appropriation act without providing for the activity. 58 Comp. Gen. 530, 532 (1979). Obligations already incurred under the resolution, however, may be liquidated. (But see Section B(5), infra.) It should be noted that in recent years, Congress has sometimes acknowledged at the outset that it was not likely to enact a particular regular appropriation act during the current fiscal year. See, e.g., Pub. L. No. 96-86, the continuing resolution for fiscal year 1980, which provided budget authority for the Legislative Branch for the entire fiscal year.

Continuing resolutions are enacted as joint resolutions making continuing appropriations for a certain fiscal year. Although enacted in this form rather than as an act, once passed by both Houses of the Congress and approved by the President, a continuing resolution is a public law and has the same force and effect as any other law. B-152554, December 15, 1970; Oklahoma v. Weinberger, 360 F. Supp. 724, 726 (W.D. Okla. 1973). Having said this, however, it is necessary to note that continuing resolutions differ considerably from normal appropriation acts.

Unlike normal appropriation acts, continuing resolutions do not usually appropriate specified sums of money. Rather, they usually appropriate "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations." The rate for operations may be the amount provided for the activity in an appropriation act that has passed both Houses but has not become law; the lower of the amounts provided when each House has passed a different act;

the lower of the amounts provided either in an act which has passed only one House or in the Administration's budget estimate; the amount specified in a particular conference report; the lower of either the amount provided in the budget estimate or the "current rate"; or simply the current rate. Therefore, in order to determine the sum of money appropriated for any given activity by a continuing resolution, it is necessary to examine documents other than the resolution itself. The remaining sections of this Chapter discuss these concepts in more detail.

Use of Treasury warrants

Funds appropriated by a continuing resolution are drawn from the Treasury by means of a Treasury warrant (TFS Form 6200). 3/ GAO countersigns Treasury warrants under the mandate contained in section 11 of the Act of July 31, 1894, as amended, 31 U.S.C. § 76, which provides in pertinent part:

> "All warrants, when authorized by law and signed by the Secretary of the Treasury, shall be countersigned in the General Accounting Office * * *."

Section 115(a) of the Budget and Accounting Procedures Act of 1950, 31 U.S.C. § 66c(a), states:

> "When the Secretary of the Treasury and the Comptroller General determine that existing procedures can be modified in the interest of simplification, improvement, or economy, with sufficient safeguards over the control and accounting for the public funds, they may issue joint regulations providing for the waiving, in whole or in part, of the requirements of existing law that--
>
> "(1) warrants be issued and countersigned in connection with the receipt, retention, and disbursement of public monies and trust funds * * *."

3/ Treasury Fiscal Requirements Manual for Guidance of Departments and Agencies, Vol. I, Part 2, Section 2040. A warrant is the official document issued pursuant to law by the Secretary of the Treasury that establishes the amount of money authorized to be withdrawn from the Treasury. Terms Used in the Federal Budget Process, supra, note (1), at 81.

Under the authority of this section, the Secretary of the Treasury and the Comptroller General have issued Department of the Treasury--General Accounting Office Joint Regulation No. 5, which provides, in paragraph 3:

> "All requirements of existing law that warrants be countersigned are hereby waived except as they relate to countersigning of warrants issued pursuant to legislation continuing appropriations until enactment of applicable appropriation acts." 4/

Therefore, GAO countersigns only those warrants pertaining to funds appropriated by continuing resolutions.

Under 31 U.S.C. § 76, it is the responsibility of GAO, before countersigning an appropriation warrant, to determine whether the amounts specified in the warrant have been appropriated by law.

4/ Treasury--GAO Joint Regulations are included as an Appendix to Title 7 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies.

B. RATE FOR OPERATIONS

(1) Current Rate

> The current rate is equivalent to the total amount of money which was available for obligation for an activity during the fiscal year previous to the one for which the continuing resolution is enacted.

The term "current rate" is used in continuing resolutions to indicate the level of spending which Congress desires for a program. For example, a resolution may appropriate sufficient funds to enable a program to operate at a rate for operations "not in excess of the current rate," or at a rate "not in excess of the lower of the current rate" or the rate provided in a certain bill.

Current rate refers to a sum of money rather than a program level. 58 Comp. Gen. 530, 533 (1979); B-194362, May 1, 1979. Thus, when a continuing resolution appropriates in terms of the current rate, the amount of money available under the resolution will be limited by that rate, even though an increase in the minimum wage may force a reduction in the number of people participating in an employment program (B-194063, May 4, 1979), or an increase in the mandatory level of assistance will reduce the number of meals provided under a meals for the elderly program (B-194362, May 1, 1979). There are, however, exceptions to this rule. For example, the FY 1980 continuing resolution was construed as appropriating sufficient funds to support an increased number of Indochinese refugees in view of explicit statements by both the Appropriations and the Budget Committees that the resolution was intended to fund the higher program level. B-197636, February 25, 1980. Also, the legislative history of the continuing resolution for FY 1981 (Pub. L. No. 96-369, 94 Stat. 1351) indicates that in some instances "current rate" must be interpreted so as to avoid reducing existing program levels.

The term "current rate" refers to the rate of operations carried on within the appropriation for the prior fiscal year. B-152554, December 6, 1963. The current rate is equivalent to the total appropriation, or the total funds which were available for obligation, for an activity during the previous fiscal year. 58 Comp. Gen. 530, 533 (1979); B-194063, May 4, 1979; B-194362, May 1, 1979; B-164031(1), December 13, 1972. Funds administratively transferred from the account during the fiscal year, under authority contained in substantive legislation, should not be deducted in determining the

current rate. B-197881, April 8, 1980; B-152554, November 4, 1974. It follows that funds transferred into the account during the fiscal year pursuant to statutory authority should be excluded. B-197881, supra.

In those instances in which the program in question has been funded by one-year appropriations in prior years, the current rate is equal to the total funds appropriated for the program for the previous fiscal year. 58 Comp. Gen. 530, supra; B-194362, supra. In those instances in which the program has been funded by multiple-year or no-year funds in prior years, the current rate is equal to the total funds appropriated for the previous fiscal year plus the total of unobligated budget authority carried over into the previous year from prior years. 58 Comp. Gen. 530, supra; B-152554, October 9, 1970.

One apparent deviation from this calculation of current rate occurred in 58 Comp. Gen. 530, supra, a case involving the CETA program. In that decision, the Comptroller General, in calculating the current rate under the 1979 resolution, included funds appropriated in a 1977 appropriation act and obligated during 1977. Ordinarily, only funds appropriated by the fiscal year 1978 appropriation act, and carry-over funds unobligated at the beginning of fiscal year 1978, would be included in the current rate. However, in this instance the funds appropriated in 1977 were included because it was clear from the legislative history of the appropriation act that Congress intended these funds to be an advance of appropriations for fiscal year 1978. Accordingly, the Congress did not appropriate funds for this activity in the fiscal year 1978 appropriation act. Thus, in order to ascertain the actual amount available for the activity for fiscal year 1978, it was necessary to include the advance funding provided by the 1977 appropriation act. The rationale used in this decision would apply only when it is clear that Congress was providing advance funding for the reference fiscal year in an earlier year's appropriation act.

Where funding for the preceding fiscal year covered only a part of that year, it may be appropriate to "annualize" the previous year's appropriation in order to determine the current rate. This was the result in 61 Comp. Gen. ___ (B-206571, June 15, 1982), in which the FY 1981 appropriation for a particular program had been contained in a supplemental appropriation act and was intended to cover only the last quarter of the fiscal year. The current rate for purposes of the FY 1982 continuing resolution was four times the FY 1981 figure.

(2) Rate Not Exceeding the Current Rate

> When a resolution appropriates funds to continue an activity at a rate for operations "not in excess of the current rate," the amount of funds appropriated by the resolution is equal to the current rate less any unobligated balance carried over into the present year.

The current rate is equivalent to the total amount of funds that was available for obligation for a project or activity in the previous fiscal year. When the continuing resolution appropriates funds to continue an activity at a rate for operations "not in excess of the current rate," it is the intent of Congress that the activity have available for obligation in the present fiscal year no more funds than it had available for obligation in the previous fiscal year. Therefore, if there is a balance of unobligated funds which can be carried over into the present fiscal year, this balance must be deducted from the current rate in determining the amount of funds appropriated by the continuing resolution. If this were not done, the program would be funded at a higher level in the present year than it was in the previous year, which is not permitted by the language of the resolution. E.g., 58 Comp. Gen. 530, 535 (1979).

For example, suppose the continuing resolution for fiscal year 1979 appropriates sufficient funds to continue an activity at a rate not exceeding the current rate. The current rate, or the total amount which was available for obligation in fiscal year 1978, is $1,000,000. Of this amount, $100,000 remains unobligated at the end of 1978, and is available for obligation in fiscal year 1979. If the activity is to operate at a rate not to exceed the current rate, $1,000,000, then the resolution can appropriate no more than the difference between the current rate and the carry-over from 1978 to 1979, or $900,000. If the resolution were interpreted as appropriating the full current rate, then a total of $1,100,000 would be available for fiscal year 1979, and the activity would be able to operate at a rate in excess of the current rate, a result prohibited by the language of the resolution. An unobligated balance which does not carry over into the present fiscal year does not have to be deducted. B-152554, November 4, 1974.

(3) Pattern of Obligations 5/

> An agency may determine the pattern of its obligations under a continuing resolution so long as it operates under a plan which will keep it within the rate for operations limit set by the resolution. If an agency usually obligates most of its annual budget in the first month or first quarter of the fiscal year it may continue that pattern under the resolution. If an agency usually obligates funds uniformly over the entire year, it will be limited to that pattern under the resolution, unless it presents convincing reasons why its pattern must be changed in the current fiscal year.

Continuing resolutions are often enacted to cover a limited period of time, such as a month or a calendar quarter. The time limit stated in the resolution is the maximum period of time during which funds appropriated by the resolution are available for obligation.

However, this limited period of availability does not affect the amount of money appropriated by the resolution. The rate for operations specified in the resolution, whether in terms of an appropriation act which has not become law, a budget estimate, or the current rate, is an annual amount. The continuing resolution, in general, regardless of its period of duration, appropriates this full annual amount. See, B-152554, November 4, 1974.

Because the appropriation under a continuing resolution is the full annual amount, an agency may generally follow any pattern of obligating funds, so long as it is operating under a plan which will enable continuation of activities throughout the fiscal year within the limits of the annual amount appropriated. Thus, under a resolution with a duration of one month, and which appropriates funds at a rate for operations not in excess of the current rate, the agency is not necessarily limited to incurring obligations at the same rate it incurred them in the corresponding month in the previous year. B-152554, December 6, 1963.

5/ As noted, a continuing resolution technically appropriates the full annual amount. This subsection deals with the rate at which the Treasury Department and GAO will warrant funds over to the agencies for obligation.

However, the pattern of obligations in prior years does provide a framework for determining the proper pattern of obligations under the continuing resolution. For example, if the activity is a formula grant program, in which nearly all appropriated funds are normally obligated at the beginning of the fiscal year, then the full annual amount will be made available to the agency under the resolution, even though the resolution may be in effect for only one month. However, if the activity is salaries and expenses, in which funds are normally obligated uniformly throughout the year, then the amount made available to the agency will be only one-twelfth of the annual amount under a one-month resolution or one-fourth of the annual amount under a calendar quarter resolution. B-152554, February 17, 1972.

Congress can, of course, alter the pattern of obligations by the language of the resolution. For example, if the resolution limits obligations in any calendar quarter to one-fourth the annual rate, the agency is limited to that one-fourth rate regardless of its normal pattern of obligations. B-152554, October 16, 1973. Further, even if the resolution itself does not have such limitations, but the legislative history clearly shows the intent of Congress that only one-fourth the annual rate be obligated each calendar quarter, only this amount will be made available unless the agency can demonstrate a real need to exceed that rate. B-152554, November 4, 1974.

Apportionment

The requirement that appropriations be apportioned by the Office of Management and Budget, imposed by the Antideficiency Act (Chapter 5, this Manual), applies to funds appropriated by continuing resolution as well as regular appropriations.

Typically, OMB permits some continuing resolution funds to be apportioned automatically. For example, if a given continuing resolution covers 10 percent of a fiscal year, OMB may permit 10 percent of the appropriation to be apportioned automatically. The agency can go directly to the Treasury Department to obtain a warrant for these funds without seeking a specific apportionment. Under such an arrangement, if program requirements produced a need for additional funds, the agency would have to seek an apportionment from OMB for the larger amount.

Apportionment requirements may vary from year to year because of differences in duration and other aspects of applicable continuing resolutions. OMB's policy (as of early

1982) is to announce its apportionment requirements for a given fiscal year in the form of an OMB Bulletin reflecting the particular continuing resolution for that year.

(4) Liquidation of Contract Authority

> When in the previous fiscal year the Congress has provided an agency with contract authority, the continuing resolution must be interpreted as appropriating sufficient funds to liquidate that authority.

When an activity operates on the basis that in one year the Congress provides contract authority to the agency and in the next year appropriates funds to liquidate that authority, then a continuing resolution in the second year must be interpreted as appropriating sufficient funds to liquidate the outstanding contract authority. Thus, there is no "rate for operations" limitation in connection with the liquidation of due debts based on validly executed contracts entered into under the authority of Congress. In this context, rate for operations limitations only apply to new contract authority for the present fiscal year. B-114833, November 12, 1974. These principles would presumably apply equally with respect to multi-year contract authority.

(5) Rate for Operations Exceeds Final Appropriation

If an agency operating under a continuing resolution incurs obligations within the rate for operations limit, but the Congress subsequently appropriates a total annual amount less than the amount of these obligations, the obligations remain valid. B-152554, February 17, 1972.

For example, a continuing resolution for a period of one month may have a rate for operations limitation of the current rate. The activity being funded is a grant program and the agency obligates the full annual amount during the period of the resolution. The Congress then enacts a regular appropriation act which appropriates for the activity an amount less than the obligations already incurred by the agency. Under these circumstances, the obligations incurred by the agency remain valid obligations of the United States.

Should such a situation occur, the agency must not incur any further obligations. Further, the agency should attempt to negotiate its obligations downward to come within the actual sum finally appropriated by the Congress. If this is not possible, a deficiency appropriation to liquidate the excess obligations must be sought.

C. PROJECTS OR ACTIVITIES

> "Projects or activities" as used in continuing resolutions may have two meanings. When determining which Government programs are covered by the resolution, and the rate for operations limit, the term "project or activity" refers to the total appropriation rather than to specific activities. When determining whether an activity was authorized or carried out in the previous year, the term "project or activity" may refer to the specific activity.

The term "projects or activities" is used in two contexts in continuing resolutions. First it is used in the appropriating language to indicate which Government programs are to be funded and at what rate. Thus a resolution might appropriate sufficient funds to continue "projects or activities provided for" in a certain appropriation bill "at a rate of operations, and to the extent and in the manner" provided in the bill. Occasionally Congress will use only the term "activities" by appropriating sufficient funds "for continuing the following activities, but at a rate for operations not in excess of the current rate."

When used in this context, "projects or activities" or simply "activities" does not refer to specific items contained as activities in the Administration's budget submission or in a committee report. Rather, the term refers to the appropriation for the previous fiscal year. 6/ Thus, if a resolution appropriates funds to continue "projects or activities" under a certain authorizing act at a rate for operations not exceeding the current rate, the agency is operating within the limits of the resolution so long as the total of obligations under the appropriation does not exceed the current rate. Within the appropriation, an agency may fund a particular activity at a higher rate than that activity was funded in the previous year and still not violate the current rate limitation.

6/ This position is not stated explicitly in the decisions. Rather, it follows from decisions such as B-162447, March 8, 1971, read in conjunction with decisions on the availability of lump-sum appropriations. (See Chapter 2, Section F, and Chapter 5, this Manual.) Of course, if the appropriation for the preceding fiscal year was a line-item appropriation, then the scope of "project or activity" will be limited accordingly.

An exception to the interpretation that projects or activities refers to the appropriation in existence in the previous fiscal year occurred in 58 Comp. Gen. 530 (1979). In prior years, CETA programs had been funded in two separate appropriations--Employment and Training Assistance, and Temporary Employee Assistance. The individual programs under the two appropriations differed only in that the number of jobs provided under Temporary Employment Assistance depended on the condition of the national economy.

Concurrently with the enactment of the 1979 continuing resolution, Congress amended the CETA authorizing legislation so that certain programs previously operating under the Temporary Employment Assistance appropriation were to operate in fiscal year 1980 under the Employment and Training Assistance appropriation. Under these circumstances, had the Comptroller General interpreted "activities under the Comprehensive Employment and Training Act" as referring to the two separate appropriations made in the previous year, and calculated the current rates accordingly, there would have been insufficient funds available for the now increased programs under the Employment and Training Assistance appropriation, and a surplus of funds available for the decreased programs under the Temporary Employment Assistance appropriation. To avoid this result, the Comptroller General interpreted the 1979 continuing resolution as appropriating a single lump-sum amount for all CETA programs, based on the combined current rates of the two appropriation accounts for the previous year. See 58 Comp. Gen. 530, at 535-36.

The term "projects or activities" has also been used in continuing resolutions to prohibit the use of funds to start new programs. Thus, many resolutions have contained a section stating that no funds made available under the resolution shall be available to initiate or resume any project or activity which was not conducted during the previous fiscal year. Used in this context the term "projects or activities" refers to the individual program rather than the total appropriation. See 52 Comp. Gen. 270 (1972); 35 Comp. Gen. 156 (1955).

One exception to this interpretation occurred in B-178131, March 8, 1973. In that instance, in the previous fiscal year funds were available generally for construction of buildings, including plans and specifications. However, a specific construction project was not actually under way during the previous year. Nonetheless it was decided that, because funds were available generally for construction in the previous year, this specific project was not a new project or activity and thus could be funded under the continuing resolution.

In recent years Congress has resolved the different interpretations of "project or activity" by altering the language of the new program limitation. Rather than limiting funds to programs which were actually conducted in the previous year, the more recent resolutions prohibit use of funds appropriated by the resolution for "any project or activity for which appropriations, funds, or other authority were not available" during the previous fiscal year. Thus, if an agency had authority and sufficient funds to carry out a particular program in the previous year, that program is not a new project or activity regardless of whether it was actually operating in the previous year.

A variation occurred in 60 Comp. Gen. 263 (1981). A provision of the Higher Education Act authorized loans to institutions of higher education from a revolving fund, not to exceed limitations specified in appropriation acts. Congress had not released money from the loan fund since 1978. The FY 1981 continuing resolution provided funds to the Department of Education based on its regular FY 1981 appropriation bill as passed by the House of Representatives. The House-passed version included $25 million for the higher education loans. Since the continuing resolution did not include a general prohibition against using funds for projects not funded during the previous fiscal year, the $25 million from the loan fund was available under the continuing resolution, notwithstanding that the program had not been funded in the previous year.

D. RELATIONSHIP TO OTHER LEGISLATION

(1) Not Otherwise Provided For

Continuing resolutions often appropriate funds to continue projects "not otherwise provided for." This language limits funding to those programs which are not funded by any other appropriation act. Programs which received funds under another appropriation act are not covered by the resolution even though the authorizing legislation which created the program is mentioned specifically in the continuing resolution. See B-183433, March 28, 1979. For example, if a resolution appropriates funds to continue activities under the Social Security Act, and a specific program under the Social Security Act has already been funded in a regular appropriation act, the resolution does not appropriate any additional funds for that program.

(2) Status of Bill or Budget Estimate Used as Reference

> When a continuing resolution appropriates funds at a rate for operations specified in a certain bill or in the administration's budget estimate, the status of the bill or estimate on the date the resolution passes is controlling, unless the resolution specifies some other reference date.

A continuing resolution will often provide funds to continue activities at a rate provided in a certain bill that has passed one or both Houses of Congress, or at the rate provided in the Administration's budget estimate. In such instances, the resolution is referring to the status of the bill or budget estimate on the date the resolution became law. B-164031(2).17, December 5, 1975; B-152098, January 30, 1970.

For example, the resolution may provide that activities are to be continued at the current rate or at the rate provided in the budget estimate, whichever is lower. The budget estimate referred to is the one in existence at the time the resolution is enacted, and the rate for operations cannot be increased by a subsequent upward revision of the budget estimate. B-164031(2).17, supra.

Also, if a resolution provides that activities are to continue at the rate provided in a certain appropriation bill, the resolution is referring to the status of the bill on the date the resolution is enacted. A later veto of the bill by the President would not affect the continuation of programs under the resolution. B-152098, January 15, 1973.

Where a continuing resolution provides funds based on a reference bill, this includes restrictions or limitations contained in the reference bill, as well as the amounts appropriated, unless the continuing resolution provides otherwise. B-116069, July 10, 1953; B-199966, September 10, 1980.

A provision in a continuing resolution using a reference bill may incorporate legislative history. For example, a continuing resolution may appropriate funds as provided in a particular reference bill at a rate for operations provided for in the conference report on the reference bill. Provisions of this type are discussed in B-204449, November 18, 1981, and B-205523, November 18, 1981.

(3) More Restrictive Authority

> The "more restrictive authority," as that term is used in continuing resolutions, is the version of a bill which gives an agency less discretion in obligating and disbursing funds under a certain program.

Continuing resolutions will often appropriate funds to continue projects or activities at the rate provided in either the version of an appropriation act that has passed the House or the version that has passed the Senate, which ever is lower "or under the more restrictive authority." In such an instance, the version of the bill which appropriates the lesser amount of money for an activity will be controlling. If both versions of the bill appropriate the same amount, the version which gives the agency less discretion in obligating and disbursing funds under a program is the "more restrictive authority" and will be the reference for continuing the program under the resolution. B-152098, March 26, 1973; B-152554, December 15, 1970.

In addition, continuing resolutions frequently provide that a provision "which by its terms is applicable to more than one appropriation" and which was not included in the applicable appropriation act for the preceding fiscal year will not be applicable to funds or authority under the resolution unless it was included in identical form in the relevant appropriation bill as passed by both the House and the Senate. Thus, in 52 Comp. Gen. 71 (1972), a provision in the House version of the 1973 Labor Department appropriation act prohibited the use of "funds appropriated by this Act" for Occupational Safety and Health Act inspections of firms employing 25 persons or less. The Senate version contained the identical provision except that "15" was substituted for

"25." The continuing resolution for that year contained both the "more restrictive authority" and the "applicable to more than one appropriation" provisions. The Comptroller General concluded that, even though the House provision was more restrictive, the OSHA provision did not apply to funds under the continuing resolution since it had not been contained in the 1972 appropriation act and by its terms it was applicable to more than one appropriation (i.e., it applied to the entire appropriation act). See also B-142011, August 6, 1969.

(4) Lack of Authorizing Legislation

The specific inclusion of a program in a continuing resolution will provide both authorization and funding to continue the program despite the expiration of the appropriation authorization legislation. Thus, for example, if the continuing resolution specifically states that the School Breakfast Program is to be continued under the resolution, the program may be continued although funding authorization legislation for the program expires prior to or during the period the resolution is in effect. See 55 Comp. Gen. 289, 292 (1975).

Similarly, if it is clear from the legislative history that Congress intends that certain programs shall continue under the resolution despite the lack or expiration of authorizing legislation, the resolution will act both as authorization and appropriation. See, e.g., Joint Resolution Making Continuing Appropriations for Fiscal Year 1979, and for Other Purposes, Pub. L. No. 95-482 (October 18, 1978), 92 Stat. 1603.

Appropriation bills sometimes contain provisions making the availability of the appropriations contingent upon the enactment of additional authorizing legislation. If a continuing resolution used a bill with such a provision as a reference, and if the authorizing legislation was not enacted, the amount contained in the appropriation bill, and therefore the amount appropriated by the continuing resolution, would be zero. To avoid this possibility, a continuing resolution may contain a provision suspending the effectiveness of such "contingency" provisions for the life of the resolution. Such a suspension provision will be applicable only until the referenced appropriation bill is enacted into law. 55 Comp. Gen. 289, 294 (1975).

E. DURATION

Continuing resolutions generally provide that the budget authority provided for an activity by the resolution shall remain available until (a) enactment into law of a regular appropriation for the activity, (b) enactment of the applicable appropriation by both Houses of Congress without provision for the activity, or (c) a fixed cutoff date, whichever occurs first. Once either of the first two conditions occurs, or the cutoff date passes, funds appropriated by the resolution are no longer available for obligation and new obligations may be incurred only if a regular appropriation is made or if the termination date of the resolution is extended.

The second condition will be considered to have occurred only when it is clear that Congress intended to terminate the activity. Thus, in B-164031(1), March 14, 1974, although a regular and supplemental appropriation act had been enacted without provision for a program, the Comptroller General decided that funds for the program were still available under the continuing resolution. In this case, the legislative history indicated that in enacting the regular appropriation act, Congress was providing funding for only some of the programs normally funded by this act and was deferring consideration of other programs, including the one in question. Therefore, the second condition was not applicable. Moreover, because supplemental appropriations are intended to provide funding only for new or additional needs, omission of the program from the supplemental did not trigger the second cutoff provision.

The duration provision was also involved in two 1979 cases. The continuing resolution for fiscal year 1979 included the duration provision described in the first paragraph of this subsection, with a cutoff date of September 30, 1979. However, the Comprehensive Employment and Training Act of 1973, as amended, provided that "notwithstanding any other provision of law, unless enacted in specific limitation of the provisions of this subsection," appropriations to carry out the CETA program shall remain available for two years. Applying the principle that the specific provision governs over the more general (see Chapter 2, Section F, this Manual), it was held that funds appropriated for CETA under the continuing resolution were available for obligation for two years in accordance with the Comprehensive Employment and Training Act. B-194063, May 4, 1979; B-115398.33, March 20, 1979.

The period of availability of funds under the resolution can be extended by Congress by amending the fixed cutoff date stated in the resolution. B-165731(1), November 10, 1971; B-152098, January 30, 1970. The extension may run beyond the session of Congress in which it is enacted. B-152554, December 15, 1970.

Once the applicable appropriation is enacted into law, expenditures made under the continuing resolution are charged to that appropriation. See, e.g., Pub. L. No. 96-86 (October 12, 1979), § 105, 93 Stat. 660.

Impoundment

The duration of a continuing resolution is relevant in determining the application of the Impoundment Control Act (Chapter 2, Section E, this Manual). Impoundment in the context of continuing resolutions was discussed in a letter to the Chairman of the House Budget Committee, B-205053, December 31, 1981. Generally, the withholding from obligation of funds provided under a continuing resolution would constitute an impoundment. Where the continuing resolution runs for only part of a fiscal year, the withholding, even if proposed for the duration of the continuing resolution, should be classified as a deferral rather than a rescission. Withholding funds during a temporary continuing resolution is different from withholding them for the life of a regular annual appropriation in that, in the former situation, Congress is still deliberating over the regular funding levels. Also, deferred funds are not permanently lost when a continuing resolution expires if a subsequent funding measure is passed.

Under this interpretation, classification as a rescission would presumably still be appropriate where a regular appropriation is never passed, the agency is operating under continuing resolution authority for the entire fiscal year, and the timing of the withholding is such that insufficient opportunity would remain to utilize the funds.

CHAPTER 8

ACQUISITION AND PROVISION OF GOODS AND SERVICES

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NOTE: This Chapter is not included in the June 1982 edition. It will be included in a future edition.

CHAPTER 9

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NOTE: This Chapter is not included in the June 1982 edition. It will be included in a future edition.

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CHAPTER 10

LIABILITY AND RELIEF OF ACCOUNTABLE OFFICERS

The concept that a person should be held accountable for funds in his or her care is not peculiar to the Government. If you get a job as a cashier at your local supermarket and come up short at the end of the day, you will probably be forced to make up the shortage from your own pocket. The store manager does not have to prove the loss was your fault. The very fact that the money is not there is sufficient to make you liable. Of course, if your cash register is emptied by an armed robber and you are in no way implicated, you will be off the hook.

Just like the private business enterprise, the Government loses money in many ways. It is lost; it is stolen; it is paid out improperly; it is embezzled. Sometimes the money is recovered; often it is not. If Government funds are lost because of some employee's misconduct or carelessness, and if the responsible employee is not required to make up the loss, the result is that the taxpayer ends up paying twice for the same thing, or paying for nothing.

When you accept the job at the supermarket, you do so knowing perfectly well that you will be potentially liable for losses. There is no reason why the Government should operate any differently. If anything, there is a stronger case for the liability of Government employees since they are, in effect, trustees for the taxpayers (themselves included). This Chapter will explore these concepts--the liability and relief of Government officers and employees who are entrusted with public funds. In Government language, they are called "accountable officers."

A. WHO IS AN ACCOUNTABLE OFFICER 1/

An accountable officer is any Government officer or employee who by reason of his or her employment is responsible

1/ This Chapter deals with accountability for funds rather than property. The standard with respect to funds is somewhat stricter in that, while an employee may be held liable for losses of property due to his fault or negligence, he is not viewed as an "insurer" with respect to property. See B-167126, August 28, 1978; B-151156, December 30, 1963. See also Chapter 11 (Part II), this Manual.

for or has custody of Government funds. 59 Comp. Gen. 113, 114 (1979); B-188894, September 29, 1977. See also Title 7, GAO Policy and Procedures Manual for Guidance of Federal Agencies, Chapter 7. Accountable officers encompass such officials as authorized civilian and military disbursing officers, certifying officers, collecting officers and other employees who by virtue of their employment have custody of Government funds. The various types of accountable officers are described below.

(1) Certifying Officers

Accountability for public funds in civilian agencies generally rests with the certifying officer who has been charged with the responsibility of certifying vouchers for payment. Unlike a disbursing officer or a collector of public moneys, a certifying officer has no public funds in his physical possession and is accountable for and required to make good to the Government only the amount of any illegal or improper payment resulting from his certification. The liability and relief of certifying officers are discussed in Sections B(1) and C(4) of this chapter.

(2) Disbursing Officers

A disbursing officer is an officer or employee of a Federal department, agency, or corporation, or a military officer of a military department, designated to disburse moneys and render accounts in accordance with laws and regulations governing the disbursement of public moneys. As one court has stated in another context:

> "We do not find the term 'disbursing officer' statutorily defined, probably because it is self-definitive. It can mean nothing except an officer who is authorized to disburse funds of the United States."

Romney v. United States, 167 F.2d 521, 526 (D.C. Cir. 1948).

He must: (a) disburse moneys only upon, and in strict accordance with, vouchers duly certified by the head of the department, establishment, or agency concerned, or by an officer or employee thereof duly authorized in writing by such head to certify such vouchers; (b) make such examination of vouchers as may be necessary to ascertain whether they are in proper form, duly certified and approved, and correctly computed on the basis of the facts certified; and (c) be held accountable accordingly, except that accountability for the

correctness of computations of certified vouchers lies with the certifying officer and not the disbursing officer. 31 U.S.C. §§ 82b, 82f. (Since the military departments do not use certifying officers, these provisions do not apply to them. 31 U.S.C. § 82e. However, the military disbursing officer is no less accountable for the funds for which he is responsible.) Additional disbursing officer responsibilities are found in 31 U.S.C. § 492(a).

(3) Cashiers

A cashier is an officer or employee of a Federal department, agency, or corporation who, having been recommended by the head of the activity, has been designated as a cashier by the officer responsible for making disbursements and thereby authorized to perform limited cash disbursing functions or other cash operations. 2/ With respect to disbursing functions under Executive Order 6166 (June 10, 1933, as amended), cashiers are divided into categories as follows:

(a) Class A Cashier -- A cashier who receives an advance from a disbursing officer for an imprest fund, and is personally accountable to the disbursing officer for the funds advanced. The Class A Cashier is not authorized to advance an imprest fund to another cashier except his alternate.

(b) Class B Cashier -- A cashier who receives an advance from a disbursing officer for an imprest fund and is authorized to advance an imprest fund to his own alternate and to a sub-cashier. The Class B Cashier is accountable in his own name to the disbursing officer for the entire amount of the advance received.

(c) Class D Cashier -- A cashier who receives an advance from a disbursing officer solely for change-making purposes. He may advance funds to sub-cashiers for change-making purposes only upon authorization of the disbursing officer from whom he received the advance. The Class D Cashier is accountable in his own name to the disbursing officer for the entire amount of the advance received.

2/ Definitions of the various types of cashiers are taken from U.S. Department of the Treasury, Manual of Procedures and Instructions for Cashiers Operating Under Executive Order No. 6166 (June 1976).

(d) Sub-Cashier -- A sub-cashier is an officer or employee of a Federal department, agency, or corporation who has been designated in writing by the head of the activity to receive an imprest fund from a Class B or D Cashier, is under the supervision of the head of the same local office as the cashier from whom the advance is received, is accountable to such cashier for the funds received, and is stationed within a reasonable distance of the advancing cashier. The provisions with respect to payment limitations and safekeeping which apply to cashiers apply to sub-cashiers as well.

(e) Alternate to a Cashier or Sub-cashier -- An alternate cashier is one who has been designated in the same manner as a cashier or sub-cashier but who will function in such capacity only during the absence of a principal cashier or sub-cashier, except where the volume of transactions requires both principal and alternate to act simultaneously in which case the principal will advance funds on the basis of a receipt signed by the alternate. The provisions which apply to cashiers and sub-cashiers apply equally to their alternates.

Cashiers must restore shortages from their own funds unless relief is granted by the proper authority (Section C, this Chapter). Overages must be deposited in the Treasury as miscellaneous receipts (Chapter 5, this Manual).

In 1981, the Treasury Department proposed to permit cashiers to "net" small cash overages against shortages in their accounts on an accumulated quarterly basis. Treasury sought to apply the proposal to cashiers throughout the Government operating under Treasury Department delegation. The Comptroller General, however, disapproved the proposal on the grounds that it would weaken internal controls over the accounting for cash balances. B-199447, March 17, 1981.

Note on imprest funds

The definitions of the various types of cashier refer primarily to the use of "imprest funds." An imprest fund is a fixed cash fund (i.e., a fixed dollar amount) advanced by an official Government disbursing officer to a duly authorized Government cashier for cash disbursements or other cash requirement purposes as specified in his designation or authorization. An imprest fund may be either a stationary fund, such as a change-making fund, or a revolving type fund. The

initial advance of imprest funds by a disbursing officer does not result in a charge to the applicable appropriation or fund account.

Imprest funds of the revolving type are replenished to the fixed amount as spent or used. As replenishments are needed, replenishment vouchers are submitted through the certifying officer to the disbursing officer. Replenishment vouchers must be supported by receipts or other evidence of the expenditures. It is when the replenishment check is issued that the charge is made to the applicable appropriation or fund account. Loss of a replenishment check before it reaches the cashier is not a situation requiring relief of the cashier. The proper procedure in such a situation is to report the loss to the disbursing office which issued the check to obtain a replacement. B-203025, October 30, 1981.

At any given time, an imprest fund may consist of cash, uncashed Government checks, and other documents such as unpaid reimbursement vouchers, sales slips, invoices, or other receipts for cash payments. An imprest fund cashier must at all times be able to account for the full amount of the fund. For example, if a cash box containing a $1,000 imprest fund disappears, and at the time of disappearance the box contained $500 in cash and $500 in receipts for which reimbursement vouchers had not yet been issued, the loss to the Government is the full $1,000 and the cashier is accountable for that full amount.

If in the Government's interests, a checking account may be set up in a private bank for imprest fund disbursements, as long as adequate control procedures are developed and the approval of the Secretary of the Treasury is obtained. See B-117566, April 29, 1959.

Further information on imprest funds may be found in Title 7, GAO Policy and Procedures Manual, section 22, and I Treasury Fiscal Requirements Manual, Part 4, Chapter 3000.

Requests for relief of imprest fund cashiers (Section C, this Chapter, infra) must be submitted through the Chief Disbursing Officer, Department of the Treasury, or other applicable disbursing officer in accordance with 3 GAO § 58.3.

(4) Collecting Officers

Collecting officers are those who receive or collect money for the Government, such as Internal Revenue Collectors.

Officers who receive or collect money for the Government are accountable to the Government for all money collected. See, e.g., 3 Comp. Gen. 403 (1924); 1 Comp. Dec. 191 (1895); A-44019, March 15, 1934. For example, an Internal Revenue Collector is responsible for the physical safety of taxes collected. He must pay over to the Government all taxes which he collected and must make good money lost, stolen, burned, etc., while in his custody unless relieved. E.g., 60 Comp. Gen. 674 (1981).

(5) Other Agents and Custodians

Occasionally officers and employees, including those not directly involved in Government fiscal operations, are given custody of Federal funds and thereby become accountable officers for the funds placed in their charge. For example, law enforcement personnel on undercover assignments are sometimes given custody of Federal funds for "flash roll" purposes for use in support of their investigative activities. These employees are accountable officers for such funds. E.g., B-191891, September 15, 1978; B-191891, June 16, 1980. However, employees who receive travel expense advances under 5 U.S.C. § 5705 are not accountable officers inasmuch as such advances are in the nature of a loan as distinguished from Government funds. 54 Comp. Gen. 190 (1974); B-183489 June 30, 1975; see also B-178595 June 27, 1973. 3/ The distinction is based on the following rationale. A traveler should not benefit from the fact that he obtained a travel advance, which is a convenience provided for him. If he does not obtain an advance and loses his personal funds that he would have spent for travel, the Government would have no obligation to make good the loss. Accordingly, one who obtains a travel advance should similarly have no claim against the Government. On the other hand, an employee who receives Government funds for operational purposes such as a flash roll is an accountable officer inasmuch as he would not have used his own money for this purpose.

3/ The fact that an employee receiving a travel advance does not thereby become an "accountable officer" does not mean that the employee will not be liable if the funds are lost or stolen. See B-206245, April 26, 1982; B-204387, February 24, 1982; B-200867, March 30, 1981. Travel advances returned to Government custody for reasons such as postponement of the travel regain their status as Government funds, and an employee receiving custody of these funds is accountable for them. B-170012, May 3, 1971; B-170012, March 14, 1972; B-200404, February 12, 1981.

Other examples of employees treated as accountable officers are: a Special Messenger delivering cash to another location, B-188413, June 30, 1977; State Department employees responsible for packaging and shipping funds to an overseas embassy, B-193830, October 1, 1979; and an officer in charge of a laundry operation on an Army base who had been advanced public funds to be held as a change fund, B-155149, October 21, 1964.

There may be more than one accountable officer in a given case, and the concept of accountability is not limited to the person in whose name the account is officially held nor is it limited to the person or persons for whom relief is officially requested. For example, accounts in the regional offices of the U.S. Customs Service are typically held in the name of the Regional Commissioner. While the Regional Commissioner is therefore an accountable officer with respect to that account, his subordinate employees who actually handle the funds are also accountable officers. B-193673, May 25, 1979; B-197324, March 7, 1980.

In each case, it is necessary to examine the particular facts and circumstances to determine who had responsibility for or custody of the funds during the relevant stages of the occurrence or transaction. Thus, in B-193830, October 1, 1979, money shipped from the State Department to the American Embassy in Paraguay never reached its destination. While the funds were chargeable to the account of the Class B cashier at the Embassy, the State Department employees responsible for packaging and shipping the funds were also accountable officers with respect to that transaction. In another case, a new Class B cashier had been recommended at a Peace Corps office in Western Samoa, and had in fact been doing the job, but his official designation (by the disbursing officer) was not made until after the loss in question. Since the new cashier, even though not yet formally designated, had possession of the funds at the time of the loss, he was an accountable officer. However, since the former cashier retained responsibility for the imprest fund until formally replaced, he too was an accountable officer. B-188881, May 8, 1978.

It may be impossible--although this will happen only in extremely rare cases--to specify exactly who the proper accountable officer is. For example, the Drug Enforcement Administration used a flash roll of 650 one hundred dollar bills and discovered that 15 bills had been replaced by counterfeits scattered throughout the roll. (The "roll" was actually a number of stacks.) The roll had been used in a number of investigations and in each instance, the transactions

(tranfers from cashier to investigators, returns to cashier, transfers between different groups of investigators) were recorded on receipts and the money was counted. While it was thus possible to determine precisely who had the roll on any given day, there was no way to determine when the substitution took place and hence to establish to whom the loss should be attributed. B-191891, June 16, 1980.

In sum, any Government officer or employee who physically handles Government funds, even if only occasionally, is "accountable" for those funds while in his or her custody.

B. LIABILITY OF ACCOUNTABLE OFFICERS

(1) Certifying Officers

The liability of a certifying officer is different from that of other accountable officers because the certifying officer does not actually have public funds in his possession. The certifying officer's liability derives from the nature of his function, to certify a voucher upon which a disbursement of public funds will be made.

Under 31 U.S.C. § 82c, a certifying officer (1) will be held responsible for the existence or correctness of the facts recited in the certificate or otherwise stated on the voucher or its supporting papers and for the legality of the proposed payment under the appropriation or fund involved, and (2) will be held accountable for the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certificate made by him, as well as for any payment prohibited by law or which did not represent a legal obligation under the appropriation or fund involved. Thus, a certifying officer who certifies a voucher for payment in the full amount claimed, disregarding the fact that the records before him indicate a possible indebtedness to the Government against which the sum claimed is available for offset, is accountable for any resulting overpayment. 28 Comp. Gen. 425 (1949). The certifying officer's accountability includes the correctness of the computations of certified vouchers. 31 U.S.C. § 82f.

A certifying officer is not liable until an improper payment is actually made on the basis of the certified voucher. The liability arises automatically at the moment of the improper payment, and this is true whether the certification involves a matter of fact, a question of law, or a mixed question of law and fact. 55 Comp. Gen. 297, 298 (1975) and cases cited therein. Under 31 U.S.C. § 82d, a certifying officer may obtain a decision of the Comptroller General on any question of law involved prior to certifying a voucher.

(2) Other Accountable Officers

Accountable officers who have physical custody of Government funds are held to a standard of strict liability. They are, in effect, insurers of the public funds in their custody and are excusable only for losses due to acts of God or the public enemy. This liability has been established in a line of Supreme Court decisions. United States v. Prescott,

44 U.S. (3 How) 578 (1845); United States v. Thomas, 82 U.S. (15 Wall) 337 (1872); Smythe v. United States, 188 U.S. 156 (1903). 4/ As the Supreme Court stated in Prescott:

> "Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come into his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity." 44 U.S. at 588.

An accountable officer is automatically liable at the moment either a physical loss occurs or an erroneous payment is made. 54 Comp. Gen. 112, 114 (1974).

The fact that a loss or deficiency has occurred raises a presumption of liability on the part of the accountable officer, and the burden of proof to rebut this presumption rests with the officer who has sustained the loss. Boggs v. United States, 44 Ct. Cl. 367 (1909); O'Neal v. United States, 60 Ct. Cl. 413 (1925); 48 Comp. Gen. 566 (1969). 5/ The Court of Claims has recently affirmed this concept. Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979).

Prior to 1972, fidelity bonding of accountable officers was required by law. See, e.g., 22 Comp. Gen. 48 (1942). Legislation in 1972 eliminated this requirement, and accountable officers are no longer bonded. 31 U.S.C. § 1201(a).

4/ Some early decisions on the liability of disbursing officers, predating the enactment of existing relief legislation, are: 5 Comp. Gen. 727 (1926); 7 Comp. Gen. 64 (1927); 13 Comp. Gen. 326 (1934); 13 Comp. Gen. 469 (1934).

5/ Many decisions prior to 1970 deal with Post Office employees. Since enactment of the Postal Reorganization Act of 1970, responsibility for relief of postal employees is with the United States Postal Service. 39 U.S.C. § 2601; B-164786, October 8, 1970. However, 39 U.S.C. § 2601 does not affect actions taken prior to its effective date. 50 Comp. Gen. 731 (1971). While the Comptroller General no longer relieves postal employees, the principles enunciated in the earlier decisions are nonetheless applicable to other accountable officers.

However, elimination of the bonding requirement has no effect on the legal liability of accountable officers. 6/ 31 U.S.C. § 1201(b); 54 Comp. Gen. 112 (1974); B-191440, May 25, 1979.

Like certifying officers, disbursing officers are also entitled to obtain advance decisions of the Comptroller General. 31 U.S.C. § 74. An advance decision of the Comptroller General thus affords protection against legal liability. However, the disbursing officer will not be protected if his request fails to state the facts raising the doubt where those facts are not apparent from the documents submitted. 20 Comp. Gen. 759 (1941).

Questions may arise as to whether a particular occurrence actually results in a loss to the Government for which someone should be held accountable. Thus, it was contended in one case that a loss of Treasury bonds with interest coupons did not really result in a loss to the Government because neither the bonds nor the coupons had ever been cashed and a "stop notice" had been placed with the Federal Reserve Bank. GAO could not agree, however, since the bonds were bearer bonds and the stop notice does not completely extinguish the Government's liability to pay on them. B-190506, December 20, 1979. Also, Government funds destroyed by fire represent a loss to the Government even though they are no longer available to be used by anyone else and can be replaced simply by printing new money. Smythe v. United States, 188 U.S. 156, 173-74 (1903) (in which the Supreme Court rejected the contention that an accountable officer's liability for notes destroyed by fire should be limited to the cost of printing new notes). See also 1 Comp. Dec. 191 (1895); B-203726, July 10, 1981.

Foreign currencies accepted in connection with accommodation exchanges (authorized by 31 U.S.C. § 492a), although not appropriated funds, are treated as Government funds for purposes of liability and relief. B-190205, November 14, 1977. (For valueless foreign currencies, see discussion of 31 U.S.C. § 492b, Section C(6), this Chapter.) The same result applies to funds taken from prisoners at the time of their confinement to be held in their behalf. A-22805, November 30, 1929. For

6/ The bonding requirement had been for the protection of the Government, not the accountable officer. Under the old system, if the United States was compensated for a loss by the bonding company, the company succeeded to the rights of the United States and could seek reimbursement from the accountable officer. B-186922, April 8, 1977.

other cases applying the principle that private funds may in appropriate circumstances be treated as Government funds for purposes of accountability and relief, see B-200108/B-198558, January 23, 1981 (funds deposited in United States Court registry account); B-200170, April 1, 1981 (overcharge refunds received by Department of Energy from oil company under consent order, to be distributed in specific manner; Energy official disregarded consent order and distributed funds to several charities).

However, an accountable officer is not liable for interest lost on funds which should have been deposited promptly but were not, even though the delay resulted in additional cost to the employing agency (by virtue of interest charges on funds borrowed from the U.S. Treasury). This is not the type of loss cognizable under the law applicable to accountable officers. B-190290, November 28, 1977.

(3) Payments of $25 or Less

In a circular letter B-161457, July 14, 1976, to all department and agency heads, disbursing and certifying officers, the Comptroller General advised as follows:

> "[I]n lieu of requesting a decision by the Comptroller General for items of $25 or less, disbursing and certifying officers may hereafter rely upon written advice from an agency official designated by the head of each department or agency. A copy of the document containing such advice should be attached to the voucher and the propriety of any such payment will be considered conclusive on the General Accounting Office in its settlement of the accounts involved."

This does not preclude a certifying or disbursing officer from requesting a decision if deemed necessary since the entitlement to advance decisions is statutory, but it does provide a means for simplifying the payment of very small amounts by authorizing payment without formal decision.

(4) Liability vs. Relief

It is important to distinguish between liability and relief. The basic legal liability of an accountable officer is strict, automatic, and is not affected by any lack of fault or negligence on his part. However, lack of fault or negligence may provide a basis for relief under one of the statutes discussed in Section C, infra. To restate, while

lack of fault or negligence may be relevant in determining whether relief may be granted, it is not relevant with respect to the officer's legal liability. 54 Comp. Gen. 112 (1974); B-167126, August 28, 1978.

Recent developments in Federal fiscal operations, such as increased computerization and electronic funds transfer, present new problems in accountability. While these new developments may alter the way in which certifying and disbursing officers operate, and may thus result in some redefinition of the conditions under which they may be relieved, the basic legal liability remains. The problems are discussed in a report by the Comptroller General entitled "New Methods Needed For Checking Payments Made By Computers," FGMSD-76-82, November 7, 1977. For further discussion, see Section C(4), this Chapter.

C. RELIEF

Prior to the enactment of the various relief statutes discussed below, the Comptroller General had no authority to relieve an accountable officer from liability. 4 Comp. Gen. 409 (1924). The only available recourse was an action in the Court of Claims (now 28 U.S.C. § 2512, Section C(6), infra), or private relief legislation. 27 Comp. Dec. 328 (1920).

Congress has, in a series of statutes, provided for the relief of accountable officers from liability. The main statutes, discussed separately in succeeding subsections of this Section, are:

--31 U.S.C. § 82a-1 -- physical loss or deficiency: accountable officers generally (enacted in 1947, 61 Stat. 720).

--31 U.S.C. § 95a -- physical loss or deficiency: disbursing officers of the military departments (enacted in 1955, 69 Stat. 687).

--31 U.S.C. § 82c -- illegal or improper payment: certifying officers (enacted in 1941, 55 Stat. 875).

--31 U.S.C. § 82a-2 -- illegal or improper payment: disbursing officers (enacted in 1955, 69 Stat. 687).

In each case, GAO is the vehicle for granting relief, but GAO's jurisdiction in most instances is triggered by certain administrative determinations to be made by the agency involved.

Prior to 1974, the Comptroller General had delegated the authority to grant or deny relief to various audit groups. Thus, many cases before 1974 were not actual "decisions" but were dealt with in the form of Office Memoranda ("O.M.") from the Comptroller General or the General Counsel to the audit division. As the result of new delegations from the Comptroller General (B-161457-O.M., November 1, 1974; B-198451-O.M., May 2, 1980), the responsibility for granting or denying relief under all of the statutes discussed in this Chapter now rests with the General Counsel. For the most part, relief is now granted or denied in the form of a letter signed by the General Counsel (although, under 31 U.S.C. § 95a, infra, formal requests are no longer necessary). By virtue of

the delegation from the Comptroller General, the letter has the same effect as a decision. A discussion of the four relief statutes and of many of the earlier cases arising under them may be found in B-115392-O.M., January 30, 1961.

(1) Agency Authority

(a) Final Agency Action

Prior to 1969, relief of an accountable officer could be obtained only by requesting it from GAO, no matter how small the amount. In a circular letter dated August 1, 1969, B-161457, the Comptroller General authorized departments and agencies to administratively resolve irregularities amounting to less than $150. The ceiling was raised to $500 by circular letter B-161457, August 14, 1974. 54 Comp. Gen. 112 (1974). The authorization now provides:

> "An irregularity arising from a single incident or series of similar incidents occurring about the same time amounting to less than $500 may be resolved by administrative action appropriate to the circumstances. Such cases will be properly documented and available for GAO review on a site audit basis. A central control record shall be maintained by each department and agency of all such actions.
>
> "The provisions of this section do not apply to exceptions or charges raised by the GAO."

This authorization applies only to physical losses or deficiencies. It does not apply to illegal or improper payments. 59 Comp. Gen. 113 (1979).

Thus, in cases of physical loss or deficiency, it is necessary to request relief from GAO only if the amount involved is $500 or more. This authorization is relevant only where the agency believes relief should be granted. If the agency believes relief should not be granted, then its refusal either to grant relief (under $500) or to request relief from GAO ($500 or more) is effectively final and not reviewable by GAO. 59 Comp. Gen. 113, supra. Administrative resolution of losses under $500 should be accomplished in accordance with the standards set forth in Comptroller General decisions. B-204740, November 25, 1981; B-196495, January 24, 1980; B-189084, January 15, 1980.

Questions may arise as to whether a series of losses should be treated as separate incidents or a single incident. Clearly, two losses arising from the same theft, one under

$500 and one over, should be combined for purposes of relief. B-189795, September 23, 1977. In B-193380, September 25, 1979, an imprest fund cashier discovered a $300 shortage while reconciling her cash and subvouchers. A few days later, her supervisor, upon returning from vacation, found an additional $500 missing. Since the losses occurred under very similar circumstances, GAO agreed with the agency that they should be treated together for purposes of seeking relief. B-187139, October 25, 1978, involved losses of $1,500, $60, and $50. Since there was no indication that the losses were related, the agency was advised to resolve the $60 and $50 losses administratively.

(b) Administrative Determinations

Several of the relief statutes require certain administrative determinations by the requesting agency as a prerequisite to granting relief, most commonly that the accountable officer was acting in the discharge of official duties and that the loss occurred without fault or negligence on the part of the accountable officer. Assuming the agency in fact believes that relief should be granted, it is a simple matter to follow the wording of the applicable statute in requesting relief from GAO. Where a relief statute requires administrative determinations as a prerequisite to granting relief, the relief cannot be granted without them. The agency determinations are necessary to trigger GAO's jurisdiction, and in their absence GAO does not have the authority to grant relief, regardless of the merits of the case. B-204464, January 19, 1982; B-198124, June 20, 1980; B-197616, March 24, 1980; B-188413, June 30, 1977, affirmed B-188413, September 27, 1977; B-180957, September 15, 1975; B-177910, February 20, 1973; B-165932, January 22, 1969.

On occasion GAO has been willing to infer a determination that the loss occurred while the accountable officer was acting in the discharge of his official duties where that determination was not expressly stated but where the facts make it clear and there is no question that relief will be granted. E.g., B-195435, September 12, 1979; B-199020, August 18, 1980. However, the determination of no contributing fault or negligence will not be inferred but must be expressly stated. As a practical matter, it will simplify the relief process if the agency's request explicitly states all required determinations.

(c) Delegation

Agency determinations required by a relief statute must be made by an agency official authorized to do so. E.g., B-184028, October 24, 1975.

31 U.S.C. § 82a-1 requires determinations by the "head of the department or independent establishment" and 31 U.S.C. § 95a requires determinations by the "Secretary of the department concerned." It has been held that, absent a clear expression of legislative intent to the contrary, the authority in these sections may be delegated only to officials authorized by law to act in place of the agency head, or to an Assistant Secretary. 29 Comp. Gen. 151 (1949). Of course, if an agency head has separate statutory authority to delegate, this will be sufficient. See, e.g., 22 U.S.C. § 2658 with respect to the Secretary of State.

The above paragraph is not applicable to determinations under 31 U.S.C. § 82a-2 since that provision expressly recognizes determinations by the agency head "or his designees for that purpose."

If a request for relief is signed by someone other than the agency head, it will be helpful if the request specifies the source of the signer's delegation. The form of the delegation is immaterial although it should, of course, be in writing.

(2) Physical Loss or Deficiency: Accountable Officers Generally (31 U.S.C. § 82a-1)

(a) Statutory Provisions

The statute applies to "any disbursing or other accountable officer or agent or former disbursing or other accountable officer or agent." It of course has no application to certifying officers.

The statute covers physical loss or deficiency 7/ of "Government funds, vouchers, records, checks, securities, or papers" but expressly excludes deficiencies resulting from illegal or erroneous payments.

In order for GAO to consider granting relief, the agency head must make two administrative determinations--

1. Loss or deficiency occurred while officer or agent was acting in the discharge of his official duties, or that loss or deficiency occurred by reason of the act or omission of a subordinate of the officer or agent; and

2. Loss or deficiency occurred without fault or negligence on the part of the officer or agent.

GAO, in order to grant relief, must concur with these determinations.

Generally, the requirement that the accountable officer must have been acting in the discharge of his official duties does not present problems. Thus, once the various jurisdictional criteria are satisfied (i.e., agency determinations have been made, request has been submitted by an agency official authorized to do so, etc.), the central question becomes whether GAO is able to concur with the administrative determination that the loss occurred without fault or negligence on the part of the accountable officer. Although the principles of law involved are simply stated, their application to a given case requires a careful analysis of the particular facts. A number of factors may bear on the conclusion in any given case, and the result will be determined by the interrelationship of these factors.

7/ The terms "loss" and "shortage" are sometimes used interchangeably in the decisions, although technically they are different. Money taken in a burglary is a loss. An unexplained deficiency discovered in an audit is a shortage.

31 U.S.C. § 82a-1 has been construed as applicable to the judicial branch (B-200108/B-198558, January 23, 1981; B-197021, May 9, 1980; B-191440, May 25, 1979; B-185486, February 5, 1976) and to the legislative branch (B-192503-O.M., January 8, 1979, denying relief to a GAO employee).

(b) Standard of Negligence

Again, it is important to distinguish between liability and relief. An accountable officer's liability is strict and independent of any lack of fault or negligence. Thus, it has frequently been stated that an accountable officer must exercise "the highest degree of care in the performance of his duty." E.g., 48 Comp. Gen. 566, 567 (1969); B-186922, August 26, 1976; B-182386, April 24, 1975.

However, in evaluating the facts to determine whether or not the accountable officer was negligent for purposes of applying the relief statute, GAO applies the standard of "reasonable care." 54 Comp. Gen. 112 (1974); B-196790, February 7, 1980. This is the standard of simple or ordinary negligence, not gross negligence. 54 Comp. Gen. 112, supra; B-158699, September 6, 1968. The standard has been stated as what the reasonably prudent and careful person would have done to take care of his or her own property of like description under like circumstances. B-193673, May 25, 1979. This is an objective standard, that is, it does not vary with such factors as the age and experience of the particular accountable officer.

(c) Actual Negligence

If the facts indicate negligence on the part of the accountable officer, and if it appears that the negligence was the proximate cause of the loss (see discussion of proximate cause, infra), then relief must be denied.

Examples of cases in which actual negligence was found and in which relief was denied are set forth below:

--Envelopes containing cash placed in safe which was unlocked from 8:00 a.m. to midnight, during which time it was accessible to many persons. B-139886, July 2, 1959.

--Safe located in area accessible to number of individuals left open while accountable officer went to lunch. B-142597, April 29, 1960.

--Accountable officer placed Treasury bonds in safe which remained open and unlocked during the day and was located in a room to which the public had access. B-190506, November 28, 1977.

--Cashier did not lock safe while stranger, posing as building maintenance man, entered cashier's cage ostensibly to repair air conditioning system and erected temporary barrier between cashier and safe. B-173710-O.M., December 7, 1971.

--Accountable officer closed safe door but did not lock safe by rotating combination dial, then left office for lunch or for the night. B-204173, January 11, 1982; B-183559, August 28, 1975; B-180957, April 24, 1975; B-181648-O.M., August 21, 1974. Accountable officer left safe in "day lock" position. B-187708, April 6, 1977; B-188733, March 29, 1979, affirmed B-188733, January 17, 1980; B-199790, August 26, 1980. Compare B-180863, April 24, 1975, in which an accountable officer who had left a safe on "day lock" was relieved in view of her lack of knowledge or instruction regarding the day lock mechanism.

--Cashier left funds overnight in locked desk drawer instead of safe provided for that purpose. B-177730-O.M., February 9, 1973.

--Cashier left funds in unlocked drawer while at lunch instead of locked drawer provided for that purpose. B-161229-O.M., April 20, 1967.

--Accountable officer left unlocked cash box in safe to which several other persons had access. B-172614-O.M., May 4, 1971; B-167596-O.M., August 21, 1969.

--Pay envelopes left on top of desk in cashier's cage 19 inches from window opening on hallway to which many persons had access. B-127204, April 13, 1956.

--Cashier cashed checks at bank and failed to count the cash received. B-193380, September 25, 1979.

--Cashier left the key to the file cabinet containing the cash box in her desk while absent on annual leave. B-182480, February 3, 1975.

--Accountable officer accepted $10,000 personal check at Customs auction sale and turned over property without verifying existence or adequacy of account; check bounced. B-193673, May 25, 1979.

A deficiency in an accountable officer's account caused by the acceptance of a counterfeit note constitutes a physical loss for purposes of 31 U.S.C. § 82a-1. B-101301, July 19, 1951; B-108452, May 15, 1952; B-118860, January 27, 1956. This may or may not amount to negligence, depending on the facts of the particular case, primarily whether the counterfeit was readily detectable. B-140836, October 3, 1960; B-191891, June 16, 1980. If the quality of the counterfeit is such that a prudent person in the same situation would question the authenticity of the bill, relief should not be granted. B-155287, September 5, 1967; B-163627-O.M., March 11, 1968. Also, failure to check a bill against a posted list of serial numbers will generally be viewed as negligence. B-155287, supra; B-163627-O.M., supra; B-166514-O.M., July 23, 1969.

Finally, failure to follow regulations is negligence. (See "Compliance with Regulations," infra.)

(d) Unexplained Loss or Shortage - - Presumption of Negligence

The cases cited in the preceding subsection all contained clear evidence of negligence on the part of the acccountable officer. However, such evidence is not necessary in order to deny relief in the case of an unexplained loss or shortage. In the typical case, a safe is opened at the beginning of a business day and money is found missing, or an internal audit reveals a shortage in an account. 8/ On the one hand there is no evidence of negligence on the part of the accountable officer. Yet on the other hand there is no evidence of burglary or any other reason for the disappearance. In other words, the loss or shortage is totally unexplained.

As discussed previously, an accountable officer's liability is strict and arises automatically at the time of the loss or shortage. The mere fact of the occurrence of a loss

8/ At one time, the term "unexplained loss" was more of a term of art and referred only to the latter of the two situations described. See, e.g., B-164449-O.M., July 10, 1968. However, the term has been broadened by usage and now is used for both situations.

or shortage gives rise to a presumption of negligence on the part of the accountable officer. (The words "presumption" and "inference" have been used somewhat interchangeably.) The presumption may be rebutted by evidence to the contrary, but it is the accountable officer's burden to produce the evidence. It is not enough to rely on the absence of implicating evidence. The mere administrative determination that there was no fault or negligence, unsupported by evidence, is not sufficient to rebut the presumption. The accountable officer must come forward with affirmative evidence that he exercised the requisite degree of care. B-167126, August 9, 1976; B-173133-O.M., July 13, 1971; B-166519, October 6, 1969. This point again relates to the distinction between liability and relief and should be emphasized: THE GOVERNMENT DOES NOT HAVE TO PRODUCE EVIDENCE TO ESTABLISH THAT THE ACCOUNTABLE OFFICER WAS AT FAULT IN ORDER TO HOLD HIM LIABLE. LIABILITY IS AUTOMATIC. RATHER, IN ORDER TO BE ENTITLED TO RELIEF, THE ACCOUNTABLE OFFICER MUST PRODUCE EVIDENCE TO SHOW THAT THERE WAS NO CONTRIBUTING FAULT OR NEGLIGENCE ON HIS PART.

Thus, in the case of an unexplained loss or shortage, since there is no evidence to rebut the presumption of negligence, there is no basis on which to grant relief. The presumption of negligence and its application to unexplained losses were discussed in 48 Comp. Gen. 566, 567-68 (1969) as follows:

> "While there is no positive or affirmative evidence of negligence on the part of [the accountable officer] in connection with this loss, we have repeatedly held that positive or affirmative evidence of negligence is not necessary, and that the mere fact that an unexplained shortage occurred is, in and of itself, sufficient to raise an inference or presumption of negligence. A Government official charged with the custody and handling of public moneys * * * is expected to exercise the highest degree of care in the performance of his duty and, when funds * * * disappear without explanation or evident reason, the presumption naturally arises that the responsible official was derelict in some way. Moreover, granting relief to Government officials for unexplained losses or shortages of this nature might tend to make such officials lax in the performance of their duties."

Other "unexplained loss" cases applying the presumption of negligence are: B-122688, September 25, 1956; B-142326, March 31, 1960; B-159987, September 21, 1966; B-158699, September 6, 1968; B-170012, August 11, 1970, affirmed upon

reconsideration, B-170012, May 3, 1971; B-188081, February 9, 1977; B-187139, October 25, 1978. See also B-64026, March 3, 1947 (predating the enactment of 31 U.S.C. § 82a-1).

Of course the presumption of negligence is not limited to unexplained loss cases. It applies to other losses and deficiencies as well and is frequently referred to in the decisions. However, its impact is perhaps clearest in the unexplained loss situation.

The presumption of negligence is occasionally criticized as unduly harsh. However, it is necessary both in order to preserve the concept of accountability and to protect the Government against dishonesty as well as negligence. See B-167126, August 28, 1978; B-191440, May 25, 1979. As stated in one decision, the presumption of negligence

> "is a reasonable and legal basis for the denial of relief where the accountable officers have control of the funds and the means available for their safekeeping but the shortage nevertheless occurs without evidence of forcible entry or other conclusive explanation which would exclude negligence as the proximate cause of the loss." B-166519, October 6, 1969.

Where the accountable officer does not have control of the funds at the time of the loss, the presumption of negligence is inappropriate for purposes of applying the relief statute. One such situation is a loss in shipment. Losses in shipment are covered in a separate subsection, infra. Another situation is when the accountable officer is on leave or duty absence at the time of the loss. Although some of the decisions mention the presumption of negligence in the leave context, as a practical matter relief will be granted, as with losses in shipment, unless there is evidence of actual contributing negligence on the part of the accountable officer. B-196960, November 18, 1980; B-188662, December 6, 1977; B-184028, March 2, 1976; B-180958-O.M., May 13, 1974; B-175756-O.M., June 14, 1972. Cf. B-191942, September 12, 1979. Of course, where contributing negligence exists, relief will be denied and the question of the role of the presumption never arises. B-182480, February 3, 1975.

(e) Proximate Cause

An accountable officer may be found negligent and nevertheless be relieved from liability. This would happen if the negligence were not the "proximate cause" of the loss or shortage. A precise definition of the term "proximate cause"

does not exist. 9/ The concept means that, first, there must be a cause-and-effect relationship between the negligence and the loss. In other words, the negligence must have contributed to the loss. However, as one authority notes, the cause of an event can be argued in a philosophical sense to "go back to the discovery of America and beyond" and its consequences can go forward to eternity. 10/ Obviously a line must be drawn someplace. Thus, the concept also means that the cause-and-effect relationship must be reasonably foreseeable, that is, a reasonably prudent person should have anticipated that a given consequence could reasonably follow from a given act.

In analyzing proximate cause, it may be helpful to ask certain questions. First, if the accountable officer had not been negligent, would the loss have occurred anyway? If the answer to this question is yes, the negligence is not the proximate cause of the loss and relief will probably be granted. However, it may not be possible to answer this question with any degree of certainty. If not, the next question to ask is whether the negligence was a "substantial factor" in bringing about the loss. If this question is answered yes, relief will probably be denied.

A couple of simple examples will illustrate:

(a) An accountable officer leaves cash visible and unguarded on a desk top while at lunch, during which time the money disappears. There can be no question that the negligence was the proximate cause of the loss.

(b) As noted previously, failure to count cash received at a bank window is negligence. Suppose, however, that the accountable officer is attacked and robbed by armed marauders while returning to the office. The failure to count the cash, even though negligent, would not be the proximate cause of the loss since presumably the robbers would have taken the entire amount anyway.

9/ "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion." William L. Prosser, Handbook of the Law of Torts, sec. 41 (4th ed. 1971).

10/ Id.

The following are cases in which relief was granted even though the accountable officer was or may have been negligent, because the negligence was found not to be the proximate cause of the loss or deficiency:

--Twelve armed men in two Volkswagen minibuses broke into the West African Consolidated Services Center at the American Embassy in Lagos, Nigeria. They forcibly entered the cashier's office and proceeded to carry the safe down the stairs. The burglars dropped the safe while carrying it, the safe opened upon being dropped, and the burglars took the money and fled. The reason the safe opened when dropped was that the cashier had not locked it, clearly an act of negligence. However, even if the safe had been locked, the burglars would presumably have continued to carry it away, loaded it onto their minibus, and forcibly opened it somewhere else. Thus, the cashier's failure to lock the safe, while negligent, was not the proximate cause of the loss. B-201173, August 18, 1981.

--Audit of imprest fund revealed shortage. Cashier had not observed proper procedures in handling fund, but relief was nevertheless granted because weaknesses in agency security amounting to "pervasive laxity" (two cashiers operating out of one cash box, safe combination not changed for several years, several persons had safe combination) were deemed the proximate cause of the shortage. B-182386, April 24, 1975.

--Accountable officer in Afghanistan negligently turned over custody of funds to unauthorized person. Money was taken by rioters in severe civil disturbance. Relief was granted because negligence was not the proximate cause of the loss. (Rioters would have taken money from authorized person as well.) B-144148-O.M., November 1, 1960.

--Cashier discovered loss upon return from two-week absence. It could not be verified whether she had locked the safe when she left. However, time of loss could not be pinpointed, other persons worked out of the same safe, and it would have been opened daily for normal business during her absence. Thus even if she had failed to lock the safe (negligence), such negligence could not be established as the proximate cause of the loss. B-191942, September 12, 1979.

--Customs Service regulations prescribe procedures to verify identity of person tendering personal check. Since these regulations are designed to protect against improper or unauthorized signatures, failure to comply with them, although negligence, is not proximate cause of deficiency due to dishonoring of check for insufficient funds. B-194069, April 4, 1979; B-195541, August 20, 1979; B-198582, August 27, 1980. (As of May 1982, GAO is reconsidering its treatment of this type of situation. Regardless of the outcome, the cases are cited here as useful illustrations of proximate cause reasoning.)

Even if there is a clearly identified intervening cause, relief may still be denied depending on the extent to which the accountable officer's negligence facilitated the intervening cause or contributed to the loss. In such a case, the negligence will be viewed as the proximate cause notwithstanding the intervening cause. The following cases will illustrate:

--Accountable officer failed to make daily deposits of collections as required by regulations. Funds were stolen from locked safe in burglary. Relief was denied because officer's negligence was proximate cause of loss in that funds would not have been in the safe to be stolen if they had been properly deposited. B-71445, June 20, 1949. See also B-203726, July 10, 1981; B-164449, December 8, 1969; B-168672-O.M., June 22, 1970.

--Accountable officer negligently left safe on "day lock" position (door closed, dial or handle partially turned but not rotated, so that partial turning in one direction, without knowledge of combination, will permit door to open). Thief broke into premises, opened safe without using force, and stole funds. Thief subsequently admitted guilt but died before making restitution. Relief was denied because negligence facilitated theft by making it possible for thief to open safe without force or knowledge of combination. B-188733, March 29, 1979, affirmed, B-188733, January 17, 1980.

In sum, an accountable officer may be relieved from liability even though negligent if it can be established that the negligence was not the proximate cause of the loss.

(f) Compliance with Regulations

If a particular activity of an accountable officer is governed by a regulation, failure to follow that regulation will be considered negligence. If that failure is the proximate cause of a loss or deficiency, relief must be denied. The relationship of this rule to the "standard of negligence" discussed earlier is the premise that the prudent person exercising the requisite degree of care will become familiar with and will follow applicable regulations.

Thus, in one case, a Customs Service employee accepted a forged personal check without following regulations on verification of identity. Relief was denied. B-197324, March 7, 1980. Similarly, relief was denied to an agent of the Bureau of Alcohol, Tobacco, and Firearms who "fronted" a flash roll (handed it over in advance to the suspect, who then disappeared) in violation of instructions. B-184275, September 17, 1975.

Treasury Department regulations on disbursing, applicable to all agencies under Executive Order No. 6166, are found in the Treasury Fiscal Requirements Manual (TFRM). Treasury regulations governing cashiers under E.O. 6166 are found in I TFRM Part 4, Chapter 3000, and in the Treasury Department's "Manual of Procedures and Instructions for Cashiers." The Treasury Manuals establish general requirements for sound cash control. For example, the cashier's manual provides that cashiers should not work from the same cash box and that safe combinations should be changed annually, whenever there is a change of cashiers, when access to the funds has become necessary due to a cashier's unforeseen absence, or when the combination has been compromised. It also reflects what is perhaps the most fundamental principle of cash control--that an employee with custody of public funds should have exclusive control over those funds. In addition, agencies exercising these functions should have their own specific regulations or instructions in accordance with individual circumstances.

It is the duty of an accountable officer to become familiar with applicable regulations and, as indicated, failure to follow regulations will be deemed negligence. Thus, relief was denied to a cashier who violated agency regulations by placing the key to a locked cash box in an unlocked cash box and then leaving both in a locked safe to which more than one person had the combination. B-193380, September 25, 1979. The decision further pointed out that oral instructions to the cashier to leave the cash box unlocked could not be considered

to supersede published agency regulations. However, if agency regulations are demonstrably ambiguous, relief may be granted. B-169848-O.M., December 8, 1971.

There are two broad situations in which failure to follow regulations will not preclude the granting of relief:

(a) Negligence will not be imputed to an accountable officer who failed to comply with regulations where full compliance was prevented by circumstances beyond his control. This recognizes the fact that compliance is sometimes up to the agency and beyond the control of the individual. If the agency fails to provide adequate security, the accountable officer can only use the best that is available to him. Thus, an accountable officer was relieved in B-78617, June 24, 1949, where regulations required that funds be kept in a safe or vault but this had not been done because no safe or vault had been furnished. For more detailed discussion of this area, see "Agency Security," this Chapter, infra.

(b) Failure to follow regulations, even though negligence, will not prevent the granting of relief if the failure was not the proximate cause of the loss or deficiency. See the preceding discussion of proximate cause for illustrations.

(g) Losses in Shipment

Government funds are occasionally lost or stolen in shipment. The Postal Service or other carrier is the agent of the sender, and funds in shipment remain in the "custody" of the accountable officer who shipped them until delivered notwithstanding the fact that they are in the physical possession of the carrier. B-185905-O.M., April 23, 1976. Thus, a loss in shipment is a physical loss for which an accountable officer is liable.

For the most part, relief for losses in shipment is the same as relief for other losses, and the rules discussed in this Chapter with respect to negligence and proximate cause apply. For example, relief was denied in one case because transmitting cash by ordinary first-class mail rather than registered or certified mail was held not to meet the reasonable care standard and therefore to constitute negligence. B-164450-O.M., September 5, 1968.

However, relief for losses in shipment differs from relief for other losses in one important respect. A loss in shipment is not viewed as an "unexplained loss" and there is no presumption of negligence. B-164450-O.M., supra. The reason for this distinction is that there is no basis to infer negligence when a loss occurs while funds are totally beyond the control of the accountable officer. Thus, where funds are lost in shipment, in the absence of positive evidence of fault or negligence, an accountable officer will be relieved if he conformed fully with applicable regulations and procedures for the handling and safeguarding of the funds and they were nevertheless lost or stolen. B-95504, June 16, 1950; B-119567, January 10, 1955; B-126362, February 21, 1956; B-142058, March 18, 1960.

The Government Losses in Shipment Act, 40 U.S.C. §§ 721 et seq., authorizes agencies to file claims with the Treasury Department for funds or other valuables lost or destroyed in shipment. The Treasury Department has a revolving fund for the payment of these claims and has issued regulations, found at 31 C.F.R. Parts 261 and 262, to implement the statute. The Treasury Department will generally disallow a claim unless there has been strict compliance with the statute and regulations.

If a loss in shipment occurs, the agency should first explore the possibility of filing a claim under the Government Losses in Shipment Act (GLISA), and should consider requesting relief from GAO only if this fails. Denial of a claim under

the Government Losses in Shipment Act will cause GAO to inquire further since it suggests the possibility that someone at the point of shipment may have been negligent, but it will not automatically preclude the granting of relief. For example, it is possible for a claim to be denied for reasons that do not suggest negligence. In B-126362, February 21, 1956, the accountable officer had reimbursed the Government from personal funds, and a claim under GLISA was denied because there was no longer any loss. GAO nevertheless granted relief and the accountable officer was reimbursed.

A GLISA claim may be disallowed for failure to strictly comply with the regulations, which would suggest negligence. In such a situation, GAO will examine the facts and circumstances of the particular case to evaluate the relationship of the non-compliance to the loss. For example, relief was granted in B-191645, October 5, 1979, despite the denial of a GLISA claim, because there was no question that the funds had arrived at their initial destination although they never reached the intended recipient. Even if there had been negligence at the point of shipment, it could not have been the proximate cause of the loss. See also B-193830, March 30, 1979, and B-193830, October 1, 1979 (both cases arising from the same loss).

(h) Burglary, Robbery, Embezzlement

If money is taken in a burglary or robbery, the accountable officer will be relieved of liability as long as the following conditions are met:

1. There must be concrete evidence that a theft did in fact take place. The mere designation of a loss as a "burglary" without supporting evidence is not enough to remove it from the "unexplained loss" category.

2. Official investigations must have produced no evidence implicating the accountable officer.

3. There must have been no fault or negligence on the part of the accountable officer contributing to the theft.

Following are examples of cases in which accountable officers were relieved based on the above rule:

--Cashier was returning from bank with proceeds of two checks. Her purse was snatched as she was entering an elevator in a GSA building. B-193866, March 14, 1979. See also B-197021, May 9, 1980; B-205429, January 18, 1982.

--Undercover investigative agent in possession of flash roll for purchase of firearms was assaulted by suspects. B-192010, August 14, 1978. See also B-205426, February 17, 1982. The conspicuous display of a flash roll is not in and of itself negligence where necessary to the agent's undercover role. B-194919, November 26, 1980. 11/

--While returning to office, cashier was approached by armed robbers and forced at gunpoint to open office door and safe. B-182476, February 28, 1975.

--Man entered cashier's office in a VA hospital and handed cashier a note demanding all of her $20 bills. Although he did not display a weapon, he said he was armed. B-191579, May 22, 1978. See also B-201126, January 27, 1981.

--Funds taken during attack on American Embassy in Tehran, Iran. B-194666, August 6, 1979.

--Armed soldiers forced entry into International Communication Agency compound in Beirut, Lebanon, and looted safe. B-195435, September 12, 1979.

--Several men broke into American Consulate in Zaire and removed the safe in a jeep. B-190205, November 14, 1977.

--Safe opened with acetylene torch by burglars at the Fairbanks, Alaska office of the Geological Survey at a time when the office was closed. B-189795, September 23, 1977.

11/ Not all losses of funds by investigative officers require GAO relief. In 61 Comp. Gen. ___ (B-204908, March 31, 1982), GAO advised the Justice Department that certain losses of funds by Drug Enforcement Administration agents in connection with attempts to buy "controlled substances" as evidence need not be submitted to GAO for relief. If the loss is within the risk inherent in the operation, such as the suspect absconding with the money (as opposed to a loss occurring in the course of the operation but unrelated to carrying out its purpose), it may be handled by DEA's Board of Investigation, and recorded as an investigation expense provided the officer was not negligent.

--Burglars broke front door lock of Bureau of Indian Affairs office in Alaska and removed safe on sled. B-182590, February 3, 1975. See also B-200715, January 22, 1981.

--Burglar(s) broke into Forest Service ranger station and forced entry into safe. B-198789, June 5, 1980. 12/

The mere fact that a theft has taken place with no evidence to implicate the accountable officer is not enough to permit the granting of relief. In addition, it must be established that there was no contributing fault or negligence on the part of the accountable officer. For example, in B-202290, June 5, 1981, thieves broke into an office of the Fish and Wildlife Service and used bolt cutters found on the premises to remove a padlock which secured the safe. Since there was no separate facility in which to secure the tools, there was no negligence in leaving the bolt cutters accessible. A number of other cases involving this issue are discussed in the subsection on proximate cause, supra.

In all of the cases cited above, the fact that a theft had taken place was beyond question. However, cases arise in which the evidence of theft is not all that clear. The problem then becomes whether to treat the case as a theft or an unexplained loss. The distinction is important. If the situation is viewed as an unexplained loss, the presumption of negligence will probably result in the denial of relief. If, on the other hand, the loss is viewed as a theft, the evidence of theft will be relevant in overcoming the presumption and the absence of positive evidence of negligence on the part of the accountable officer becomes much more significant. These tend to be the most difficult cases to resolve, and GAO will look at all relevant factors such as how and where the safe combination was stored, when it was last changed, whether the combination dial was susceptible of

12/ There are numerous "forced entry" cases in which relief was granted. See, for example: B-119203, June 4, 1954; B-182477, December 16, 1974; B-184274, September 29, 1975; B-189719, September 29, 1977; B-191048, May 30, 1978; B-193036, October 19, 1978; B-193174, November 29, 1978; B-195290, August 14, 1979; B-198881, June 18, 1980; B-198949, July 15, 1980; B-201651, February 9, 1981; B-203756, July 30, 1981; B-203696, August 3, 1981; B-205428, December 31, 1981; B-205559, January 18, 1982.

observation while the safe was being opened, access to the safe and to the facility itself, and the safeguarding of keys to cash boxes.

The difficulty stems from the fact that the accountable officer laws are designed to protect the Government against dishonesty as well as negligence. On the one hand, if an accountable officer did all he could to safeguard the funds, he should be relieved of liability. But on the other hand, the application of the relief statutes should not provide a blueprint for dishonesty. Recognizing that absolute certainty is impossible in many if not most cases, the decisions try to achieve a balance between these two considerations. Thus, GAO will give weight to the administrative determination and to statements of the individuals concerned, but these factors cannot be conclusive and the decision will be based on all of the evidence.

In B-198836, June 26, 1980, funds were kept in the bottom drawer of a four-drawer file cabinet. Each drawer had a separate key lock and the cabinet itself was secured by a steel bar and padlock. Upon arriving at work one morning, the cashier found the bottom drawer slightly out of alignment with several pry marks on its edges. A police investigation was inconclusive. GAO viewed the evidence as sufficient to support a conclusion of burglary, and since the record contained no indication of negligence on the part of the cashier, she was relieved.

In another case, a safe was found unlocked with no signs of forcible entry. However, there was evidence that a thief had entered the office door by breaking a window. The accountable officer stated that he had locked the safe before going home the previous evening, and there was no evidence to contradict this or to indicate any other negligence. GAO accepted the accountable officer's uncontroverted statement and granted relief. B-188733, March 29, 1979. See also B-164449-O.M., July 10, 1968.

In B-170596-O.M., November 16, 1970, the accountable officer stated that she had found the padlock on and locked in reverse from the way she always locked it. Her statement was corroborated by the agency investigation. In addition, the lock did not conform to agency specifications, but this was not the cashier's responsibility. She had used the facilities officially provided for her. Relief was granted.

Relief was also granted in B-170615-O.M., November 23, 1971, reversing upon reconsideration B-170615-O.M., December 2, 1970.

In that case, there was some evidence that the office lock had been pried open but there were no signs of forcible entry into the safe. This suggested the possibility of negligence either in failing to lock the safe or in not adequately safeguarding the combination. However, the accountable officer's supervisor stated that he (the supervisor) had locked the safe at the close of business on the preceding work day, and two safe company representatives provided statements that the safe was vulnerable and could have been opened by anyone with some knowledge of safe combinations.

The occurrence of more than one loss under similar circumstances within a relatively short time will tend to corroborate the likelihood of theft. B-193416, October 25, 1979; B-199021, September 2, 1980. In B-193416, the first loss was totally unexplained and the entire cash box disappeared a week later. The safe combination had been kept in a sealed envelope in a "working safe" to which other employees had access. Although the seal on the envelope was not broken, an investigation showed that, while the combination could not be read by holding the envelope up to normal light, it could be read by holding it up to stronger light. In B-199021, two losses occurred in the same building within several weeks of each other. All agency security procedures had been followed and the record indicated that the cashier had exercised a very high degree of care in safeguarding the funds. In neither case was there any evidence of forcible entry or of negligence on the part of the accountable officer. Balancing the various relevant factors in each case, GAO granted relief.

The disappearance of an entire cash box will also be viewed as an indication of theft. However, this factor standing alone will not be conclusive since there is nothing to prevent a dishonest employee from simply taking the whole box rather than a handful of money from it. The following cases involve the disappearance of an entire cash box with no signs of forcible entry. Note the various additional factors viewed as relevant in each case.

--B-189658, September 20, 1977. Safe was not rated for burglary protection and could have been opened fairly easily by manipulating the combination dial. Relief granted.

--B-189896, November 1, 1977. Supervisor's secretary maintained a log of all safe and bar-lock combinations, a breach of security which could have resulted in the compromise of the combination. Relief granted.

--B-173133-O.M., December 10, 1973. Cashier locked safe and checked it in the presence of a guard. Several other employees had access to the safe combination. Relief granted.

--B-183284, June 17, 1975. Safe was malfunctioning at time of loss. Six other persons knew safe combination. Relief granted.

--B-185666, July 27, 1976. Some evidence of forced entry to door of cashier's office but not to safe or safe drawer. Cash box later found in men's room. Negligence by cashier in improperly storing keys and safe combination in unlocked desk drawer not proximate cause of loss since seal on envelope was found intact. Relief granted.

--B-191942, September 12, 1979. Cash box disappeared during two-week absence of cashier. Even assuming cashier negligently failed to lock safe prior to her absence, there was no way to establish this as the proximate cause of the loss since box had been kept in a "working safe" which would have been opened daily in her absence. Relief granted.

--B-184028, March 2, 1976. Cashier had been experiencing difficulty trying to lock the safe and stated she might have left it unlocked inadvertently. Relief denied.

To summarize the "cash box" cases, the disappearance of an entire cash box suggests theft but is not conclusive. In such cases, even though the cause of the loss cannot be definitely attributed, relief will probably be granted if there is uncontroverted evidence that the safe was locked, no other evidence of contributing fault or negligence on the part of the accountable officer, and especially if there are other factors present tending to corroborate the likelihood of theft.

Losses due to embezzlement or fraudulent acts of subordinate finance personnel, acting alone or in collusion with others, are treated as physical losses and relief will be granted if the statutory conditions are met. B-192567, November 3, 1978; B-191722, August 7, 1978; B-191781, June 30, 1978; B-167139-O.M., September 19, 1972; B-133862-O.M., November 29, 1957; B-101375-O.M., April 16, 1951. However, losses resulting from cashing of forged checks or payments on fraudulent vouchers presented by other than subordinate finance personnel are illegal or improper payments rather than

physical losses and relief may not be granted under 31 U.S.C. § 82a-1 although it may be considered under 31 U.S.C. § 82a-2 (Section C(5), this Chapter). 2 Comp. Gen. 277 (1922); B-76903, July 13, 1948; B-127608-O.M., May 28, 1956; B-133862-O.M., November 29, 1957; B-138872-O.M., June 2, 1959.

(i) Agency Security

The accountable officer is responsible for safeguarding the funds in his or her custody; the agency is responsible for providing adequate means to do so. Adequate means includes both physical facilities and administrative procedures. If the accountable officer fails to use the facilities and procedures that have been provided, this failure will be viewed as negligence. However, if the agency fails to provide adequate security, the weak security may be viewed as the proximate cause of the loss, in which event relief will be granted. The accountable officer can do no more than use the best that is available and relief will not be denied for failure to follow adequate security measures which are beyond the accountable officer's control. Of course, an accountable officer has a duty to report security weaknesses to appropriate supervisory personnel.

If there is no sign of forcible entry and no indication of fault or negligence on the part of the accountable officer (i.e., the unexplained loss), evidence of faulty agency security will rebut the presumption of negligence and result in the granting of relief. The pivotal question becomes whether the security deficiency is attributable to the agency or to the accountable officer. Where relief is granted on the basis of faulty agency security, GAO may make recommendations or suggestions for corrective action.

The Treasury Department Manual of Procedures and Instructions for Cashiers provides that cash should be under the exclusive control of the cashier, and the safe combination and duplicate key to the cash box "should be placed in a sealed, signed, and dated envelope for retention in a secure place by the administrative officer or security officer at the station for use only in the event of an emergency." Relief will usually be granted where several persons other than the accountable officer have access to the funds through knowledge of the safe combination, the theory being that this situation precludes definite placement of responsibility for the loss. B-199034, February 9, 1981; B-199128, November 7, 1980; B-199020, August 18, 1980; B-197799, June 19, 1980; B-191942, September 12, 1979; B-183284, June 17, 1975; B-181049-O.M., July 23, 1974; B-180664-O.M., April 23, 1974; B-173133-O.M., December 10, 1973; B-169756-O.M., July 8, 1970.

If it is necessary for more than one cashier to work out of the same safe, the safe should have separate built-in locking drawers rather than removable cash boxes. B-191942, September 12, 1979.

Cashiers should never work out of the same cash box or drawer. Cashiers' Manual, supra. If only one box is provided for more than one cashier, this is a breach of security and will support the granting of relief. B-182386, April 24, 1975; B-191440, May 25, 1979; B-204647, February 8, 1982.

Relief was also granted in the following situations. In each case, the security deficiency could not be attributed to fault or negligence on the part of the accountable officer.

--Regulations required storage of funds in a safe or vault. Agency failed to provide the safe or vault. B-78617, June 24, 1949.

--Safe was known not to be secure. Agency had initiated corrective measures but theft occurred before action was implemented. B-186190, May 11, 1976; B-170251-O.M., October 24, 1972.

--Cashier kept combinations to three safes on an adding machine tape in her wallet. Agency failed to change combinations after wallet was stolen. Also, safe company representatives stated that one safe was vulnerable and could readily have been opened. The fact that only the vulnerable safe had been opened supported the conclusion that the stolen combinations had not been used. B-170615-O.M., November 23, 1971.

--Locking mechanism on safe was defective and could be opened by manipulating the dial. B-167123-O.M., September 28, 1971.

--Padlock did not conform to agency specifications but this was not the accountable officer's responsibility. B-170596-O.M., November 16, 1970.

--Safe combination and key to cash drawer were kept in an unlocked desk drawer. B-177963-O.M., March 21, 1973. (NOTE: This would be negligence if it was the fault of the accountable officer or if the accountable officer passively acquiesced in the security breach. B-185666, July 27, 1976.)

--Agency discovered that one key would open several cash boxes. Locks were changed but, through inadvertence, not on the box from which money was subsequently stolen. This was beyond cashier's control. Agency failed to provide adequate security by failing to change lock after learning of its inadequacy. B-197270, March 7, 1980. A similar case is B-203646, November 30, 1981.

--Agency permitted investigative agents to enter safe and remove funds after working hours. B-180022-O.M., March 14, 1974.

--Evidence suggested likelihood of duplicate key. Two other employees were arrested and found guilty. B-161689-O.M., June 26, 1967.

--There was evidence of forced entry to office door but not to safe. Record showed that, despite best efforts of accountable officer, it was impossible for him to shield dial from observation while opening safe. In view of office layout, position of safe, and number of persons allowed access to office, relief was granted. B-184493, October 8, 1975. (An explanation of this type may or may not be sufficient, depending on the particular facts. Compare B-170012, August 11, 1970.)

--Numerous security violations amounting to "pervasive laxity" on the part of the agency. B-182386, April 24, 1975. See also B-196855, December 9, 1981; B-197799, June 19, 1980; B-169756-O.M., July 8, 1970.

If there is evidence of negligence on the part of the accountable officer in conjunction with security deficiencies, the accountable officer's negligence must be balanced against the agency's negligence and relief may be granted or denied depending on which is viewed as the proximate cause of the loss. See B-182386, April 24, 1975 and the discussion of proximate cause, supra.

(j) Extenuating Circumstances

Relief under 31 U.S.C. § 82a-1 is granted or denied solely on the basis of the statutory conditions and the associated principles of law discussed previously in this section. Relief may not be granted on the basis of equitable considerations. Since the reasonable care standard is an objective one, extenuating and mitigating circumstances cannot be taken into consideration.

Thus, where an accountable officer has been found negligent, the following factors have been held not relevant, nor are they sufficient to rebut the presumption of negligence:

--Heavy workload. 48 Comp. Gen. 566 (1969); B-189084, January 3, 1979; B-191051, July 31, 1978; B-186127, September 1, 1976; B-183559, August 28, 1975; B-192503-O.M., January 8, 1979.

--Long period of loyal and dependable service; evidence of accountable officer's good reputation and character. 48 Comp. Gen. 566, supra; B-183559, supra; B-167126, August 9, 1976; B-170012, August 11, 1970.

--Inexperience; inadequate training or supervision. B-189084, supra; B-191051, supra; B-192503-O.M., supra.

--Acceptance of extra duties by the accountable officer; shortage of personnel. B-186127, supra.

(k) Summary

The preceding presentation of 31 U.S.C. § 82a-1 has been divided into a number of subsections. Some (e.g., standard of negligence, presumption of negligence, proximate cause) are based on the legal concepts involved in relief cases, while others (e.g., losses in shipment, burglary) discuss the types of situations in which losses occur. Some cases are quite simple and can be resolved by reference to one or two of the subsections, while others may involve elements of several. The decision in any given case will be determined by GAO's evaluation of the totality of the evidence, and it is important that requests for relief include all pertinent information.

In brief, an accountable officer is automatically liable at the moment of a loss or shortage. To mitigate this rule, however, Congress has provided a mechanism for relief. If the agency requests relief in conformity with the statutory conditions, and if GAO agrees with the administrative determinations, relief will be granted.

If the accountable officer is found negligent, and if this negligence is viewed as the proximate cause of the loss, relief must be denied. Failure to follow regulations is negligence. If there are no applicable regulations, GAO will apply the reasonable care standard to determine negligence.

Even where there is no evidence of actual negligence, there is a legal presumption or inference of negligence arising from the occurrence of the loss or shortage. If there is no other explanation of the loss or shortage, the presumption of negligence will result in the denial of relief. However, the accountable officer can rebut the presumption by presenting evidence to account for the loss or shortage. Of course, if the record clearly establishes that the loss resulted from burglary or robbery, the presumption is easily rebutted. But the evidence does not have to explain the loss with absolute certainty. If the evidence is not all that clear, the accountable officer may still be able to rebut the presumption by presenting evidence tending to corroborate the likelihood of theft or showing that some factor beyond his control was the proximate cause of the loss. If such evidence exists, and if the record shows that the accountable officer complied fully with all applicable regulations and procedures, the agency's determination of no fault or negligence will usually be accepted and relief granted. (As a practical matter, since the accountable officer must first convince the agency to request relief, the evidence is presented directly to the agency and included in turn with the agency's submission to GAO.)

Occasionally, a case arises that defies categorization. In these cases, the result must be determined by the application of the legal concepts discussed, such as the standard of negligence and proximate cause. One such case was B-196790, February 7, 1980. A patient at a VA hospital, patient "X", had obtained a cashier's check from a bank on May 9, 1978. On September 12, 1978, another patient, patient "Y", presented the check at the hospital for deposit to patient X's personal funds account. On the following day, patient X withdrew the money and left. The bank refused to honor the check because, unknown to hospital personnel, patient X had gone to the bank on May 17, stated that he had never received the check, and the bank had refunded its face value. As noted in the decision, patient X had "cleverly managed to double his bank account by collecting the same funds twice." The issue was whether it was negligence for the VA cashier to accept the check dated four months earlier or to permit patient X to withdraw the funds the day after the check was deposited. GAO considered the nature of a cashier's check, applied the reasonable care standard, and granted relief, but recommended that VA pursue further collection efforts against the bank.

(3) Physical Loss or Deficiency: Military Disbursing Officers (31 U.S.C. § 95a)

Enacted in 1955, 31 U.S.C. § 95a authorizes the relief of disbursing officers of the Army, Navy, Air Force, or Marine Corps from liability for the physical loss or deficiency of any Government funds, vouchers, records, or papers in their charge. It applies to both civilian and military personnel of the named departments, as long as they are disbursing officers. B-151156, December 30, 1963. The 1955 enactment combined existing relief provisions for disbursing officers of the Army and Navy and extended them to cover the other branches.

In order for relief to be granted, the applicable Secretary must make two determinations:

(a) The loss or deficiency occurred while the disbursing officer was in line of duty status; and

(b) The loss or deficiency occurred without fault or negligence on the part of the disbursing officer.

The statute makes these determinations conclusive on GAO. Thus, once the determinations are made, the granting of relief is mandatory. Unlike 31 U.S.C. § 82a-1, if the matter is properly cognizable under 31 U.S.C. § 95a, GAO has no discretion and thus needs no set of principles to apply.

The purpose of 31 U.S.C. § 95a is to authorize relief to military disbursing officers for losses of funds, vouchers and other papers under accidental circumstances beyond their control and without their fault or negligence, such as losses by fire, shipwreck, thefts or physical losses resulting from enemy action or otherwise. B-75978, June 1, 1948.

There are two important limitations on the availability of 31 U.S.C. § 95a:

(a) It applies only to disbursing officers and not to other types of accountable officers. B-151156, December 30, 1963; B-144467, December 19, 1960; B-194780, August 8, 1979; B-194782, August 13, 1979. See Section A(2), this Chapter, and B-151156, supra, for the definition of a disbursing officer.

(b) It applies only to a physical loss or deficiency and not to an illegal or improper payment. The agency's determination as to what constitutes a physical loss is not conclusive. B-151156, supra.

For physical losses involving accountable officers other than disbursing officers, relief must be sought under 31 U.S.C. § 82a-1 (Section C(2), this Chapter). E.g., B-155149, October 21, 1964. For losses resulting from illegal or improper payments, relief must be sought under 31 U.S.C. § 82a-2 (Section C(5), this Chapter).

Also, 31 U.S.C. § 95a is not the "exclusive remedy" with respect to physical losses of military disbursing officers. It exists side-by-side with 31 U.S.C. § 82a-1. Thus, for losses cognizable under 31 U.S.C. § 95a, the disbursing officer (or the applicable Secretary) has an option to proceed under either statute. B-151156, supra. (Of course, for the most part there would be little to gain by electing to proceed under 31 U.S.C. § 82a-1 if 31 U.S.C. § 95a is also available.)

The situations arising under 31 U.S.C. § 95a are similar to those arising under 31 U.S.C. § 82a-1, since both statutes deal with physical losses or deficiencies. For example, in B-200437, October 21, 1980, an Army disbursing officer was granted relief for a loss in shipment after a claim under the Government Losses in Shipment Act had been denied. A subordinate employee was found negligent and held liable.

Because relief under 31 U.S.C. § 95a is mandatory, there have been relatively few decisions interpreting the statute or establishing principles to follow. Those that exist deal with threshold questions and fall generally into two broad categories corresponding to the two limitations noted above.

One group deals with the limitation of 31 U.S.C. § 95a to disbursing officers. See, for example, B-151156 and B-144467, supra, in which the Navy and Air Force suggested that all accountable officers are disbursing officers for purposes of 31 U.S.C. § 95a. The Comptroller General disagreed, noting in B-144467 that "While all disbursing officers are accountable officers, all accountable officers are not disbursing officers." A disbursing officer, as stated in B-151156, is one to whom public funds are entrusted for the purpose of making payments of obligations of the United States.

The second group deals with what constitutes a physical loss. Thus, losses due to embezzlement or fraudulent acts of subordinate finance personnel, acting alone or in collusion with others, may be treated as physical losses, whereas losses resulting from cashing of forged checks or illegal payments on fraudulent vouchers presented by other than subordinate finance

personnel are illegal or improper payments rather than physical losses. 2 Comp. Gen. 277 (1922); B-133862-O.M., November 29, 1957; B-138872-O.M., June 2, 1959; B-127608-O.M., May 28, 1956. (This principle has been noted with additional citations in Section C(2), this Chapter, with respect to 31 U.S.C. § 82a-1 since it applies equally to both statutes.) An unexplained shortage of military pay certificates was held to constitute a physical loss in B-127937-O.M., August 2, 1956. However, the making of a travel advance to an employee who terminated his employment without accounting for the advance is not a physical loss. B-75978, June 1, 1948.

By circular letter B-198451, February 5, 1981, the military agencies were notified of a change in procedures under 31 U.S.C. § 95a. Since GAO has no discretion with respect to the agency determinations and relief is mandatory as long as the determinations are made, there is no need for GAO to review those determinations on a case-by-case basis. Thus, there is no need for the agency to submit a formal request for relief. As long as the case is properly cognizable under 31 U.S.C. § 95a (i.e., it involves a disbursing officer and a physical loss or deficiency), it is sufficient for purposes of compliance with the statute for the agency to make the required determinations and to retain the documentation on file for audit purposes. Of course, should there be a question as to whether a particular case is properly cognizable under 31 U.S.C. § 95a, the agency should request a decision.

(4) Illegal or Improper Payment: Certifying Officers (31 U.S.C. § 82c)

As noted earlier in this Chapter, a certifying officer is different from other accountable officers in that a certifying officer does not have physical custody of funds. Rather, his job is to certify vouchers for payment. The liability of a certifying officer, discussed previously in Section B of this Chapter, is prescribed by 31 U.S.C. §§ 82c, 82d, and 82f. Briefly, he is responsible for the correctness of vouchers, including computations, and the legality of the payments, and is accountable for the amount of any "illegal, improper, or incorrect payment" certified by him.

A great many Government officials make official "certifications" of one type or another, but this does not make them certifying officers for purposes of the accountable officer laws. The concepts of accountability and relief discussed in this section apply only to "authorized certifying officers" who certify vouchers upon which moneys are to be paid out by disbursing officers in discharging a debt or obligation of the Government. 23 Comp. Gen. 953 (1944). This may in appropriate circumstances include the head of a department. 21 Comp. Gen. 976, 979 (1942). An authorized certifying officer must be so designated in writing. 31 U.S.C. § 82b.

Thus, an employee who "certified" overtime assignments in the sense of a timekeeper verifying that employees worked the hours of overtime claimed could not be held liable for resulting overpayments under an accountable officer theory. B-197109, March 24, 1980. Similarly, the Comptroller General has held that 31 U.S.C. § 82c does not apply to an "approving officer" who approves vouchers after they have been duly certified, 21 Comp. Gen. 841 (1942); an official who certifies an adjustment voucher used to make adjustments in appropriations or accounts in respect of an obligation already paid and which therefore does not involve paying moneys out of the Treasury to discharge an obligation, 23 Comp. Gen. 953 (1944); or the certification of "unvouchered expenditures" (see Chapter 15, this Manual) of a confidential nature under 31 U.S.C. § 107, 24 Comp. Gen. 544 (1945).

A similar question arose in 55 Comp. Gen. 388 (1975). The General Services Administration requested a decision on the liability of GSA certifying officers under interagency service and support agreements with certain independent agencies. Under the arrangement in question, the agency would assume certification responsibility for the basic expenditure vouchers, but they would be processed for final

payment through GSA, with GSA preparing and certifying a master voucher and schedule to be accompanied by a master magnetic tape. The Comptroller General applied the principle that, once a voucher has been duly certified by an authorized official, later administrative processing does not constitute certification for purposes of 31 U.S.C. § 82c. Thus, the legal liability of the GSA certifying officer would be limited to errors made in his final processing.

The decision at 55 Comp. Gen. 388 relied on 21 Comp. Gen. 841 and 23 Comp. Gen. 953, cited above, and on B-142380, March 30, 1960. B-142380 states that, where the certifying officer who certifies the voucher and schedule of payments is different from the certifying officer who certifies the basic vouchers, the certifying officer who certifies the basic vouchers is responsible for the correctness of such vouchers and the certifying officer who certifies the voucher-schedule is responsible only for errors made in the preparation of the voucher-schedule.

In addition to prescribing liability, 31 U.S.C. § 82c, informally known as the Certifying Officers' Relief Act, also establishes a mechanism for relief. The Comptroller General, in his discretion, may relieve a certifying officer from liability for an illegal, improper, or incorrect payment certified by him if the Comptroller General finds either

(1) that the certification was based on official records and that the certifying officer did not know, and by reasonable diligence and inquiry could not have ascertained, the actual facts; or

(2) that the obligation was incurred in good faith, that the payment was not contrary to any statutory provision specifically prohibiting payments of the character involved, and that the United States received value for such payment.

Unlike 31 U.S.C. §§ 82a-1 annd 95a, previously discussed, 31 U.S.C. § 82c does not require determinations by the agency. The determinations under § 82c must be made by the Comptroller General. Also, the determinations under § 82c are stated in the alternative--relief may be granted if either of the two determinations can be established. There is no special form of request under § 82c. Relief may be requested by the agency on behalf of the certifying officer, or by the certifying officer himself. See, e.g., 31 Comp. Gen. 653 (1952).

One of the objectives of 31 U.S.C. § 82c was to reduce the volume of private relief legislation recommended on behalf of certifying officers. The legislative history of the

statute indicates that an agency should seek relief from GAO before considering relief legislation. As to those "less meritorious cases" in which relief may be denied, relief legislation would remain an available option. 30 Comp. Gen. 298 (1951).

Section 82c is not limited by its terms to the executive branch. However, 31 U.S.C. § 82b does expressly mention the executive branch, and sections 82b and 82c were sections 1 and 2 of the same 1941 enactment. Thus, the Comptroller General has concluded that § 82c does not apply to the legislative branch. 21 Comp. Gen. 987 (1942); B-191036, July 7, 1978. (See Section C(6), infra.) While the applicability of § 82c to the judicial branch has never been expressly addressed, it has been held that § 82b does not apply to the judicial branch. B-6061/A-51607, April 27, 1942. It follows that § 82c does not apply to the judicial branch either.

Certifying officers have a heavy burden of verification in order to avoid liability or to qualify for relief. The certifying officer is responsible for determining that the appropriation is legally available for payment, and that the services for which bills have been presented have been rendered, or that advancement of funds prior to the rendition of such services is legally proper. Certifying officers should not certify payment vouchers that are unsupported by pertinent documentation indicating that procedural safeguards regarding payment have been observed. Certifying officers should return payment vouchers that are deficient in documentation to the appropriate administrative officials for proper administrative approvals and supporting documents. B-179916, March 11, 1974.

Requests for relief of certifying officers must present sufficient information to permit GAO to make one of the required findings. For example, the Peace Corps requested relief from liability for a certifying officer who had certified a voucher for expenditures to repair Ethiopian schools, which did not represent a legal obligation under the Peace Corps enabling legislation. GAO could not grant relief because information supplied with the request was insufficient to make determinations under either of the alternative grounds set forth in 31 U.S.C. § 82c. B-191900, July 21, 1978.

When there is a question concerning a proposed payment, the certifying officer or the agency head should seek an advance decision from the Comptroller General. The State Department was faced with a unique payment problem involving advance employee severance payments and sought a decision.

The Comptroller General advised that the State Department could issue instructions to the United States Embassy in Bogota, Colombia, stating that the certifying officer would not be held liable for advance severance pay paid to eligible employees who subsequently lose eligibility for such payment. The decision was conditioned on the assumption that the certifying officer was to certify payments on the basis of information provided to him that would be complete on its face with respect to the purpose of the payments, and in each case would reflect an administrative finding of compliance with the Department's regulations. B-192511, June 8, 1979.

A clear illustration of a certifying officer's responsibilities and liability occurred when a Department of Transportation employee embezzled more than $850,000 in 1977. The fraud was discovered by virtue of the employee's ostentatious purchases, including several luxury automobiles and a "topless" bar. The employee was found guilty and sent to jail. However, investigation revealed negligence on the part of a Department certifying officer. The employee had perpetated the fraud by inserting his own name on six payment vouchers for Urban Mass Transportation Administration grants. Each voucher contained a list of approximately ten payees with individual amounts, and the total amount, and each had been certified by the certifying officer. The negligence occurred in one of two ways. If the employee inserted his own name and address on the voucher before presenting it to the certifying officer, the certifying officer was negligent in not spotting the name of an individual, one of his own employees, on a list of payees the rest of which were mass transit agencies. If the employee presented a partial voucher and added his own name after it was certified, the total as presented to the certifying officer could not have agreed with the sum of the individual amounts, and the certifying officer was negligent in not verifying the computation. GAO raised exceptions to the certifying officer's account 13/ (see Chapter 2, Section E, this Manual) and advised the Department of Transportation

13/ A certifying officer does not have an "account" in the sense that a disbursing officer does. For purposes of GAO's account settlement function, a certifying officer's "account" consists of the certified vouchers and supporting documents on the basis of which payments are made by a disbursing officer and included in the disbursing officer's account covering a particular accounting period. B-147293-O.M., February 21, 1962.

that it must proceed with collection action against the certifying officer for the full amount of the excepted payments less any amounts recovered from the embezzler. B-194727, October 30, 1979. Apparently in view of the clear negligence, relief was never requested.

55 Comp. Gen. 297

In 1975, a certifying officer requested guidance on his role and responsibilities. He was concerned specifically with the extent to which he was bound by the advice of his agency's legal staff and the extent to which reliance on such legal advice would justify the granting of relief. While the questions did not involve a specific voucher, the Comptroller General rendered a decision as a matter of general interest. The decision, 55 Comp. Gen. 297 (1975), presents a clear summary of the law with respect to the liability and relief of a certifying officer. This subsection is essentially an adaptation of that decision, with some revisions.

If the certifying officer should either make a "false, inaccurate, or misleading certificate" that is the proximate cause of any illegal, improper, or incorrect payment, or issue a certificate causing a payment prohibited by law or which does not represent a "legal obligation under the appropriation or fund involved," then the certifying officer is liable to the United States for any payment made under such certificate. 31 U.S.C. § 82c.

Furthermore, a certifying officer is liable the moment an improper payment is made as the result of his erroneous certification. See 54 Comp. Gen. 112, 114 (1974). This is true whether the certification involves a matter of fact, a question of law, or a mixed question of law and fact. 4 Comp. Dec. 332, 337 (1897); 23 Comp. Gen. 181, 183 (1943); 30 Comp. Gen. 298, 300 (1951); 39 Comp. Gen. 548, 549 (1960); 45 Comp. Gen. 447 (1966). Moreover, GAO looks only to the certifying officer for reimbursement even though some other administrative employee may be liable to the certifying officer under administrative regulation. 32 Comp. Gen. 332 (1953); 15 Comp. Gen. 962 (1936).

The relief provisions of 31 U.S.C. § 82c allow the Comptroller General to relieve a certifying officer from liability based on the officer's certification of incorrect facts, provided that the certification was based on official records and that the officer did not know or could not reasonably have learned the actual facts. As a general rule, a certifying officer may not escape liability for losses resulting from

improper certification merely by stating either that he was not in a position to ascertain of his personal knowledge that each item on a voucher was correctly stated or that he must depend on the correctness of the computations of his subordinates. If he relies upon statements and computations of subordinates, he must assume responsibility for the correctness of their statements and computations, unless it can be shown that neither he, nor his subordinates, in the reasonable exercise of care and diligence, could have known the true facts. Otherwise, the certification would be without material value as a protection of the United States against erroneous payments if, after certifying definitely to the correctness of the voucher, the certifying officer could then escape liability by merely stating that he was not personally familiar with the facts to which he certified and did not know whether they were correct. 49 Comp. Gen. 486 (1970).

The function of certification is not perfunctory, but involves a high degree of responsibility. 20 Comp. Gen. 182 (1940); 26 Comp. Gen. 578, 579 (1947). Thus, the press of work cannot relieve the certifying officer of his responsibilities. B-147747, December 28, 1961. On the other hand, where proper administrative safeguards exist, certifying officers do not need to examine time, attendance, and leave records in order to certify the correctness of amounts shown on payrolls submitted to them. 31 Comp. Gen. 17 (1951). (31 Comp. Gen. 17 further pointed out that the potential for future recovery of an overpayment from an employee's retirement account is not sufficient to relieve the certifying officer.)

GAO has never undertaken to formulate any general rule declaring what acts may carry exemption from liability for certification of incorrect facts. Rather, GAO will apply the relief provisions by considering the practical conditions and procedures under which certifications of fact are made. Consequently, the diligence to be required of a certifying officer before requests for relief under the act will be considered favorably is a matter of degree dependent upon the practical conditions prevailing at the time of certification, the sufficiency of the administrative procedures protecting the interest of the Government, and the apparency of the error.

The statute also allows the Comptroller General to relieve certifying officers from liability for payments made in good faith and for value received by the United States. But the Comptroller General may not relieve a certifying officer if the Comptroller General finds that the payment was specifically prohibited by statute, regardless of value

received by the Government or the certifying officer's good faith. 46 Comp. Gen. 135 (1966); 31 Comp. Gen. 653, 654 (1952); 14 Comp. Gen. 578, 583 (1935).

"Value received" normally implies a tangible item with a readily determinable dollar value. However, in appropriate circumstances, an intangible item may constitute value received where payment of funds has achieved a desired program result. B-127160, April 3, 1961. Cf. B-191900, July 21, 1978.

Assuming value received for a payment and the absence of a statutory prohibition, the test of good faith regarding legal questions concerning certified vouchers is whether or not the certifying officer was "in doubt" regarding the payment, and, if so, whether he exercised his right to request and receive an advance decision from the Comptroller General on any question of law involved in a payment on any voucher presented to him for certification under 31 U.S.C. § 82d. Thus, a certifying officer, who accepts the advice and instruction of an administrative or legal officer concerning a doubtful payment instead of exercising his right to obtain a decision by the Comptroller General, may not be relieved of responsibility for making an erroneous payment. 31 Comp. Gen. 653, 654 (1952); 14 Comp. Gen. 578, 583 (1935); B-180752, June 12, 1974. For example, in B-126374, February 14, 1956, GAO denied relief to a certifying officer who, following the advice of an administrative officer, certified a voucher to hire a boat and crew for a recreational trip to the Red Sea for Government employees stationed in the Middle East.

Where there is doubt as to the legality of a payment, the certifying officer's only complete protection from liability for an erroneous payment is to request and follow the Comptroller General's advance decision under 31 U.S.C. § 82d. Moreover, in view of the certifying officer's statutory right to request and obtain an advance decision from the Comptroller General regarding the lawfulness of any payment to be certified, the agency's general counsel's conclusions of law regarding such payment are not "binding" on the agency's certifying officers.

Statistical sampling and "provisional" vouchers

In 1963, the Comptroller General held that reliance on a statistical sampling plan for the internal examination of vouchers prior to certification would not operate to relieve a certifying officer from liability under 31 U.S.C. § 82c. 43 Comp. Gen. 36 (1963). The decision stated:

> "We believe that any plan of examining vouchers prior to certification which contemplates the certification of vouchers with the knowledge that some of them--even though the particular ones are not known--contain erroneous or improper payments violates the spirit and intent, if not the letter, of the acts establishing the responsibility of certifying officers."
> 43 Comp. Gen. at 38-39.

GAO recognized in the decision that an adequate statistical sampling plan could produce overall savings to the Government, but was forced to conclude that it was not authorized under existing law.

In response to this, Congress enacted 31 U.S.C. § 82b-1 in 1964. The statute authorizes agency heads, upon determining that economies will result, to prescribe the use of adequate and effective statistical sampling procedures in the examination of disbursement vouchers. As originally enacted, the authority was limited to vouchers not exceeding $100. A 1975 amendment to the statute removed the $100 limit and authorized the Comptroller General to prescribe maximum dollar limits. The current limit is $500. 3 GAO § 45.1. Further guidance on establishing statistical sampling plans may be found in 57 Comp. Gen. 321 (1978) and Title 3 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies, Chapter 5.

The relevance of all this to accountable officers is spelled out in the statute. 31 U.S.C. § 82b-1 further provides that a certifying officer or disbursing officer acting in good faith and in conformity with an authorized statistical sampling procedure will not be held liable for any certification or payment on a voucher which was not subject to specific examination because of the procedure. Relief may be denied, however, if the agency has not diligently pursued collection action to recover the illegal, improper, or incorrect payment.

Relief may also be denied if the sampling plan used does not conform to the standards in 3 GAO, Chapter 5. 3 GAO § 46. For vouchers over the limit prescribed by the Comptroller General, 43 Comp. Gen. 36 continues to apply.

A conceptually related subject is the certification of "provisional" vouchers. Some agencies have procedures for the certification of provisional vouchers for periodic payments under cost-type contracts. This means the certification of vouchers which are essentially unaudited except for

basic mathematical and cumulative cost checks, subject to adjustment upon audit when the contract is completed. As with statistical sampling, some errors on provisional vouchers may escape detection. As a general proposition, GAO will not object to a procedure of this sort as long as it provides for the periodic audit of the provisional vouchers. The periodic "batch audits" need be conducted only as frequently as deemed necessary (but at least annually), according to the reliability of each contractor's accounting and billing procedures. B-180264, March 11, 1974 (discussing provisional voucher procedures of the Environmental Protection Agency and the Department of Defense).

The certifying officer's role with respect to audited contracts is discussed in B-201408, April 19, 1982.

Automated payment systems

As pointed out in Section B of this Chapter, the increased use of automated payment systems is changing the way in which certifying officers operate. Perhaps the clearest example is payroll certification. A certifying officer may be asked to certify a grand total accompanied by computer tapes containing payrolls involving millions of dollars. There is no way the certifying officer can verify that each payment is accurate and legal.

GAO reviewed the impact of computerization in a report entitled "New Methods Needed For Checking Payments Made By Computers," FGMSD-76-82, November 7, 1977. While the certifying officer's basic legal liability remains, the conditions under which he may be relieved under an automated payment system must be different to reflect these changes. The approach to relief in this context stems from the following premises discussed in the report:

(1) In automated systems, evidence that the payments are accurate and legal must relate to the system rather than to individual transactions.

(2) Certifying and disbursing officers should be provided with information showing that the system on which they are largely compelled to rely is functioning properly.

(3) Reviews should be made at least annually, supplemented by interim checks of major system changes, to determine that the automated systems are operating effectively and can be relied on to compute payments that are accurate and legal.

The report concluded:

> "In the future, when a certifying or disbursing officer requests relief from an illegal, improper, or incorrect payment made using an automated system, GAO will continue to require the officer to show that he or she was not negligent in certifying payments later determined to be illegal or inaccurate. However, consideration will be given to whether or not the officer possessed evidence at the time of the payment approval that the system could be relied on to produce accurate and legal payments. In cases in which the designated assistant secretary or comparable official provides the agency head and GAO with a written statement that effective system controls could not be implemented prior to voucher preparation and certifies that the payments are otherwise proper, GAO will not consider the absence of such controls as evidence of negligence in determining whether the certifying official should be held liable for any erroneous payment prior to receipt of an advance decision. Of course, the traditional requirements that due care be exercised in making the payments and that diligent effort be made to recoup any erroneous payments will still be considered in any requests for waiver of liability. Also, should the certifying official fail to take reasonable steps to establish adequate controls for future payments, the reasons for such failure will be taken into account in any requests for waiver of liability concerning such future payments." "New Methods Needed For Checking Payments Made by Computers," supra, pp. 17-18.

Thus, in considering requests for relief under an automated payment system where verification of individual transactions is impossible, the basic question will be the reasonableness of the certifying officer's reliance on the system to continually produce legal and accurate payments. However, this is only one factor, albeit a major one, and GAO will still consider other factors such as evidence of lack of due care on the part of the certifying officer. B-201965, June 15, 1982 (non-decision letter). See also B-178564, January 27, 1978, discussing the application of these principles to certain Department of Agriculture programs.

Regardless of what system is used, there is of course no authority to make known overpayments. B-205851, June 17, 1982.

(5) Illegal or Improper Payment: Disbursing Officers (31 U.S.C. § 82a-2)

The Comptroller General is authorized under 31 U.S.C. § 82a-2 to relieve disbursing officers or former disbursing officers of any department, agency, or independent establishment of the Government, from liability for deficiencies in their accounts as the result of the making of any illegal, improper, or incorrect payment. The granting of relief requires a determination that the payment was not the result of bad faith or lack of due care on the part of the disbursing officer. The determination may be made by the agency and concurred in by GAO, or it may be made by GAO on its own motion.

The statute further provides that the granting of relief to a disbursing officer shall not affect the liability or authorize the relief of any payee, beneficiary, or recipient of any illegal or improper payment, nor will it relieve the disbursing officer, the cognizant agency, or GAO of responsibility to pursue collection action against the payee, beneficiary, or recipient. Relief may be denied if GAO determines that the agency has not diligently pursued collection action. 31 U.S.C. § 82a-2(a) and (b). The effect on the accountable officer's liability of a compromise of the Government's claim against the recipient or beneficiary is discussed in Chapter 11 (Part II), this Manual.

The legislative history of 31 U.S.C. § 82a-2 indicates that the terms "illegal" and "improper" as used in the statute do not necessarily imply fraudulent or wrongful conduct, but refer to a payment which the Comptroller General finds is not in "strict technical" conformity with the law. 49 Comp. Gen. 38 (1969); B-127608-O.M., May 28, 1956. The primary difficulty in applying the statutory criteria for relief is the determination of whether the payment was or was not the result of bad faith or lack of due care on the part of the disbursing officer. Bad faith carries with it a suggestion of dishonesty, and generally implies actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or obligation. It connotes a disregard of and refusal to learn facts when available. See also Section C(4), this Chapter, with respect to certifying officers. The lack of due care is the legal definition of negligence, and has been discussed in Section C(2) of this Chapter.

The determination of whether a payment was or was not the result of bad faith or lack of due care must, of course, be made on the basis of the facts and circumstances surrounding

the particular payment in question. B-136027-O.M., June 13, 1958. A high error rate in the disbursing office involved does not automatically establish lack of due care in the making of a particular payment, nor does a low error rate and a record of an exemplary operation automatically establish due care in the making of a particular payment. B-136027-O.M., supra; B-141038-O.M., November 17, 1959. The continued existence of an "inherently dangerous" procedure, however, does indicate lack of due care on the part of the responsible disbursing officer. B-162629-O.M., November 9, 1967.

A disbursing officer is personally responsible for payments made by his subordinates. However, he may be relieved under 31 U.S.C. § 82a-2 if the improper payment was not the result of bad faith or the lack of due care attributable to him personally. B-141038-O.M., November 17, 1959. In reviewing cases involving payments made by subordinates, GAO has developed the rule that, where a subordinate actually disburses the funds, relief may be granted on a showing that the disbursing officer properly supervised his subordinates by maintaining an adequate system of procedures and controls to avoid errors, and took steps to see that the system was effective and being followed. In applying this rule, GAO recognizes that errors will occasionally occur even in the most carefully established and efficiently supervised system.

Thus, in B-194877, July 12, 1979, the amounts of two VA education payments were switched through the error of a subordinate, resulting in an overpayment to one payee that could not be recouped. In view of the magnitude of operations at the disbursing center, the disbursing officer could not be expected to personally inspect every check, and relief was granted. The same reasoning was applied to grant relief in B-187180, September 21, 1976, where the wrong amounts had been inserted on checks, and in B-202911, June 29, 1981, involving embezzlement by an employee. However, in B-192109, October 11, 1978, the Bureau of Indian Affairs had sent a check to the wrong person (with a slightly different name than the correct payee). Relief was denied because the record contained insufficient evidence to establish that the disbursing officer had exercised proper supervision. (Relief was subsequently granted upon submission of further information. B-192109, June 3, 1981).

It is apparent from the above that it is difficult, if not impossible, to state any hard and fast rules applicable inflexibly to all cases involving relief under the provisions of § 82a-2. What may be considered good faith and

the exercise of due care in one set of circumstances may not be so considered in another set. However, it may be stated generally that, where proper efforts to collect from the recipient of the improper payment have been made, relief may be granted where the department or agency involved has made a determination that the payment was not the result of bad faith or lack of due care on the part of the disbursing officer, and no evidence to the contrary is available. Also, relief may be granted without such administrative determination where it is evident that the payment was not the result of bad faith or lack of due care on the part of the disbursing officer.

It is a prerequisite to the granting of relief, of course, that there be no actual evidence of bad faith or lack of due care and the error must not be so apparent as to indicate that it could have occurred only through lack of due care. Assuming that these conditions have been met, bad faith or lack of due care generally will not be imputed to a disbursing officer where payment was made on the basis of facts of record upon which he was, or reasonably could be, expected to rely, even though such facts subsequently are determined to be erroneous.

While the mere blind adherence to an officially established system and procedure does not necessarily indicate the absence of bad faith and the application of due care, the making of an erroneous payment through failure to follow an officially established system and procedure, unless such failure was completely beyond the control and without the fault of the disbursing officer, constitutes lack of due care. B-138593-O.M., February 18, 1959; B-138102-O.M., January 29, 1959; B-137723-O.M., December 10, 1958; B-133503-O.M., September 23, 1957. Thus, it has been held that a disbursing officer who followed a well set up, efficient, and carefully policed disbursing system in accordance with officially prescribed procedures, under which he was not required to see and did not see the document which was the basis of the erroneous payment, was not personally guilty of such bad faith or lack of due care in connection with that payment as would warrant withholding relief. B-141038-O.M., November 17, 1959. Likewise, a disbursing officer who carefully followed an officially established system which failed to detect a certain type of overpayment, was held not guilty of lack of due care for making such overpayments prior to the time the weakness of the system was called to administrative attention. B-128377-O.M., August 1, 1956.

Like 31 U.S.C. § 82a-1 but in contrast with 31 U.S.C. § 82c, 31 U.S.C. § 82a-2 is not limited to the executive branch. B-200108/B-198558, January 23, 1981 (holding that funds deposited in United States Court registry accounts are funds for which the clerk of the court is accountable).

In applying the above principles, GAO has granted relief in the following cases:

--Due to mechanical failure, a check printing machine failed to advance a voucher schedule and a second check was issued to a person with the same name but different middle initial than the correct payee. A clerk failed to notice the error during verification. The record indicated an adequate system of supervision. In view of the volume of work at the disbursing center, the error was viewed as the type that will occasionally escape even in a well-established and carefully supervised system. B-195106, July 12, 1979.

--An Air Force disbursing office made improper payments to individuals with fraudulent identification cards. Although applicable regulations were found inadequate and were subsequently changed, the disbursing officer and his subordinates had been in full compliance with existing directives. B-192558, December 7, 1978. The decision pointed out, however, that compliance with regulations which are clearly insufficient will not always satisfy the standard of due care.

--Duplicate income tax refund checks were issued as the result of an employee's failure to check the cancellation and stop payment files, a violation of written instructions. Both checks were cashed. The magnitude of operations at the disbursing center precluded the disbursing officer from personally inspecting all operations. B-195396, October 1, 1979.

--A Bureau of Indian Affairs disbursing officer erroneously made a payment to the wrong heir. Unknown to him, the probate and title determinations on which he had based the payment had been reopened and revised. The disbursing officer had not been required, nor could he be reasonably expected, to verify the inheritance determination. B-188744, July 15, 1977.

--Soldier's deposits were paid to the wrong soldier. Pass book supporting the payment belonged to another. Error was ascribed to a clerical error by a member of the disbursing officer's staff. B-78532-O.M., May 10, 1956.

--Air Force disbursing officer made duplicate travel allowance payments. While there may have been some laxity in control and certain weaknesses in responsibilities, no method or requirement existed by means of which prior similar payments could reasonably have been discovered except by memory alone. GAO accepted agency's determination. B-128377-O.M., August 1, 1956.

--Disbursing officer paid military personnel commuted rations and overseas station subsistence per diem concurrently, even though the personnel could have eaten, or did eat, at least two meals per day in a Government mess. Payments were made in reliance on administrative action indicating the nonavailability of a Government mess to the persons involved. B-128733-O.M., February 5, 1957.

--Overpayment of mustering-out pay resulted from failure to follow procedures provided by regulation which would have detected a prior payment. Disbursing officer had taken positive steps to improve the disbursement practice before the error. Office had a large number of untrained personnel and the payment in question had been made by an untrained clerk. B-129631-O.M., January 23, 1958.

--Army disbursing officer made overpayment by drawing check in larger amount than shown on voucher. GAO accepted agency's determination of due care and good faith since nothing in record suggested the contrary. B-133785-O.M., September 25, 1957. GAO reached same result with respect to check drawn to wrong payee. B-134836-O.M., January 15, 1958; B-134790-O.M., January 13, 1958.

--Payment of retired pay was continued beyond the period a former officer was dropped from the Navy rolls, due to administrative failure to notify the disbursing officer. Payment was the result of administrative failure beyond the control of the disbursing officer. B-135024-O.M., March 4, 1958.

--Payment was made to an alleged vendor in Italy who later claimed non-payment. Signature on voucher had been forged. The genuine signature was readily available at the time of the payment, but Navy procedure provided that primary identification was the responsibility of the Supply Officer. Failure to compare signatures was therefore not negligence on the part of the disbursing officer. B-137223-O.M., January 8, 1960.

Conversely, application of the principles discussed resulted in the denial of relief in the following cases:

--Accountable officer paid advance travel vouchers to person who represented himself as courier without requesting identification; vouchers had been forged. B-178953, August 8, 1973.

--Military finance officer authorized improper per diem payments. Admittedly in doubt as to propriety of payments, he had sought guidance from higher headquarters. Reliance on advice from higher headquarters rather than seeking advance decision from Comptroller General in doubtful cases is not the exercise of due care. 49 Comp. Gen. 38 (1969). For further cases on the effect of a disbursing officer's failure to request an advance decision, see 14 Comp. Gen. 464 (1934); 14 Comp. Gen. 578 (1935); 23 Comp. Gen. 578 (1944). See also 55 Comp. Gen. 297, Section C(4), this Chapter, for the same point with respect to certifying officers.

--An exception was taken to the payment of a dependent's transportation because records did not show that the travel, if performed, was for the purpose of establishing a permanent residence. The payee alleged that he neither claimed nor received the payment. The signature on the voucher was found to be forged. The record did not establish whether bad faith or lack of due care was involved in making the payment. Even if the signature had been proper, payment would have been unauthorized. B-132034-O.M., July 10, 1957. See also B-132851-O.M., October 8, 1957.

--Disbursing officer continued to pay New Mexico gasoline tax after State Attorney General and Judge Advocate General had both concluded that the United States was not liable for the tax. Disbursing officer claimed that he had not been specifically directed to stop paying. B-135811, May 29, 1959.

--Disbursing officer reimbursed imprest fund based on purchase orders that were obviously altered or otherwise contrary to regulations. This was held to constitute a prima facie case of lack of due care and the record contained no controverting evidence. B-135910-O.M., July 14, 1958; B-138593-O.M., February 18, 1959. Disbursing officer reimbursed imprest fund on basis of purchase orders which were not supported by dealer's invoice or delivery slip as required by regulations. B-137723-O.M., December 10, 1958.

--Finance officers had authorized payments for nontemporary storage of household goods for members enroute to new permanent duty stations but who had delayed their travel for permissive temporary duty to attend civilian colleges. Payments were not contemplated by applicable regulations and were contrary to a decision of the Comptroller General. 44 Comp. Gen. 160 (1964).

--Disbursing officer made duplicate payments on voucher schedule covering payments already made. Disbursing officer had requested guidance on new procedures, and "duplicate" schedule with instructions had been sent to her in response to that request, with cover letter clearly stating that the schedule covered payments previously made. Payment could only have been due to lack of due care. B-142051, March 22, 1960.

--Accountable officer knowingly hired a part-time janitor who was already employed full-time by the District of Columbia, a violation of the Dual Compensation Act, and paid him from an imprest fund. Accountable officer must be presumed to know the law, and also should have known that compensation cannot be paid from an imprest fund. B-177841-O.M., October 23, 1973.

--Various Peace Corps accountable officers made improper overpayments of volunteer readjustment allowances to Corps members over a number of years. Relief could not be granted where neither the identity of the persons overpaid nor the amounts of the overpayments could be ascertained. B-165743, May 11, 1973.

The discussion of statistical sampling and automated payment systems in Section C(4) of this Chapter is also relevant to disbursing officers. The liability of disbursing officers for overpayments under an electronic funds transfer program is discussed in 59 Comp. Gen. 597 (1980).

(6) Other Relief Statutes

The four relief statutes discussed in some detail--31 U.S.C. §§ 82a-1, 95a, 82c, and 82a-2--are the ones most commonly encountered. However, several other relief statutes exist.

(a) Court of Claims

28 U.S.C. § 2512 provides as follows:

> "Whenever the Court of Claims finds that any loss by a disbursing officer of the United States was without his fault or negligence, it shall render a judgment setting forth the amount thereof, and the General Accounting Office shall allow the officer such amount as a credit in the settlement of his accounts."

This statute, which originated in legislation enacted in 1866, predates the other relief legislation and once was the only relief mechanism available apart from private relief legislation. Now, with the availability of administrative channels of relief by virtue of the other relief statutes, it is used much less frequently. For a recent case, see Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979).

(b) Legislative Branch Agencies

Since 31 U.S.C. § 82c does not apply to the legislative branch, Congress has enacted specific statutes to authorize relief of certifying officers of certain legislative branch agencies. The statutes, patterned after 31 U.S.C. § 82c, are 2 U.S.C. § 142b (Library of Congress), 2 U.S.C. § 142e (Congressional Budget Office), and 44 U.S.C. § 308 (Government Printing Office).

(c) District of Columbia

Also patterned after 31 U.S.C. § 82c, section 47-120 of the District of Columbia Code authorizes the Comptroller General to relieve certifying officers of the District of Columbia Government.

(d) Treasurer of the United States

The Treasury occasionally suffers losses resulting from the issuance of Government checks. In the most common situation, a payee claims he never received a check and the

Treasury issues a substitute. Both the original and the substitute are then negotiated, resulting in a double payment. Losses also result from other situations such as altered checks. Prior to 1947, Congress periodically relieved the Treasurer from personal liability by enacting special legislation and by appropriating the funds necessary to adjust the accounts.

In 1947, Congess enacted 31 U.S.C. § 156, providing that the Treasurer shall not be liable for losses resulting from the payment of any check drawn upon the Treasurer of the United States which is "paid in due course and without negligence by or on behalf of the Treasurer." The statute also "authorized and directed" the Comptroller General to allow credit in the Treasurer's account for such payments in the future.

Treasury does not request "relief" under 31 U.S.C. § 156 on a case-by-case basis. Rather, it accumulates the cases and submits them in large groups. Credit is allowed largely as a matter of routine. See B-115388, October 12, 1976, which allowed credit for over 2,000 uncollectible checks.

There is an important problem with 31 U.S.C. § 156 that has yet to be resolved. The statute does not give the Comptroller General restoration authority, i.e., authority to charge losses to some current appropriation (see Section E, this Chapter). Thus, specific appropriations are needed to clear the Treasurer's account even after relief has been granted. See B-115388, supra; B-141329, February 26, 1960. Absent either restoration authority or specific appropriations, Treasury carries the losses as accounts receivable indefinitely. The issues are discussed in more detail in B-197876-O.M., April 20, 1981, and a report entitled "Millions Paid Out In Duplicate and Forged Government Checks," AFMD-81-68, October 1, 1981.

(e) Losses Resulting From Certain Exchange Transactions

Legislation enacted in 1944, 31 U.S.C. § 492a, authorizes disbursing officers to make various exchange transactions for official or accommodation purposes. 31 U.S.C. § 492b requires that gains resulting from these operations be paid into the Treasury as miscellaneous receipts and authorizes appropriations to adjust deficiencies. Gains may be offset against deficiencies on a fiscal year basis. To implement this legislation, the Treasury Department has issued regulations (Treasury Department Circular No. 830)

and has established a "Gains and Deficiencies on Exchange Transactions" account. If a given fiscal year produces a net deficiency, Treasury requests an appropriation in that amount. (For Defense Department disbursing officers, a recurring provision in annual Defense appropriation acts makes Defense appropriations available for this purpose.)

The Gains and Deficiencies account "was established and authorized solely in connection with relieving disbursing officers of accountability for losses due to exchange rate fluctuations incurred in carrying out certain disbursing functions and to require that gains from such cause be covered into the Treasury as miscellaneous receipts." 45 Comp. Gen. 493, 495 (1966).

GAO has considered the use of the Gains and Deficiencies account in a number of cases involving valueless Vietnamese and Cambodian currency after the American evacuation from those countries in the mid-1970's. See 56 Comp. Gen. 791 (1977); 61 Comp. Gen. ___ (B-186348, December 15, 1981, overruling 56 Comp. Gen. 791 in part); B-197708, April 8, 1980.

(7) Waiver of Erroneous Overpayments Provides Relief

There is statutory authority for waiver of claims of the United States arising out of erroneous payments of pay and certain allowances made to or on behalf of certain employees of the United States or to or on behalf of members of the uniformed services. This authority is contained in 5 U.S.C. § 5584 for civilian employees, 10 U.S.C. § 2774 for members of the uniformed services, and 32 U.S.C. § 716 for members of the National Guard. Implementing regulations for these waiver statutes are contained in 4 C.F.R. Parts 91-93. Department and agency heads may waive erroneous payments in amounts not exceeding $500. Erroneous payments above this amount may be waived only by the Comptroller General. All of the waiver statutes contain provisions for the adjustment of the accountable officer's account from which the erroneous payment was made when the overpayment is waived. Accordingly, if the overpayment is waived, the accountable officer is effectively relieved.

For example, the Military Sealift Command requested relief from liability for disbursing officers who had made overpayments as a result of administrative error. GAO determined that the overpayments could be waived under 5 U.S.C. § 5584. Hence there was no need to consider the question of relief since upon waiver, the accounts in question could be adjusted pursuant to 5 U.S.C. § 5584(d). B-184947, March 21, 1978. This result applies even where relief has been denied under the applicable relief statute. B-177841-O.M., October 23, 1973.

(8) Statute of Limitations

31 U.S.C. § 82i provides that the accounts of accountable officers shall be settled by GAO within three years "from the date of the receipt of the account by the General Accounting Office." Since a charge cannot be raised against an accountable officer after the expiration of this period, the statute operates as well as a limitation on the accountable officer's liability for improper expenditures. Unlike other statutes of limitations which merely affect the remedy (e.g., by barring the commencement of legal proceedings), 31 U.S.C. § 82i completely eliminates the debt. Thus, an accountable officer can escape liability for an improper expenditure if the Government does not raise a charge against the account within the three-year period. B-181466, November 19, 1974 (non-decision letter); B-199542, November 7, 1980; B-206591, April 27, 1982.

The statute was enacted at a time when all accounts were physically transmitted to GAO for settlement. As a result of changes in audit methods, this is no longer done. Rather, the accounts are retained by the various agencies where they are subject to audit and settlement by GAO. To reflect this change in audit procedures, the date of receipt by the agency of substantially complete accounts is now considered as the point from which the three-year period begins to run. B-205587, June 1, 1982; B-181466, July 10, 1974 (non-decision letter).

Since GAO no longer audits all individual transactions, agencies are required to report to GAO all irregularities in the accounts of accountable officers (which have not been resolved administratively) within two years after the date the accounts are made available to GAO for audit. This will permit the timely raising of a charge within the three-year period. Fraud or other serious irregularities of substantial amount or significance must be reported as soon as possible. B-205587, supra; B-161457, August 1, 1969 (circular letter); GAO Policy and Procedures Manual, Title 7.

The statute of limitations does not apply to losses due to fraud or criminality on the part of the accountable officer. Also, it applies only to accountable officers and does not establish a limitation period on recoveries against recipients of illegal or erroneous payments. Arnold v. United States, 404 F.2d 953 (Ct. Cl. 1968).

The statute of limitations of 31 U.S.C. § 82i applies only to improper payments, not to physical losses or deficiencies. 60 Comp. Gen. 674 (1981). A group of recent

decisions had applied the statute in physical loss cases (B-201840, April 6, 1981; B-198308, March 9, 1981; B-197616, February 24, 1981; B-189613, June 8, 1978). However, in 60 Comp. Gen. 674, GAO overruled that aspect of the prior decisions, stating that "We have reconsidered those decisions, in the light of the legislative history of 31 U.S.C. § 82i, and have concluded that we were wrong." An accountable officer's liability for a physical loss or deficiency is wholly independent of GAO's raising a charge against that officer's account.

(9) Requests for Reconsideration

Whenever GAO makes a determination under 31 U.S.C. §§ 82a-1, 82a-2, or 82c that results in the denial of relief for an accountable officer, the agency or the accountable officer may through appropriate administrative channels request GAO to review and reconsider the determination. However, GAO will not review determinations resulting in denial of relief made by the military departments under 31 U.S.C. § 95a, inasmuch as such determinations are conclusive and GAO has no authority to overturn them.

Requests for review and reconsideration should set forth the errors which the applicant believes have been made in the denial determination. The applicant has the burden of establishing, through the submission of credible evidence, that GAO's original determination to deny relief either failed to consider certain evidence, or to give it appropriate weight, or relied too heavily on other evidence in the record. Where the applicant succeeds in showing that an earlier denial determination was in error, GAO will reverse the earlier determination and grant relief upon reconsideration. Where the applicant fails to establish that the earlier denial was in error, GAO will affirm its earlier determination.

See B-201556, March 3, 1982, for a case in which GAO revoked previously granted relief when a subsequent related request cast doubt on the veracity of the administrative determinations upon which the relief had been originally granted.

D. COLLECTION ACTION--WITHHOLDING PAY

Whenever a loss occurs for which an accountable officer is liable, the agency should seek to recover from the recipient if possible. Any amounts recouped will reduce the accountable officer's liability. (Note that 31 U.S.C. § 82a-2 expressly permits the denial of relief if the agency has not diligently pursued collection action.)

If an outstanding liability remains, and the agency does not request relief or relief is requested and denied, the accountable officer becomes indebted to the United States for the amount involved. At that point, it is the agency's responsibility to initiate collection action against the accountable officer in accordance with the Federal Claims Collection Act and implementing regulations. (See Chapter 11, Part II, this Manual.) B-177430, October 30, 1973; B-179902-O.M., January 4, 1974.

If the accountable officer is still employed by the Government, the means of collection is mandatory withholding of pay as prescribed by 5 U.S.C. § 5512(a):

> "The pay of an individual in arrears to the United States shall be withheld until he has accounted for and paid into the Treasury of the United States all sums for which he is liable."

See B-198124, June 20, 1980; B-196855, December 18, 1979; B-190809, March 14, 1978. The Comptroller General has held that 5 U.S.C. § 5512(a) does not apply to ordinary debtors but only to accountable officers, and that its application is mandatory. 23 Comp. Gen. 555 (1944); 37 Comp. Gen. 344 (1957); 39 Comp. Gen. 203 (1959). Since it is mandatory, it cannot be waived. E.g., 19 Comp. Gen. 312 (1939).

It is possible to read 5 U.S.C. § 5512(a) as requiring that all pay be withheld until the debt is repaid, and a number of early decisions so construed it. E.g., 7 Comp. Gen. 4 (1927); 9 Comp. Gen. 272 (1930); 19 Comp. Gen. 312 (1939). 14/ While these early decisions have not been overruled, the current view is that the statute will be satisfied by withholding in installments. B-180957-O.M., September 25, 1979.

14/ Prior to the 1966 recodification of title 5, U.S. Code, the provision in question (then 5 U.S.C. § 82) read "No money shall be paid" until the debt is repaid. See 2 Comp. Gen. 689 (1923); 42 Comp. Gen. 83 (1962).

Also, since a person employed by the Government is presumed to have the present or prospective financial ability to repay a debt, termination of collection action is inappropriate. B-160483, December 9, 1966; B-160633, January 19, 1967; B-180674, November 25, 1974; B-189701, September 23, 1977; 49 Comp. Gen. 359, 361 (1969). See also Chapter 11 (Part II), this Manual.

If pay is withheld under 5 U.S.C. § 5512(a), the statute provides a means to obtain judicial review of the indebtedness. Under 5 U.S.C. § 5512(b), GAO is required, upon the request of the individual, his agent, or his attorney, to immediately report the balance due to the Attorney General, and the Attorney General is required within sixty days to order suit to be commenced against the individual. For examples of referrals under 5 U.S.C. § 5512(b), see B-198124, August 13, 1980; B-188413, July 7, 1978.

E. RESTITUTION, REIMBURSEMENT, AND RESTORATION

Prior to 1955, there was no statutory authority to permit the reimbursement of an accountable officer who had made restitution to the Government for a physical loss. Thus, once an accountable officer made restitution (if, for example, the agency required it), the decisions held that there was no longer a deficiency in the account for which relief could be considered. 27 Comp. Gen. 404 (1948); B-101301, July 19, 1951, and cases cited therein.

Legislation in 1955 amended 31 U.S.C. §§ 82a-1 and 95a to expressly authorize reimbursement of the accountable officer for any amounts paid in restitution, if relief was granted. Accordingly, restitution by the accountable officer in physical loss cases is no longer an impediment to the granting of relief. See, e.g., B-126362, February 21, 1956. There is no mention of reimbursement in 31 U.S.C. §§ 82a-2 or 82c.

An obvious limitation on the reimbursement authority was illustrated in B-187021, January 19, 1978. In that case, a cashier sought reimbursement, claiming she had made restitution to an imprest fund from personal funds. However, by virtue of her actions in initially concealing the loss, she was unable to show that the loss had in fact ever occurred. Since the loss could not be established, reimbursement was denied. Thus, an accountable officer should always report the loss before making restitution.

The final point to be covered is restoration of the account. Under two of the relief statutes--31 U.S.C. §§ 82a-1 and 82a-2--the Comptroller General may authorize the restoration or adjustment of the account if relief is granted. This is accomplished by charging the appropriation or fund available for the accountable function at the time the adjustment is made. 31 U.S.C. § 82c does not contain a restoration provision. 31 U.S.C. § 95a also does not contain a restoration provision, but limited restoration authority with respect to advance accounts is contained in 31 U.S.C. § 95b. In addition, annual Defense Department appropriation acts include a provision making Defense appropriations available for losses in the accounts of disbursing officers or agents. For example, the FY 1981 provision is found at Pub. L. No. 96-527, § 709, 94 Stat. 3068, 3082.

If relief is denied, or if the agency does not request relief, restoration is authorized by 31 U.S.C. § 1202. Under this provision, if the loss was due to the fault or negligence

of the accountable officer, and if the agency determines that the amount of the loss is uncollectible (including uncollectible from the accountable officer), the amount of the loss is to be charged to the appropriation or fund available for the expenses of the accountable function at the time the restoration or adjustment is made. This is merely an accounting transaction and does not affect the accountable officer's personal liability. See B-188715, January 31, 1978; B-167827, February 4, 1975; B-177910, February 20, 1973. For the specific accounting procedure, see GAO Policy and Procedures Manual, Title 7.

Note that, under the restoration provisions of 31 U.S.C. §§ 82a-1, 82a-2, and 1202, the loss must be charged to the appropriation for the fiscal year in which the adjustment is made, and not the fiscal year in which the loss occurred.

The restoration authority may be viewed as a way of determining the appropriation chargeable with a loss. For example, State Department disbursing officers overseas, acting under delegations of authority from the Treasury Department, may receive and disburse moneys on behalf of other Government agencies as well as the State Department. If the services are sufficiently extensive to warrant reimbursement, the State Department charges the "user" agencies. Construing the restoration provision of 31 U.S.C. § 82a-1, the Comptroller General held that losses in such a situation which cannot be related to the functions of any particular agency or agencies are chargeable to State Department appropriations. 37 Comp. Gen. 224 (1957). The decision further pointed out that such adjustments could be considered as part of the costs of the disbursing function for purposes of determining the reimbursement charges assessed against the user agencies and thus distributed to all user agencies in the same manner as other costs. Id., at 226. See also 56 Comp. Gen. 791 (1977), applying 37 Comp. Gen. 224 to losses of United States currency incident to the 1975 evacuation from Vietnam.

CHAPTER 11

CLAIMS AGAINST AND BY THE UNITED STATES

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CHAPTER 11

CLAIMS AGAINST AND BY THE UNITED STATES

Some years ago, a gentleman alleged that he had been carefully observing the activities of the moon for a long period of time, and discovered that it had jumped its orbit and was getting dangerously close to the earth. According to his story, instead of publicly announcing the situation and thereby creating a panic, he secretly and hurriedly perfected a rocket which he fired at the satellite, thus placing it back on its orbit, and thereby prevented the destruction of the earth. As a result of this activity, he filed a claim against the Government for $50,000,000. The claim was disallowed. 1/

More recently, a Government employee in California went to work one morning as usual. Shortly after he arrived, an earthquake occurred and he was trapped under a sink where he remained for two days until he was dug out by rescue crews. His agency paid him his regular pay for the periods he would normally have worked, and he subsequently filed a claim for overtime pay for the remaining time that he was trapped under the sink. Since he was not "engaged in the actual performance of his prescribed duty" while under the sink, his claim was disallowed. 2/

While these two stories are certainly not typical, they illustrate the GAO function to be discussed in this Chapter--the settlement of claims against and by the United States. Part I deals with claims against the Government (payment claims). Part II covers claims by the Government (debt claims).

1/ Address of Arch B. Brown, former GAO attorney, at the Federal Bar Association Convention, Washington, D.C., September 28, 1956.

2/ B-175932-O.M., June 13, 1972.

PART I - CLAIMS AGAINST THE GOVERNMENT

A. ROLE OF GAO

Claims against the Government can arise out of virtually any aspect of Federal operations. A great many claims involve areas covered by the other OGC Manuals--Civilian and Military Personnel, Transportation, and Procurement (see Chapter 1, this Manual). Also, claims may arise in areas covered by other chapters of this Manual. For example, Chapter 3 discusses a number of restrictions on the purposes for which appropriated funds may be used. Questions in these areas frequently arise in the form of claims which cannot be paid because of a particular restriction. It is not the purpose of this Chapter to duplicate the substantive discussion found in the other OGC Manuals or elsewhere in this Manual. The purpose of this Chapter is to present an overview of the claims settlement function and a brief discussion of several types of claims not covered elsewhere.

(1) Statutory Basis

The basis of GAO's claims settlement jurisdiction is 31 U.S.C. § 71 (Revised Statutes § 236):

> "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

This statute is derived from legislation originally enacted in 1817. The claims settlement function was originally lodged in the Treasury Department, and was transferred to GAO by the Budget and Accounting Act of 1921. The purpose of the transfer in 1921 was to vest the function in an auditing authority independent of the executive branch. Lambert Lumber Co. v. Jones Engineering & Construction Co., 47 F.2d 74 (8th Cir. 1931), cert. denied, 283 U.S. 842.

GAO's regulations on claims settlement are found in 4 C.F.R. Parts 30 et seq. and Title 4, GAO Policy and Procedures Manual for Guidance of Federal Agencies (4 GAO).

(2) Meaning of "Settle and Adjust"

The authority given to GAO by 31 U.S.C § 71 is to "settle and adjust" claims. While the term "settlement" in the litigation context means compromise, it has a different meaning in the administrative claims context. The Supreme Court has defined the term as follows:

> "The word 'settlement' in connection with public transactions and accounts has been used from the beginning to describe administrative determination of the amount due. * * * The words 'settled and adjusted' [as used in R.S. § 236] were taken to mean the determination * * * for administrative purposes of the state of the account and the amount due. * * *
>
> * * * * *
>
> "We should not say, of course, that instances may not be found in which the word 'settlement' has been used in acts of Congress in other senses, or in the sense of 'payment.' But it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well defined meaning as denoting the appropriate administrative determination with respect to the amount due."

Illinois Surety Co. v. United States ex rel. Peeler, 240 U.S. 214, 219-221 (1916).

Thus, to settle a claim means to administratively determine the validity of that claim. Peeler, supra, at 220; Cooke v. United States, 91 U.S. 389, 399 (1875); 20 Comp. Gen. 573 (1941). Settlement includes the making of both factual and legal determinations. 20 Comp. Gen. 573, supra. The authority to settle and adjust claims does not, however, include the authority to compromise claims. B-133616, October 25, 1957; B-122319, August 21, 1956. In the context of payment claims, the rationale for this is simply that a claim determined to be valid should be paid in full. Likewise, public funds should not be used to pay any part of a claim determined not to be valid. Thus, the authority to compromise a given claim against the United States depends on the existence of statutory authority above and beyond the authority to "settle and adjust" claims of that type. 3/

3/ It should be emphasized that the discussion in this Chapter is limited to administrative claims. The payment of compromise settlements in cases referred to the Justice Department for litigation is covered in Chapter 12, this Manual.

A number of agencies and Government corporations are empowered by statute to "sue and be sued." The Comptroller General has held that this includes the authority to compromise a claim without a lawsuit. 25 Comp. Gen. 685 (1946); B-190806, April 13, 1978. However, compromise authority in this context is incident to the specific "sue and be sued" power and not to more general claims settlement authority.

The settlement function also includes the determination of whether an appropriation is legally available for making payment. 18 Comp. Gen. 285, 292 (1938).

(3) Limitations on GAO's Claims Settlement Authority

A claim for purposes of GAO's claims settlement authority means a monetary claim--a claim for the payment of money. Without specific statutory authority, GAO is not authorized to consider claims for equitable relief, such as specific performance (B-179702, October 10, 1973) or the recrediting of sick leave (B-171947, June 16, 1972; B-171947, November 16, 1972).

There are, however, certain types of monetary claims which are beyond the scope of GAO's settlement authority. Thus, GAO has no jurisdiction to consider or settle claims for patent infringement. B-160745, February 13, 1967, affirmed B-160745, July 27, 1967; B-149392, August 1, 1962. The main reason for this is that the remedy provided by 28 U.S.C. § 1498(a) (action in the Court of Claims) is viewed as exclusive. The Comptroller General may nevertheless render decisions on the use of appropriated funds in patent-related contexts. For example, the Comptroller General held in 37 Comp. Gen. 199 (1957) that 10 U.S.C. § 2386 authorizes the military departments to enter into agreements, using procurement appropriations, for the settlement of claims arising out of patent infringements. Absent such a statute, however, this authority would not exist. 11 Comp. Gen. 44 (1931).

Also, GAO cannot resolve issues of mental competency. Thus, claims for the refund of money allegedly donated to the United States where the claimant contends that mental incompetency precluded the donor from forming the necessary donative intent cannot be settled by GAO but must be resolved by court action. B-191904, July 19, 1978 (non-decision letter); B-196052-O.M., January 7, 1980. 4/

If an agency has statutory authority to settle its own claims, this specific authority will take precedence over 31 U.S.C. § 71. Thus:

(1) The United States Postal Service has specific authority under the Postal Reorganization Act to settle its own claims. B-179464, March 27, 1974.

4/ As a matter of proper terminology, GAO has the jurisdiction to settle claims of this type because 31 U.S.C. § 71 refers to "all claims," but because of the practical considerations, the policy has evolved that they may not be allowed. This distinction is discussed in 21 Comp. Dec. 134, 136-139 (1914).

(2) GAO has no jurisdiction to settle claims against the District of Columbia Government. 1 Comp. Gen. 451 (1922); B-168704, January 16, 1970; B-129677, October 22, 1957. Cf. 36 Comp. Gen. 457 (1956). (Part of the rationale here is based on the status of the District of Columbia Government as a separate legal entity.)

(3) GAO's claims settlement authority does not extend to Government corporations where the corporation has authority to sue and be sued and to determine the character and necessity of its expenditures. 53 Comp. Gen. 337 (1973); 27 Comp. Gen. 429 (1948); B-190806, April 13, 1978; B-156202, March 9, 1965. (These decisions involve the Federal Housing Administration and the Pension Benefit Guaranty Corporation.)

(4) Prior to 1979 legislation implementing the Panama Canal Treaty of 1977, the Panama Canal Company, as a Government corporation, could settle its own claims but the Canal Zone Government was an independent agency of the United States subject to 31 U.S.C. § 71. B-179464, March 27, 1974. In 1979, both agencies were replaced by the Panama Canal Commission which has its own claims settlement authority in certain areas. This authority is discussed in B-197052, April 22, 1980, as modified by B-197052, February 4, 1981.

In the absence of legislation expressly placing the authority elsewhere, however, as in the examples noted above, GAO's claims settlement jurisdiction under 31 U.S.C. § 71 extends to all Federal agencies. E.g., B-203638, December 23, 1981 (Federal Home Loan Bank Board).

GAO has recently limited its jurisdiction on certain claims subject to negotiated grievance procedures under collective bargaining agreements authorized by the Civil Service Reform Act of 1978. Generally, GAO will decline to assert jurisdiction where a grievance has been filed and one of the parties to the agreement objects to GAO's consideration of the claim. The rationale is that, having elected to invoke the grievance procedure, neither the employee (claimant) nor the union should be permitted to abandon that procedure over the agency's objection and seek redress in another forum. 61 Comp. Gen. ___ (B-199999, October 9, 1981). Where no grievance has been filed, GAO will still decline jurisdiction over claims involving rights arising solely under the collective bargaining agreement if a party to the agreement objects, but will consider claims based on rights existing independent of the collective bargaining agreement, despite the objection of a party. 61 Comp. Gen. ___ (B-200004, October 9, 1981).

Finally, a number of statutes deal with specific types of claims and authorize administrative settlement by the agency involved. If the statute provides that the agency settlement shall be "final and conclusive," then GAO has no jurisdiction to review the merits of a particular claim. Examples are the Federal Tort Claims Act and the Military Personnel and Civilian Employees' Claims Act of 1964, discussed later in this Chapter.

Merits vs. cognizability

Even though GAO may not question the merits of a settlement under a statute which makes an agency's settlement action final and conclusive, GAO retains the authority to consider the threshold question of whether a given claim is cognizable under the statute. As stated in 47 Comp. Gen. 316, 318 (1967) with respect to the Military Personnel and Civilian Employees' Claims Act of 1964, an agency's settlement "if made in accordance with the provisions of the * * * act and applicable regulations, would be final and conclusive."

To take a simple illustration, if an agency settled a tort claim resulting from an automobile accident, GAO could not question the agency's determination that its employee had been negligent nor could it question the amount of the award (assuming, of course, that it did not exceed the amount claimed). However, if the claim arose in a foreign country, the agency's settlement would not be entitled to "final and conclusive" status because, in view of the specific exception in the Federal Tort Claims Act for claims arising in foreign countries, the claim would not be properly cognizable under the statute.

The concept was discussed in an early decision of the Comptroller of the Treasury, 21 Comp. Dec. 250 (1914). In that case, the Secretary of Agriculture asked whether he could pay a claim under a statute (now 16 U.S.C. § 502(d)) which authorized the Secretary to reimburse owners of horses, vehicles, and other equipment lost or damaged while being used for official business. The claim was for a mule, owned by a Forest Service employee, which had died presumably while engaged in official business. The Comptroller pointed out that the statute gave the Secretary jurisdiction to determine the facts as to whether loss or damage occurred incident to official business and the amount of the loss or damage. However--

> "This conclusion does not deprive the Comptroller of his jurisdiction to determine generally the scope and purpose of the legislation and to limit expenditures thereunder to the contemplated purposes * * *." 21 Comp. Dec. at 251.

In a more recent decision, the Comptroller General held that an agency could not pay a claim by an employee under the Military Personnel and Civilian Employees' Claims Act of 1964 when it was also paying a claim under the Federal Tort Claims Act arising from the same incident. The reason is that allowance of a tort claim must be based on a determination that the employee was negligent while an agency may allow a claim under the 1964 Act only if it determines that the employee was not negligent. Thus, allowance of the tort claim precluded allowance of the employee's claim. 58 Comp. Gen. 291 (1979).

For other decisions illustrating the merits vs. cognizability distinction, see B-190106, March 6, 1978; B-153031, January 28, 1964.

Private relief acts

Private relief acts may or may not include an appropriation (see Chapter 2, Section F, this Manual). Those that do constitute appropriations will either specify payment from the funds of a designated agency or will direct payment by the Secretary of the Treasury "out of any money in the Treasury not otherwise appropriated."

At one time, GAO settlement was required on all payments under private relief legislation. See, e.g., B-141722-O.M., January 29, 1960. This is no longer the case. GAO settlement is now required only in cases referred to GAO because of aspects of doubt or where the legislation expressly provides for GAO settlement. In all other cases, payment is made directly by the agency designated in the relief act. If a relief act directs payment by the Secretary of the Treasury "out of any money in the Treasury not otherwise appropriated" and does not indicate any more specific source of funds for payment or expressly require GAO settlement, payment is charged to account 20X1706 (Relief of Individuals and Others by Private and Public Laws) and is made directly by the Treasury Department, with no need for GAO involvement except in doubtful cases. See B-142380, March 24, 1960 (circular letter).

The amount specified in a private relief act effectively constitutes a "final adjudication" and, except for the possibility of bringing the matter to the attention of Congress, must be paid even if it is erroneous. 2 Comp. Dec. 629 (1896).

(4) Procedures

(a) Necessity for Filing Claim

As a general proposition, a person who thinks the Government owes him money must file a claim to get it. The Government is not legally required to initiate payments in the absence of claims or to encourage the filing of claims. 5/ Thus, the Comptroller General has noted that an agency is not required to notify an employee or former employee that he was underpaid in some past transaction. 24 Comp. Gen. 9 (1944); 26 Comp. Gen. 102, 106 (1946). Cf. 41 Comp. Gen. 761, 764 (1962).

However, GAO has not objected to proposed additional payments of compensation, otherwise legally due, without awaiting the filing of specific claims, particularly where a relatively short time has elapsed between the original payments and the additional payments, or where retroactive rights have been expressly granted by statute. 31 Comp. Gen 166, 173 (1951); 36 Comp. Gen. 459 (1956); 38 Comp. Gen. 56 (1958); B-115800, December 8, 1964. In some instances, a distinction has been drawn between employees or members still on the rolls and those who have been separated, with claims required from the latter category. See 41 Comp. Gen. 812, 819 (1962); 23 Comp. Gen. 398, 401 (1943); 23 Comp. Gen. 721, 723 (1944). GAO has also approved procedures under which an agency sends a notice of entitlement to former employees, with actual payment

5/ 18 U.S.C. § 205 makes it a criminal offense for an officer or employee of the Government to act as agent or attorney for prosecuting any claim against the United States other than in the proper discharge of his official duties. For the most part, GAO will not determine what does or does not constitute a violation of this provision. See 38 Comp. Gen. 56 (1958) and Chapter 1, this Manual. However, in a few cases, GAO has ventured opinions that certain actions are unobjectionable as far as GAO is concerned. Thus, the mere request to a vendor or contractor to submit an invoice so that timely payment can be made, where there is no question of the Government's liability nor dispute as to the facts, is viewed as the discharge of official duties and therefore unobjectionable. 30 Comp. Gen. 266 (1951). Also, where the Government's liability is undisputed, the agency may notify prospective claimants of their entitlement to a refund upon the filing of a claim without violating the statute, especially where the claimants would have no other way of knowing of their entitlement. 34 Comp. Gen. 517 (1955).

to be made upon receipt of written instructions. 50 Comp. Gen. 266 (1970); 38 Comp. Gen. 56 (1958). Similarly, an erroneous over-deduction may be refunded without the need for a specific claim. B-148953, July 13, 1962.

In addition, an agency may refund an overpayment when otherwise proper (see Chapter 15, this Manual) without the need for a formal claim. This is based on public policy. 58 Comp. Gen. 372, 375 (1979). However, in view of the cost to the Government of issuing checks and processing payments, the agency should establish a minimum amount below which refunds will not be made unless a claim is filed. 58 Comp. Gen 372, supra; A-12900, February 11, 1942. GAO's current minimum is $5. B-181373-O.M., August 16, 1974. Proposals to establish higher minimums should be supported by cost studies. B-117604, March 6, 1972.

Agencies may administratively adjust vouchers to correct underclaims resulting from minor errors in computation, not exceeding $30, without requiring amendment of the claim by the claimant. 57 Comp. Gen. 298 (1978).

Thus, while there are situations in which payments have been allowed without requiring the submission of claims, these are viewed as exceptions and the prospective claimant will be well advised to file a claim if there is any question.

(b) Form of Claim

Although some types of claims require specific forms, there is, as a general proposition, no particular form required for filing a claim. 4 C.F.R. § 31.2; 4 GAO 6.10; B-190771, April 17, 1978; B-171732, March 24, 1971. However, a claim must be in writing and must be signed by the claimant or his authorized agent or attorney. 4 C.F.R § 31.2; see also 18 Comp. Gen. 84, 89 (1938).

(c) No Minimum Amount

There is no minimum amount for filing of claims. B-180163, January 9, 1974. However, claims for $25 or less may be settled by the administrative agency even if they involve doubtful questions of law or fact, in reliance upon written advice from appropriate agency officials. 4 GAO 5.3; B-192246, January 8, 1979.

(d) GAO vs. Agency Adjudication

Not all claims falling within GAO's claims settlement jurisdiction are actually adjudicated by GAO. As a practical matter, a large proportion of claims against the Government are adjudicated and either paid or denied directly by the agency involved. In such cases, GAO fulfills its statutory responsibility by virtue of its audit and account settlement functions. 4 GAO 3.1. However, certain categories of claims require direct settlement by GAO. These are set forth in 4 GAO 5.1 as follows:

1. Claims which involve doubtful questions of law or fact, except that claims of $25 or less may be settled by the cognizant agency (4 GAO 5.3).

2. Claims which are required by statute, regulations, or decision of the Comptroller General to be settled in GAO before payment is made or denied. (See, for example, "Claims After Expiration of Agency or Commission," infra, this Chapter.)

3. Reclaims of items previously disallowed by the administrative agency, unless the agency determines that its original disallowance was clearly in error.

Generally, a claimant should file his claim first with the agency involved. 4 C.F.R § 31.4; 4 GAO 6.3. If the statute of limitations is close to expiring (Section B(1), infra), however, it may be desirable to file directly with GAO. If a claim is filed with GAO and there is no indication that the cognizant agency has considered the matter, the claim will be returned to the claimant with instructions to submit it to the appropriate agency.

If the agency determines that the claim does not involve a doubtful question of law or fact and does not otherwise require direct settlement by GAO, the agency may proceed to allow or disallow the claim. If the agency pays the claim, the matter is ended, subject to subsequent GAO audit. If the agency denies the claim, the claimant may (1) "reclaim," that is, seek reconsideration by the agency in accordance with whatever regulations the agency may have, or (2) seek review by GAO. If the agency determines that the claim is a "doubtful claim" (4 GAO 5.2), the agency should refer the claim to GAO.

(e) Responsibilities Within GAO

Claims at GAO are handled initially by the Claims Group, Accounting and Financial Management Division. 6/ Upon referral of a claim by an agency or upon appeal by a claimant, the claim will be reviewed by a claims adjudicator. If not included as part of the submission, the agency will be requested to furnish an administrative report, to include the agency's recommendation and a citation to the appropriation to be charged in the event the claim is allowed. 4 GAO 8.2. Of course, the claimant may also submit any material he wishes to have considered. The Claims Group will then allow or disallow the claim. See 4 C.F.R. § 31.8.

If a claim involves a doubtful legal issue, the Claims Group may seek advice from the Office of General Counsel, which will be provided in the form of an "Office Memorandum." An Office Memorandum is not a decision of the Comptroller General, but merely internal advice as to the disposition of a particular claim. B-153419, November 2, 1964. However, since Office Memoranda are useful in providing guidance on future similar claims where no formal decisions may exist, they are cited in this Chapter as appropriate.

6/ The GAO Claims Group has undergone considerable evolution in recent years. Formerly known as the Transportation and Claims Division, it became the Claims Division in 1974 when legislation transferred the audit of transportation payments from GAO to the General Services Administration. In 1980, it was merged with the Financial and General Management Studies Division (FGMSD) and became known as the Claims Group. FGMSD was redesignated as the Accounting and Financial Management Division later that year. As a general proposition, the GAO Claims Group does not settle claims against GAO. Claims by GAO employees or where GAO is the cognizant agency are settled by other GAO divisions to whom the Comptroller General has delegated the authority in specific contexts (for example, the Office of General Counsel for claims under the Federal Tort Claims Act and the Administrative Finance Section, Office of Budget and Financial Management, for claims under the Military Personnel and Civilian Employees' Claims Act of 1964).

(f) Effect of Claim Settlement

While a claim settlement may effectively dispose of a particular claim and, as a practical matter, may well be useful in providing guidance for the future, a claim settlement does not constitute a decision of the Comptroller General and will not necessarily be followed as a precedent. 7/ This principle is stated in 4 GAO 14.2 as follows:

> "Settlement of an individual claim by the Claims [Group] is not to be regarded as a precedent for the guidance of accountable or other administrative officers."

Unless revised by or at the direction of the Comptroller General (see below), a claim settlement is final and conclusive on the executive branch. 4 GAO 14.1. Once a settlement certificate has been issued, no other agency is authorized to modify or change it, even to correct an obvious error. The correct procedure is to return it to GAO. A-13727/B-8177, March 28, 1940.

(g) Reconsideration

GAO's policy on reconsideration of claims settlements is stated in 4 C.F.R. § 32.1:

> "Settlements made pursuant to 31 U.S.C. 71 will be reviewed (a) in the discretion of the Comptroller General upon the written application of (1) a claimant whose claim has been settled or (2) the head of the department or Government establishment to which the claim or account relates, or (b) upon motion of the Comptroller General at any time."

A request for reconsideration will be reviewed initially by the Claims Group. If the request clearly establishes that the original settlement was in error, the Claims Group will make appropriate revision. In other cases, the Claims Group will either respond with a letter of explanation or will refer the matter to the Comptroller General, in which event a formal decision will be rendered.

7/ The principle has been stated in numerous decisions. See, for example, 11 Comp. Gen. 365, 367 (1932); 17 Comp. Gen. 445, 449 (1937); 18 Comp. Gen. 609 (1939); 20 Comp. Gen. 403 (1941); 23 Comp. Gen. 310 (1943); 42 Comp. Gen. 337, 338 (1963); 43 Comp. Gen. 788, 792 (1964); 52 Comp. Gen. 751 (1973); B-193445, August 1, 1979; B-153419, November 2, 1964.

As reflected in the above-quoted regulation, reconsideration by the Comptroller General of a claim settlement is discretionary and not a requirement of "due process." 21 Comp. Gen. 244 (1941). There is no definite time limit for filing a request for reconsideration. GAO will apply a standard of reasonableness based on the facts and circumstances of the particular case. Requests for reconsideration have been found untimely in the following cases:

1. Personnel claims: B-184971, June 4, 1976 (27 years); B-185026, May 27, 1976 (11 years); B-164378, April 28, 1976 (9 years); 32 Comp. Gen. 107 (1952) (1 year and 8 months).

2. Transportation claims: B-155521, February 23, 1965 (8 years); B-147781, September 21, 1967 (5 years); B-157883, December 30, 1965 (3 years).

(h) Basis of Settlement

GAO settles a claim on the basis of the written record presented by the parties. GAO does not conduct adversary hearings or take oral testimony. 4 C.F.R. § 31.7; B-197884, July 15, 1980; B-196686, January 17, 1980; B-192831, April 17, 1979; B-188023, July 1, 1977; B-187891, June 3, 1977; B-186763, March 28, 1977. 31 U.S.C. § 71 does not authorize GAO to issue a subpoena duces tecum. B-122885, August 24, 1955. As stated in 4 C.F.R. § 31.7, "Settlements are founded on a determination of the legal liability of the United States under the factual situation involved as established by the written record." The settlement of a claim by GAO on the basis of the written record has been held not a denial of due process. B-196924, May 20, 1980; 21 Comp. Gen. 244 (1941).

GAO is authorized to settle claims only on the basis of applicable legal principles and not on the basis of moral obligations. 42 Comp. Gen. 124, 142 (1962); B-175670, May 25, 1972. If substantial defenses in law exist, GAO must disallow the claim. 42 Comp. Gen. at 142, supra. However, 31 U.S.C. § 71 does authorize GAO, in the exercise of its claims settlement function, to render decisions making an original construction or modifying an existing construction of statutes involved in the settlement of a claim. 19 Comp. Gen. 478 (1939).

Since claims may be allowed only on the basis of legal liability, an agency has no authority to issue regulations purporting to accept liability on claims it perceives to be fair and equitable. B-201054, April 27, 1981. This is but a corollary of the principle that no one is authorized to give away Government money or property.

(i) Burden of Proof: Evidentiary Requirements

The burden of proof in establishing the liability of the United States is on the claimant. 4 C.F.R. § 31.7; 31 Comp. Gen. 340 (1952); 18 Comp. Gen. 980 (1939); 20 Comp. Dec. 263 (1913); B-196686, January 17, 1980; B-192326, November 30, 1978; B-179942, July 9, 1974.

There is no hard-and-fast rule as to what evidence is required to support a claim. The Comptroller General has viewed 31 U.S.C. § 71 as giving GAO discretion in determining the quantum of evidentiary support necessary to establish the liability of the United States. 55 Comp. Gen. 402 (1975); 22 Comp. Gen. 269 (1942); B-190771, April 17, 1978; B-188238, May 20, 1977; B-184305, December 22, 1976. Generally, the claimant should submit the "best evidence obtainable." 55 Comp. Gen. 402, 404, supra. A phrase frequently found in the decisions is that the evidence must be "clear and convincing." E.g., B-187857, July 26, 1977; B-177639, March 9, 1973.

In most cases, the information necessary to establish liability will be found in records maintained by the Government. B-179942, July 9, 1974. Non-availability of Government records will present evidentiary problems. The general rule is that, where Government records have been destroyed pursuant to law or are unavailable due to lapse of time, and there is no other documentation available from any source to establish the liability of the United States, the claim must be denied. B-188041, April 22, 1977; B-190599, December 9, 1977 (appeal from settlement 28 years later); B-190078, November 17, 1977 (claim for Navy savings deposit account not withdrawn at time of discharge in 1921); B-187523, November 9, 1976 (1976 claim for mustering-out pay from Korean War); B-183316, April 21, 1975 (claimant alleged that an ancestor had made a 100-year loan of $30,000 to the Government during the Civil War but could offer no proof of the transaction); B-179942, supra (claim alleging non-receipt of Government check; neither claimant nor agency could identify date, amount, or purpose of check).

The absence of Government records, however, is not necessarily an absolute bar to allowance, and GAO will review the claim in light of the best evidence available under the circumstances. B-178664-O.M., June 14, 1973; B-193023-O.M., January 18, 1979. In the latter case, a claim by the United Kingdom for fuel delivered to a Navy vessel was allowed where the Navy verified receipt of the fuel but was unable to determine from official records whether payment had been made. A claim was allowed under similar circumstances in B-187877,

April 14, 1977. However, similar claims were disallowed in B-187857, December 23, 1976, and B-184712, March 3, 1976, where the evidence was insufficient to clearly establish delivery.

Cases involving military records destroyed in the 1973 fire at the Personnel Records Center, St. Louis, Missouri, further illustrate these evidentiary problems. In B-183900, August 3, 1976, a claim was disallowed because no other records could be produced to substantiate the claim. In another case, GAO reviewed regulations to determine whether the department's policy during the times in question supported the claimant's allegations, but disallowed the claim because the regulations did not provide the support as alleged. B-188489, April 5, 1977.

If the record presents an irreconcilable dispute of fact, GAO will accept the agency's version and disallow the claim. B-192831, April 17, 1979. An "irreconcilable dispute of fact" does not mean merely that the claimant and the agency disagree on something. It means a conflict that cannot be resolved without adversary proceedings. B-187891, June 3, 1977. Cf. 21 Comp. Dec. 134, 138 (1914). The reason for this policy is that the claimant would still have recourse to the courts whereas the agency would not.

(j) Judicial Review

While GAO's action will be binding on the executive branch, it is not binding on the claimant. Thus, disallowance of a claim by GAO does not preclude the claimant from seeking judicial relief, assuming recourse to the courts would have been available in the first place. B-164036, December 19, 1967; A-87280, January 22, 1938; 21 Comp. Gen. 244, 250 (1941). There is no requirement to present a claim to GAO before going to court. B-164036, supra.

(k) Expenses of Claim Preparation

In the absence of statutory authority, expenses incurred by a claimant in the preparation, presentation, and proof of an administrative claim may not be reimbursed. 8 Comp. Dec. 498 (1902); 17 Comp. Gen. 831 (1938); B-35644, April 19, 1948; B-121929, December 8, 1954. For related concepts, see Chapter 12, this Manual (costs and attorney's fees in the judgment context) and Chapter 3, this Manual (attorney's fees in administrative claims). A somewhat related type of claim is a claim for bid preparation costs by one who has bid unsuccessfully for a Government contract. These may be allowed in limited circumstances. See, e.g., B-193595, September 22, 1980. They are handled by OGC's Procurement Law group and are beyond the scope of this Manual.

(l) Records Disposal

An agency may not dispose of records pertaining to a claim by or against the Government prior to GAO settlement except upon the written approval of the Comptroller General. 44 U.S.C. § 3309.

(m) Payment to Wrong Person

If, through administrative mistake of fact or law, a payment is made to a person not entitled to it, and it is clear that some other person is entitled to it, payment should be made to the proper claimant. The agency should take action to recover from the first payee, but payment to the proper claimant should not be held up pending recovery of the erroneous payment, even though this may result in a duplicate payment. 2 Comp. Gen. 102 (1922); 19 Comp. Gen. 104 (1939); 37 Comp. Gen. 131, 133 (1957); B-98609, November 14, 1950.

(n) Subrogation Claims

Finally, GAO will consider subrogation claims where appropriate. The doctrine was summarized as follows in B-190771, April 17, 1978:

> "The doctrine of subrogation applies where one person pays a debt for which another is primarily liable provided that the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability; it applies where a party is compelled to pay the debt of a third person to protect his own right or interest, or to save his own property. * * * [I]t is well settled that subrogation never lies where one who is merely a volunteer pays the debt of one person to another."

B. GENERAL CONSIDERATIONS

(1) Statute of Limitations

Informally known as the "Barring Act," 31 U.S.C. § 71a provides a six-year statute of limitations on the filing of claims cognizable by GAO. Originally enacted in 1940, the statute provided a ten-year limitation which was reduced to six years in 1975. See 58 Comp. Gen. 738 (1979).

The statute provides that a claim or demand "cognizable by the General Accounting Office" under 31 U.S.C. § 71 "shall be forever barred unless such claim, bearing the signature and address of the claimant or of an authorized agent or attorney, shall be received in said office within 6 years after the date such claim first accrued."

While a claimant who files a barred claim may be furnished an explanation as a matter of courtesy, the statute authorizes a rather abrupt response. It provides that a barred claim "shall be returned to the claimant, with a copy of [31 U.S.C. § 71a], and such action shall be a complete response without further communication." Prior to 1980, claims which appeared to be barred were required to be submitted to GAO for direct settlement. Under current procedures, the receiving agency can advise a claimant that GAO will determine the claim to be barred if it has not been received in GAO within six years after its date of accrual. Current procedures are contained in circular letter B-198713, July 29, 1980.

31 U.S.C. § 71a expressly exempts claims by "any State, Territory, possession or the District of Columbia." It therefore applies essentially to claims by individuals and business entities. The exemption for claims by a State does not extend to claims by a city, county, or other political subdivision. B-159110, June 27, 1966; B-199838, October 20, 1981.

The purpose of a statute of limitations is to bar stale claims. The theory is that "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944); Twitchco, Inc. v. United States, 348 F. Supp. 330 (M.D. Ala. 1972).

The Barring Act is limited to claims cognizable by GAO under 31 U.S.C. § 71. Thus, if an agency has authority to make "final and conclusive" settlement of claims of a given type,

31 U.S.C. § 71a will not apply. See 42 Comp. Gen. 337, 339 (1963). However, if a claim is within GAO's claims settlement jurisdiction, the Barring Act will apply and this is not affected by the fact that the administrative agency involved might perform the actual adjudication (for example, non-doubtful claims). Id. The Barring Act does not apply to court judgments even though GAO issues a "settlement" on them (see Chapter 12, this Manual), since this authority does not stem from 31 U.S.C. § 71. B-49485-O.M., June 3, 1946.

Numerous other statutes of limitations exist in various contexts. See, for example, the OGC Transportation Law Manual for discussion of statutes of limitations in transportation matters. If a more specific statute of limitations relates to claims cognizable by GAO, its relationship to the Barring Act will depend on whether it applies to the administrative settlement of claims or is limited to the filing of suit. A specific statute of limitations applicable to administrative settlement will take precedence over 31 U.S.C. § 71a, the more general provision. See 4 C.F.R. § 31.5.

However, the Comptroller General has frequently held that time limitations applicable to the commencement of "actions at law" do not affect GAO's administrative settlement jurisdiction. An early discussion of this point appears in B-15487, February 16, 1948, in which it was held that the expiration of the time limit for filing suit in the Court of Claims did not preclude administrative settlement by GAO. 8/ The principle was restated in 29 Comp. Gen. 54 (1949). To take a more recent illustration, the time limit for filing a claim under the Fair Labor Standards Act is the six years prescribed by 31 U.S.C. § 71a, notwithstanding a two-year statute of limitations for commencing actions at law. Thus, a claim filed under the FLSA more than two years but less than six years after it accrued could still be considered administratively, although the claimant would have lost his recourse to the courts. 57 Comp. Gen. 441 (1978).

The principle has also been applied with respect to shorter statutes of limitations in the Communications Act (51 Comp. Gen. 20 (1971); B-199458-O.M., February 23, 1981) and the Suits in Admiralty Act (29 Comp. Gen. 54, supra; B-158984-O.M., June 13, 1966).

8/ The general statutes of limitations applicable to filing suit in the district courts and the Court of Claims, 28 U.S.C. §§ 2401(a) and 2501, are six years. Prior to the 1975 amendment to 31 U.S.C. § 71a, the Barring Act was ten years. Now, they are all the same.

The Barring Act requires that the claim be "received in" GAO within the six-year period. Thus, the claim must be filed with GAO and filing with the agency whose actions gave rise to the claim will not satisfy 31 U.S.C. § 71a. 57 Comp. Gen. 281, 283 (1978); 53 Comp. Gen. 148, 155 (1973); 42 Comp. Gen. 337, 339 (1963); 32 Comp. Gen. 267 (1952); B-201707, July 14, 1981; B-161809, July 5, 1967.

However, section 71a does not specify who must file the claim with GAO. Therefore, where the claimant has filed directly with the cognizant agency, transmittal to GAO by the agency will be sufficient to stop the running of the statute. Nevertheless, the responsibility rests with the claimant (see 4 C.F.R. § 31.5(a)), and the agency's failure to transmit the claim, or a copy of it, to GAO will not prevent the operation of the Barring Act. 57 Comp. Gen. 281 (1978); B-201936, April 21, 1981. This result has been applied even where the personnel officer of the cognizant agency presents a sworn statement that he mailed the claim to GAO but GAO had no record of ever having received it. B-195564, September 10, 1979. In short, the statute continues to run until the claim is received in GAO. It is the receipt and not the mailing that counts.

Section 71a requires that the claim bear "the signature and address of the claimant or of an authorized agent or attorney." The purpose of the signature requirement is to assure "that the claimant is still alive, that the record address is still the proper address, that the claimant himself may not have waived or forfeited his right to the amount involved" and that "the check in payment of the claim would reach the claimant himself." 24 Comp. Gen. 9, 11 (1944). At one time, GAO required the original signature. Present policy is that a photostat bearing a facsimile signature is acceptable (for example, where a claimant files with another agency and the agency sends a copy to GAO), at least where the original is subsequently received. B-194444-O.M., September 26, 1979. A communication from an agency on behalf of a claimant is not a "claim" for purposes of the Barring Act. 25 Comp. Gen. 670, 673 (1946). Nor is an agency's request for an advance decision, unless accompanied by a voucher signed by the claimant. B-201936, April 21, 1981; 60 Comp. Gen. 354 (1981).

GAO has no authority to waive the Barring Act or to extend the time limit. 42 Comp. Gen. 622, 624 (1963); 25 Comp. Gen. 670, 672 (1946); B-196634, December 13, 1979; B-161812, September 22, 1967.

The six-year period begins to run from the date the claim first accrued. A claim first accrues "on the date when all events have occurred which fix the liability, if any, of the United States and entitles the claimant" to sue or to file a claim. Empire Institute of Tailoring, Inc. v. United States, 161 F. Supp. 409 (Ct. Cl. 1958); 42 Comp. Gen. 337 (1963); 42 Comp. Gen. 622 (1963). Where a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract. Cannon v. United States, 146 F. Supp. 827 (Ct. Cl. 1956). See also 44 Comp. Gen. 1, 7 (1964).

Thus, in one case, a school claimed tuition payments for courses of instruction given to veterans. The pertinent agreement provided for payments to be made "each four weeks in arrears." GAO found that a new claim accrued when each payment became due (that is, during each four-week period), notwithstanding that the school may have reserved an option to delay billing until courses had been completed. B-147497, August 31, 1964.

The time of accrual may be postponed by administrative proceedings under a "disputes" clause. See B-162293, September 29, 1967.

A claim for back pay first accrues when the work is performed. 58 Comp. Gen. 3 (1978). Where the work is continuing, the claim accrues on a daily basis. 29 Comp. Gen. 517 (1950); B-195564, September 10, 1979.

The following decisions concern the date of accrual in the contexts indicated: 35 Comp. Gen. 600 (1956) (claim for benefits under the Missing Persons Act); 42 Comp. Gen. 337 (1963) (claim for reimbursement arising from refund of purported overpayment of retired pay); 42 Comp. Gen. 622 (1963) (claim for death gratuity payable to survivors of certain deceased armed forces personnel); 45 Comp. Gen. 172 (1965) (effect of correction of military records on claim for disability retirement pay); 45 Comp. Gen. 249 (1965) (claim for refund arising from GAO Notice of Exception).

When a right depends upon the happening of an event or contingency, the claim based on that right does not accrue, and hence the statute of limitations does not begin to run, until the happening of that event or contingency. 20 Comp. Gen. 734 (1941). Thus, where, by statute, a claim is not cognizable until some particular determination is made by a designated Government agency, the claim does not accrue

until that determination has been made. 34 Comp. Gen. 605 (1955); 50 Comp. Gen. 607 (1971); 61 Comp. Gen. ___ (B-201633, October 29, 1981). An example is the entitlement to benefits under the Missing Persons Act. 35 Comp. Gen. 600 (1956). However, this concept does not apply to a "determination of validity" by virtue of a decision of the Comptroller General. 58 Comp. Gen. 3 (1978).

The Barring Act contains a tolling provision for certain wartime claims. When a claim of any person serving in the United States military or naval forces accrues in time of war, or when war intervenes within five years after its accrual, the claim may be presented within five years after peace is established. The Comptroller General held that this provision did not apply to a civilian employee of the Navy Department interned with the crew of the U.S.S. Pueblo in North Korea in 1968 who filed a claim for overtime compensation for his internment in 1968. The claim was not received in GAO until 1977 and was therefore barred from consideration. B-194474, May 3, 1979, affirmed in B-194474, October 24, 1979.

Another statutory provision relevant to claims of military personnel is section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C. App. § 525, which provides that periods of military service shall not be included in applying a statute of limitations, whether the claim or cause of action accrued prior to or during the service. E.g., 36 Comp. Gen. 645 (1957); 41 Comp. Gen. 812 (1962).

The Barring Act does not apply to claims for money held by the Government in trust for others. This concept embraces funds deposited with the Government under statutory authority which the Government holds in the Treasury as funds of the depositor rather than as appropriated funds of the Government, such as savings deposits of enlisted members of the uniformed services. 42 Comp. Gen. 622, 623 (1963); B-142673-O.M., June 30, 1960; B-126384-O.M., January 5, 1956. A specific example of a trust account to which the Barring Act does not apply is the account for "Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown" (31 U.S.C. §§ 725p, 725s). B-103575, August 27, 1951. 9/ Moneys erroneously transferred from a trust account to a non-trust account do not lose their trust fund status for purposes of the Barring Act. B-134569-O.M., January 13, 1958.

9/ Payments from the "Unclaimed Moneys" account are made directly by the Treasury Department, without GAO settlement, from the permanent indefinite appropriation established by 31 U.S.C. § 725p-1. B-142380, March 24, 1960; Treasury Department Fiscal Requirements Manual, Vol. I, Part 6, Chapter 3000.

If securing the necessary evidentiary support is likely to cause substantial delay, a claimant may protect his rights against possible bar by the statute of limitations by filing his claim subject to later completion of the supporting evidence. See B-197661, May 22, 1980. See also United States v. Kales, 314 U.S. 186 (1941).

Finally, the Barring Act applies to claims cognizable under the Meritorious Claims Act, infra, this Chapter.

(2) Assignment of Claims

(a) Introduction

The assignment of claims against the United States is governed by the Assignment of Claims Act of 1940, as amended, 31 U.S.C. § 203 and 41 U.S.C. § 15. In brief, the Act prohibits the assignment of claims except under very rigid conditions and prohibits the transfer of contracts, but permits the assignment of contract proceeds within limits. Although the present statutory scheme derives from the 1940 legislation, the anti-assignment concept dates back to the 19th century. See 9 Stat. 41 and 10 Stat. 170.

The portion of the statute prohibiting the assignment of claims is found in the first paragraph of 31 U.S.C. § 203. Except for an authorized assignment of contract proceeds, an assignment of a claim against the United States will be "null and void" unless it is executed in the presence of at least two attesting witnesses "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." "Warrant" in this context means the check itself. 8 Comp. Gen. 184 (1928).

The purposes of the prohibitory aspects of the Act are (1) to prevent the harassment caused by multiplying the number of persons with whom the Government must deal; (2) to prevent possible multiple payment of claims; (3) to make unnecessary the investigation of alleged assignments, powers of attorney, and other authorizations; (4) to enable the Government to deal exclusively with the original claimant or contractor, and (5) to preserve for the Government those defenses which it may have to claims by way of setoff and counterclaim which might not be applicable to an assignee. B-194029, June 18, 1979. The statute is intended to protect the Government and not the parties to the assignment. 47 Comp. Gen. 522, 524 (1968).

The first paragraph of 41 U.S.C. § 15 prohibits the transfer of contracts. The purposes of the prohibition against the transfer of contracts have been stated as follows:

> "(1) to secure to the Government the personal attention and services of the contractor, (2) to render the party performing the contract liable to punishment for fraud or neglect of duty, (3) to prevent parties from acquiring a mere speculative interest in a Government contract, and (4) to prevent speculators from selling such contracts at a profit to bona fide bidders and contractors." 52 Comp. Gen. 462, 465-66 (1973).

The provisions of the Act permitting the assignment of contract proceeds--in effect, all of 31 U.S.C. § 203 and 41 U.S.C. § 15 except for the first paragraph of each section--were added in the 1940 revision. The purpose of the 1940 legislation, designed primarily to aid in the defense production efforts of the time, was to induce financial institutions to lend money to Government contractors with which to finance the performance of their Government contracts. The inducement was security in the form of assignment of the contract proceeds. See 55 Comp. Gen. 155, 157 (1975). The need for this type of financial inducement is all the more apparent in view of the statutory prohibition on advance payments (Chapter 4, this Manual).

Although 31 U.S.C. § 203 declares assignments of claims not meeting the statutory requirements to be "absolutely null and void," its provisions have been held applicable only to voluntary assignments of claims against the United States. 36 Comp. Gen. 157 (1956). Assignments arising by operation of law (for example, pursuant to court order) are, therefore, not prohibited. Examples of assignments or transfers that are deemed to arise by "operation of law" and are therefore exempt from the anti-assignment prohibition include the following:

--Transfers by intestate succession or testamentary disposition (will): Erwin v. United States, 97 U.S. 392 (1878).

--Transfers by consolidation or merger to the successor of a claimant corporation: Seabord Air Line Ry. v. United States, 256 U.S. 655 (1921).

--Transfers by judicial sale: Western Pacific RR. Co. v. United States, 268 U.S. 271 (1925).

--Transfers by subrogation to an insurer: United States v. Aetna Casualty and Surety Co., 338 U.S. 366 (1949).

--Transfers by statutory provision to a trustee or receiver in bankruptcy: McKay v. United States, 27 Ct. Cl. 422 (1892). Similarly, a subsequent assignment by the assignee in bankruptcy is also valid when judicially mandated. 3 Comp. Gen. 623 (1924); B-183058, March 7, 1975.

--Transfers by voluntary assignment of all the assets of an insolvent debtor for the benefit of creditors: Goodman v. Niblack, 102 U.S. 556 (1880).

The foregoing examples and citations have been taken for the most part from Patterson v. United States, 354 F.2d 327, 329-330 (Ct. Cl. 1965). See also 47 Comp. Gen. 522, 524 (1968).

The Assignment of Claims Act addresses the validity of assignments as against the United States. It does not purport to address the validity of the assignment as between the assignor and assignee, which is a separate question. Thus, an assignment which is invalid under the Assignment of Claims Act may nevertheless be valid as between the parties. For example, the Comptroller General noted in B-176890, April 18, 1973, that an assignment executed in connection with the giving of a surety bond, while not valid against the Government, was still effective between the parties. The rationale is that the Act was designed only for the protection of the United States. See also B-169420, September 4, 1970, and B-169420, October 22, 1970.

Since the prohibition against assignments is for the Government's protection, it may be waived by the Government in appropriate circumstances. Benjamin v. United States, 318 F.2d 728 (Ct. Cl. 1963). See also following discussion of "Permissible Assignments Under the Assignment of Claims Act."

Liens asserted by attorneys for the successful prosecution of claims against the Government have been held to operate as voluntary assignments and are therefore void as against the United States unless they meet the requirements for validity imposed by 31 U.S.C. § 203. Thus, an attorney's retainer or contingent fee agreement based on a percentage of the amount to be recovered does not create an enforceable lien against the United States, regardless of its validity as between the attorney and client. See 49 Comp. Gen. 44, 47 (1969); B-179424, November 13, 1973; B-63597, February 21, 1952; B-68587, November 10, 1949; B-68587, July 14, 1949.

The Assignment of Claims Act has been the subject of numerous decisions of the courts as well as the Comptroller General. The discussion in this Manual attempts to present the issues from the perspective of the GAO decisions. While some of the court cases are cited here and many others are cited and discussed in the decisions, the reader is cautioned to include the judicial decisions in his research to assure a thorough coverage.

(b) Permissible Assignments Under the Assignment of Claims Act

The Assignment of Claims Act permits the assignment to a bank, trust company, or other financing institution, of moneys due or to become due from the United States under a contract providing for payments aggregating $1,000 or more.

The authority is not unrestricted, however. Thus, the Act does not authorize an assignment to an assignee acting merely as a collection agent. The assignee (bank, trust company, or other financing institution) must have a financial interest in the contractor's operations under the contract. Generally, this means that the assignment must secure a loan which the assignee has made to the assignor to finance the assignor's performance of the contract. Without this financial participation by the assignee, the assignment is not valid against the Government. E.g., B-171552, April 27, 1971; B-175670, May 25, 1972.

The loan need not have been made to finance performance of the particular contract whose proceeds are being assigned. If the assignor has several Government contracts, it is sufficient that the loan was made for the purpose of financing Government contracts in general. Peterman Lumber Company v. Adams, 128 F. Supp. 6 (W.D. Ark. 1955); 49 Comp. Gen. 44, 46 (1969).

The statute provides that the assignment must cover all amounts payable under the contract. Partial assignments are invalid unless expressly permitted by the contract. B-172059, June 29, 1971.

The statute also provides that, unless expressly permitted by the contract, an assignment may not be made to more than one party. See 39 Comp. Gen. 533 (1960); B-155400, December 3, 1964. However, an assignment may be made to one party as agent or trustee for two or more parties participating in the financing. (See "What Is A Financing Institution," infra.)

The authority to assign contract proceeds does not include the authority to assign the right to settle, adjust, or compromise claims. A purported assignment of this right need not be recognized by the United States. 35 Comp. Gen. 104 (1955).

Although the Act permits the assignment of accounts receivable under a contract, it does not permit an assignment of the contract itself. 52 Comp. Gen. 462, 464 (1973); 20 Comp. Gen. 295 (1940). As noted above, transfer of a contract is expressly prohibited by 41 U.S.C. § 15.

However, certain types of transfer are permissible. For example, transfer of title to premises leased to the Government, where the lessor has nothing to do but collect the rent, does not violate the statute and the rent may be paid to the transferee. 9 Comp. Gen. 72, 73 (1929); 52 Comp. Gen. 462, 466 (1973). Also, transfers of Government contracts incident to a corporate merger or consolidation, the sale of an entire business, or the transfer of the entire portion of the business embraced by the contract have been held valid. 51 Comp. Gen. 145 (1971); 48 Comp. Gen. 196 (1968); 9 Comp. Gen. 72, supra. The rationale in some cases has been that the transfer was not an assignment within the scope of the Assignment of Claims Act. E.g., 9 Comp. Gen. 72. In other cases, the Comptroller General has recognized that, since the Act is intended for the protection of the Government, the Government "may treat a contract as annulled by an assignment or recognize the assignment as the circumstances in a particular case may warrant." 32 Comp. Gen. 227, 228 (1952). Thus, in a case involving the leasing of copying equipment to the Navy, the Comptroller General did not object to the Navy's recognizing an attempted novation agreement under which the original lessor transferred all of its assets pertaining to the Navy leases to a bank. B-184665, September 25, 1975. See also 53 Comp. Gen. 124 (1973).

Where a prime contractor retains responsibility for contract performance, subcontracting of a substantial portion of the work under the contract is not considered an assignment of that contract. B-186341, September 7, 1976.

The Act prescribes notice requirements which must be met in order for the assignment to be valid against the United States. The assignee must:

> "file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment."

An assignment does not become effective until receipt of notice by the United States as specified in the statute. 55 Comp. Gen. 744 (1976); B-185962, April 7, 1976; B-184665, September 25, 1975.

Where notice of the assignment is given and received in accordance with the statute and, notwithstanding, the contracting agency later sends a payment to the contractor-assignor, the United States will be liable to the assignee for the amount of the erroneous payment. Central National Bank of Richmond v. United States, 91 F. Supp. 738 (Ct. Cl. 1950); B-158212, February 21, 1966.

However, in order for this liability to attach, the assignment must be in strict compliance with the statutory requirements. Thus, in one case where the agency paid the contractor after receiving notice of an assignment, the Comptroller General denied the assignee's claim because the assignment had no validity against the United States in that there had been no loan by the assignee to the assignor to finance performance of the contract. B-175670, May 25, 1972. A similar claim was denied where the assignee gave the required notice to the contracting officer but not to the designated disbursing officer. Although the contracting officer had in turn notified the disbursing officer, this "second hand" notice was delayed through administrative oversight. The assignee, since it had the statutory responsibility for giving proper notice, had to bear the risk of any resulting delay in notifying the disbursing officer. B-159494, September 2, 1966.

The Act also requires written notice of the assignment to applicable sureties but does not prescribe any time limit within which the written notice must be given. Thus, in 22 Comp. Gen. 520 (1942), it was held that a delay of five months on the part of an assignee bank in filing written notice with the surety did not subordinate its rights to those of the surety with respect to future payments, at least where the surety was unable to show that the delay had operated to its (the surety's) prejudice.

Assignments may be made under Letters of Intent or Notices of Award to the extent that they give rise to valid contracts. B-29624, October 29, 1942. Assignments may not be made, however, until a contract obligation actually arises. B-24402, September 21, 1942. One instrument of assignment may cover several contracts. Id.

As a general proposition, an assignment of a claim against the Government should specify the particular contract involved, and, therefore, a blanket assignment does not meet the requirements of the Act. B-120222, October 27, 1955; B-195629, September 7, 1979. However, the lack of specificity of a blanket assignment can be cured for purposes of perfecting a valid assignment under the Act when "there are in existence later amendment schedules [specifying the Government contract] signed by the assignor, which purport to be an integral part of the original [blanket] assignment instrument." B-171125, February 4, 1971. Likewise, an assignor's secured note which assigned his accounts receivable to a financial institution and which was executed during the period of the Government contract, was recognized under the Assignment of Claims Act where the contractor/assignor's schedule of accounts receivable listed the Government contract account. 58 Comp. Gen. 619 (1979).

Payments under bills of lading which are themselves contracts may be assigned so long as each bill provides for payment of $1,000 or more. 21 Comp. Gen. 265 (1941). Where goods are transported pursuant to a previously executed contract, the bills of lading are merely a receipt for the goods to be transported, and payment for the transportation is made under the previously executed master contract rather than under a particular bill of lading covering the service. In this situation, the $1,000 limit in the Assignment of Claims Act applies to the aggregate. 23 Comp. Gen. 989 (1944). 10/

Payments under an indefinite quantity contract cannot be assigned unless the contract gives rise to a definite commitment on the part of the Government to order services or supplies requiring a minimum expenditure of $1,000. 50 Comp. Gen. 434, 440 (1970); 26 Comp. Gen. 874 (1947); 23 Comp. Gen. 989 (1944).

Assignment of an amount payable or to become payable under a Government contract includes any additional amounts which may become due pursuant to a change order or modification of the original contract. 23 Comp. Gen. 943 (1944).

Payments due under a contract may be assigned at any time before the contract is closed. B-125205, November 14, 1955. There is no requirement that the assignment be made before the work is completed.

10/ See the OGC Transportation Law Manual for more detailed discussion of assignment of claims in the transportation context.

Assignments valid under the Act remain in effect until formally released by the assignee. B-122052-O.M., January 18, 1955; B-119142, October 1, 1954. For example, a letter from an assignee stating that all loans made in consideration of the assignment had been repaid in full and that the assignee's only interest in the assignment was to collect for the subcontractor, was construed by the Comptroller General as "a gratuitous explanation of intended disposition of further payments" and not as a release. B-122052, January 18, 1955. The release of an assignment, once made, may not be subsequently withdrawn. B-26651, January 9, 1943. Notwithstanding, previously released assignments of payments due or to become due may be reassigned by the original assignor. B-33501, April 1, 1943. A subsequent assignment by the original assignee, however, will not operate to release the original assignment, and without the release of the first, is "null and void" under the statute. 22 Comp. Gen. 520, 524-525 (1942); B-40491, March 17, 1944.

(c) What Is A "Financing Institution"?

The Assignment of Claims Act permits the assignment of contract proceeds to a "bank, trust company, or other financing institution." If the assignee is not a "bank, trust company, or other financing institution," the assignment will be valid only if it meets the rigid criteria prescribed in the first paragraph of 31 U.S.C. § 203. B-171125, February 4, 1971; 22 Comp. Gen. 44 (1942).

A "financing institution" is one which deals in money, as distinguished from other commodities, as the primary function of its business activity. 22 Comp. Gen. 44, 46 (1942); 31 Comp. Gen. 90 (1950). A "factor" or "factoring company" (one which purchases merely the accounts receivable) is a financing institution to which assignments can be made under the Act. 20 Comp. Gen. 415 (1941). So is a small business investment company. 43 Comp. Gen. 138 (1963).

The institution may be an individual or a partnership as well as a corporate organization. 20 Comp. Gen. 415, supra; 22 Comp. Gen. 44, supra; 31 Comp. Gen. 90, supra. However, an ordinary corporation which incidentally provides financing to its suppliers or to others with whom it deals is not a "financing institution" under the Act. 22 Comp. Gen. 44, supra. Likewise, an individually owned insurance agency not regularly engaged in the business of financing is not a "financing institution" within the Act merely because it extends credit in the course of its primary business activities. 21 Comp. Gen. 120 (1941).

In addition, the following have been held not to qualify as "financing institutions" for purposes of the Assignment of Claims Act:

--A surety. Royal Indemnity Co. v. United States, 93 F. Supp. 891 (Ct. Cl. 1950); B-187456, November 4, 1976; B-155944, February 10, 1965.

--A subcontractor completing performance. Beaconwear Clothing Company v. United States, 355 F.2d 583 (Ct. Cl. 1966).

--A manufacturer or materialman who agrees to fill orders under a Government contract by extending credit to the contractor in consideration of an assignment of the contract proceeds. Uniroyal, Inc. v. United States, 454 F.2d 1394 (Ct. Cl. 1972); B-183305, March 25, 1975 (non-decision letter).

A trust, pension or non-pension, is not an "institution" and therefore cannot be a "financing institution." 36 Comp. Gen. 290 (1956). However, the Act expressly recognizes a "trust company" as a proper assignee. Thus, an assignment to a bank or trust company is not invalidated merely because the indebtedness secured by the assignment represents an investment of trust funds where legal title to and control over such funds are vested in the bank or trust company. Id. Accordingly, an assignment will not be regarded as invalid solely by reason of the source of funds for the loan consideration for which the assignment is made so long as the assignee qualifies as a financing institution. The Comptroller General has also recognized that a trust corpus, together with its trustees, whether individual, corporate, or otherwise, having as a primary function the investing of assets of the trust, may be regarded as a financing institution within the meaning of the Act. 40 Comp. Gen. 174, 175 (1960). It is not necessary to distinguish between private corporate pension trusts and public pension trusts. 50 Comp. Gen. 613 (1971) (holding that California public pension trusts were financing institutions and therefore proper assignees under 31 U.S.C. § 203).

Although an assignment under the Assignment of Claims Act may not be made to more than one party, it may be made to one party as agent or trustee for two or more parties participating in the financing. See 50 Comp. Gen. 613, 615 (1971). However, the Comptroller General has noted that an assignment to a party or parties not eligible under the Act cannot be

validated by the simple expedient of having ineligible assignees designate a bank as trustee for collection. 52 Comp. Gen. 462, 465 (1973). In 52 Comp. Gen. 462, the Comptroller General, following the rationale of 50 Comp. Gen. 613, supra, concluded that a group of municipal bondholders, viewed as an unincorporated totality, had as a group the function of lending money and could therefore qualify as a financing institution. The Comptroller General further concluded that the bondholders could make a valid assignment to a bank, also a bondholder, acting as trustee for the group, even though some of the bondholders as individuals could not qualify as financing institutions.

On the other hand, the Comptroller General has held that holding companies do not qualify as proper assignees where they receive a security interest in a Government contractor's accounts receivable, notwithstanding that they claim to be intermediaries for the bank's financing of the contract. 55 Comp. Gen. 155 (1975).

(d) Setoff

Under 31 U.S.C. § 203 and 41 U.S.C. § 15, the Government is precluded from asserting certain setoffs against funds payable under a Government contract containing a "no setoff" provision when the rights to those funds have been assigned to a financial institution. B-176905, November 1, 1972. However, in the absence of a "no setoff" provision, common law applies and the assignee stands in the shoes of the assignor so that the Government may set off against the assignee any claims of the Government against the assignor which had matured prior to the assignment. South Side Bank & Trust Co. v. United States, 221 F.2d 813 (7th Cir. 1955); 37 Comp. Gen. 318 (1957). However, even under the common law, debts of the assignor which mature after an assignment is made may not be set off against payments otherwise due the assignee. 20 Comp. Gen. 458, 459 (1941); B-195460, October 18, 1979.

The provisions in the Assignment of Claims Act authorizing the limitations on setoff apply to "any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President." They also apply only "in time of war or national emergency," but their availability has been extended by subsequent legislation. 50 U.S.C. §§ 1651(a)(4) and (5).

A "no setoff" provision will not protect the assignee from all setoffs. Under the terms of the Act, it will protect against setoff for liabilities arising independently of the contract from which the assignment was made, and liabilities, arising independently or not, on account of renegotiation, fines, penalties, taxes, or social security contributions. Also, the "no setoff" provision will protect the assignee only with respect to the assignor's indebtedness resulting from loans for contract performance. 49 Comp. Gen. 44 (1969); 37 Comp. Gen. 9 (1957); 35 Comp. Gen. 104 (1955).

When applicable, the "no setoff" provision defeats the operation of Internal Revenue Service tax liens and reduces the Government's common law right of setoff to the extent the assignor is indebted to the assignee. 37 Comp. Gen. 318 (1957); B-166531, November 10, 1969.

The "no setoff" provision affords no protection to an assignee until after the notice requirements of the Act have been met. In one case involving a "no setoff" provision, the Comptroller General held that debts owed to the Government by the assignor which existed before notice of the assignment was filed may be set off against debts owed by the Government to the assignee. B-158451, March 3, 1966. See also 29 Comp. Gen. 40 (1949); B-122071, December 1, 1954; B-61335/B-61337, June 20, 1947.

As to whether an amount sought to be set off arises out of another transaction, certain liabilities of a contractor have been recognized as not arising independently of the contract and, therefore, may be set off even in the face of prior notice of assignment or a "no setoff" provision. Such setoffs are made on the theory that an assignment carries with it the right to receive only such amounts as are due and owing to the contractor under the contract. B-110730, September 18, 1952. For example, the Comptroller General has viewed liquidated damages asserted under the terms of the contract as not having arisen independently of the contract and therefore available for setoff against payments due an assignee. B-110730, supra. Excess costs incurred on reletting of Government contracts terminated because of the default of the original contractor have also been held to remain subject to setoff against payments due an assignee. 35 Comp. Gen. 149 (1955); B-178198, August 30, 1973; B-165016, February 24, 1969.

The competition between assignments and Federal tax liens has been the subject of numerous decisions. In 60 Comp. Gen. 510 (1981), GAO reviewed the principles and precedents in this area and made the following points:

1. If the proceeds of a contract containing a "no setoff" clause have been validly assigned, the Government cannot offset a tax debt under any circumstances.

2. If the contract does not contain a "no setoff" clause, the assignee stands in the shoes of the assignor, and the Government may offset a tax debt of the assignor that was in existence before the assignment became effective. The actual offset cannot be made until the tax debt has matured (i.e., liability assessed), but the fact that the Internal Revenue Service has not actually made the assessment before the assignment became effective will not defeat the offset.

3. An assignment under 31 U.S.C. § 203 becomes effective on the date the contracting agency receives notification of the assignment. Failure to record or perfect an assignment as a security interest under State law (such as the Uniform Commercial Code) does not affect the validity of the assignment with respect to any other claims by the Federal Government.

Once an assignment has been released (for example, after the indebtedness secured by the assignment has been liquidated), the Government's common law right of setoff resumes. B-162526, October 9, 1967. (See Part II, this Chapter.)

(e) Government Setoff vs. Third-Party Claims

As noted above, the Government may not assert its right of setoff against funds payable under a Government contract containing a "no setoff" provision when the rights to those funds have been validly assigned to a financial institution. However, if the debt underlying an assignment has been satisfied, or if such assignment is not based on any underlying debt, and the assignee is not asserting an interest in the assignment, the assignment under such circumstances would not prevent setoff against funds which may be payable under the contract. See 49 Comp. Gen. 44 (1969); 37 Comp. Gen. 9 (1957); B-176905, November 1, 1972.

It is these circumstances, or in circumstances where a purported assignment is void under 31 U.S.C. § 203, that the claims of third parties to amounts remaining due under a Government contract may arise. A third party typically making

such a claim may be a surety whose claim is based upon payment to laborers and materialmen under a payment bond or upon the costs of completing the contract under the surety's performance bond. The current rule with respect to such a situation is that a surety who pays on a performance bond in order to complete a contract has priority over the United States to the retainage in the Government's hands. A surety who pays on his payment bond, however, does not have priority when the United States is asserting a tax or other obligation owed by the prime contractor. B-187456, November 4, 1976. While a surety which completes a contract pursuant to its performance bond becomes a subrogee of the Government and thus is entitled to any rights the Government has to retained funds, a payment bond surety who pays the contractor's laborers and materialmen is merely a subrogee of the contractor and thus a creditor of the Government against whom the Government may set off its claims. B-187456, supra.

While a setoff cannot be made to defeat the rights of an assignee under 31 U.S.C. § 203 and 41 U.S.C. § 15, the assignee is protected only to the extent that his assignment is valid under the Act. Therefore, since a surety does not qualify as a "financing institution," an assignment executed by a contractor in favor of a surety in the application for a payment bond does not entitle the surety to priority as an assignee. B-176890, April 18, 1973; B-169420, October 22, 1970. Accordingly, where there are competing claims to amounts due under a Government contract, the following order of priority will govern (B-169420, October 22, 1970):

1. To the performance bond surety to the extent of its expenses incurred in the completion of the contract;

2. To the United States to the extent of debts due the United States, irrespective of the source of the debt;

3. To the payment bond surety to the extent of payments made to laborers and suppliers; and

4. Any amounts in excess of the above to be paid to the contractor.

Where a claim arises from a third-party transaction with the assignee, the Comptroller General has held that the Government is a stranger to the transaction between the assignee and the third party and that their transaction is not determinative of the Government's obligation under the assignment. 54 Comp. Gen. 137 (1974). In one case, however, the Comptroller General, after finding that the Government's

right to set off its tax claims was superior to that of a surety whose claim was based upon payments to laborers and materialmen under the contract payment bond, decided that unless the contractor, the assignee bank and the surety settled their differences by mutual agreement, the amount due under the contract after the tax claims had been set off would be withheld pending a judicial determination of the rights of the parties in such proceedings as they choose to institute. B-174488, December 29, 1971.

(f) Prompt Payment Discounts

Occasionally a Government disbursing officer may receive notice of a contractor's intent to assign the proceeds from certain contracts, but may not be able to make prompt payment to the assignee because of the notice's failure to comply with the formal requirements of 31 U.S.C. § 203. During the period that it takes to correct the deficiencies in the notice, it is inappropriate for the Government to pay either the contractor or the assignee since the Government is on notice that the funds are intended to be assigned. Therefore, to pay them to the assignee in the absence of a legally valid assignment would subject the Government to possible double liability in the event the contractor and the assignee contest to whom the moneys were due. Where, under such circumstances, the delay in consummating the assignment exceeds the time available for the Government to claim its prompt payment discount provided for in the contract, the Comptroller General has held that prompt payment discounts may be properly taken from payments due the assignee where the payment against which discount is claimed was made within the allotted number of days after the assignment is legally effectuated. B-194981, December 12, 1979; B-192774, April 16, 1979. The reason for this is that the Assignment of Claims Act makes it the assignee's responsibility to provide appropriate documentation to the disbursing officer, and the Government should not be liable for the assignee's failure or delay in fulfulling its statutory obligations.

As to how to determine the date of payment for prompt payment discount purposes, see 61 Comp. Gen. ___ (B-201384, December 29, 1981) and B-107826, July 29, 1954.

(g) Fraud or Mistake

Where an assignee receives payment as a result of fraud or mistake between the Government and the contractor, and the assignee receives the payment in good faith without knowledge of the mistake or fraud and has parted with value

therefor, the overpayment may not be recovered from him, at least to the extent that the payments received were applied in reduction of advances to the assignor for performance of the contract. 24 Comp. Gen. 603 (1945). However, in a case where the fraud was perpetrated against the assignee by the contractor, the Comptroller General held that the Government is not an insurer as to such fraudulent schemes and is not required to involve the assignee in matters of contract administration in order to protect the assignee from them. Accordingly, the claim for the amount of fictitious invoices presented by the assignee of a Government contractor which were retrieved by the contractor prior to payment, could not be honored since the record presented no grounds to impute negligence or to assert estoppel against the Government. 50 Comp. Gen. 434 (1970).

Where a notice of assignment is either lost or mishandled, and the contractor continues to receive all contract payments directly, the assignee's claim for such payments cannot be allowed if the assignment would have been invalid in any case, for example, where there was no loan by the assignee to the assignor to be used in performance of the contract. B-175670, May 25, 1972.

(3) Referral to the Court of Claims

28 U.S.C. § 2510(a) provides;

> "The Comptroller General may transmit to the Court of Claims for trial and adjudication any claim or matter of which the Court of Claims might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.
>
> "The Court of Claims shall proceed with the claims or matters so referred as in other cases pending in such court and shall render judgment thereon."

The Comptroller General has consistently viewed this statutory authority to refer cases directly to the Court of Claims as discretionary. E.g., B-131612, October 31, 1957.

Referrals under this provision have been limited to only two specific categories of claims. In B-176997, March 27, 1973, a decision in which a claimant's request that GAO refer his case to the Court of Claims under 28 U.S.C. § 2510(a) was denied, the Comptroller General explained the application of the statute as follows:

> "These provisions * * * have not been regarded by this Office as having any application to a claim which has been considered and finally determined by this Office. They have only been regarded by us as being for application in the following instances: (1) where there are two or more claimants who have a conflicting interest in a certain and specific sum of money which has been determined to be clearly due and is in the control of the Government as a stakeholder, the adjudication of which by the Court of Claims is deemed necessary to protect the Government against a later claim by unsuccessful claimants, and (2) where the rights of claimant are definite and clearly established under applicable provisions of law, but the amount due is too uncertain to permit settlement by this Office."

Thus, the Comptroller General will not refer claims which GAO has settled and disallowed.

For further examples of cases denying claimants' specific requests that GAO refer their claims under 28 U.S.C. § 2510(a), see B-154118, July 23, 1964 (claim for additional retired pay disallowed in prior GAO settlement); B-147203, February 7, 1963 (claim for lump-sum payment in lieu of annual leave disallowed in prior GAO settlement); B-134121, November 7, 1957 (GAO lacked authority under statute to refer claimant's case previously dismissed by Court of Claims for lack of jurisdiction); B-131612, October 31, 1957 (claim for travel and moving expenses disallowed in prior GAO settlement and on reconsideration).

Since the statute authorizes referral of claims only where the Court of Claims "might take jurisdiction on the voluntary action of the claimant," GAO will not refer a claim on which suit is barred by the statute of limitations. B-126471, May 11, 1956.

One of the few instances where the statutory authority of 28 U.S.C. § 2510(a) has been exercised, B-150968, May 20, 1963, involved conflicting claims under a contract. The claims arose under a construction contract for improvements to an airport. When the work was completed and accepted according to the contract provisions, approximately $10,000 remained due, plus an additional claim by the contractor for $2,700. However, because the contractor had apparently left outstanding bills for labor and materials on the project, the surety on the performance and payment bonds claimed the funds remaining in Government control. Additional claims for this money were filed by a bank assigned the funds under the construction contract itself, and by the IRS for back taxes owed by the contractor. This case illustrates an instance where two or more claimants had a conflicting interest in a specific sum which was due and in the control of the Government as stakeholder. Therefore, in order to protect the Government, the Comptroller General referred the matter directly to the Court of Claims for trial and adjudication.

Finally, merely advising a claimant of the availability of the judicial process will not constitute a referral under 28 U.S.C. § 2510(a). In a case involving a claim by a subcontractor against the United States for termination of a Government contract, the claimant attempted to construe a referral from language used by the Comptroller General in denying the claim on reconsideration. In this way the claimant hoped to avoid the bar of the statute of limitations. The Court of Claims held that the Comptroller General's conclusion "to resolve doubt in favor of that course which will result in the conservation of appropriated funds and leave to the proper

judicial authority the final determination of the matter" (B-147131, March 2, 1962) did not constitute a formal referral. Steel Improvement and Forge Company v. United States, 355 F.2d 627 (Ct. Cl. 1966). The Court stated:

> "There are no words of transmittal or referral in the above-quoted language. Plaintiff was merely being advised of the option of seeking judicial review of its claim. Had the Comptroller General intended to refer or transmit the case to this court, we believe that, in the least, the Comptroller General would have either mentioned the applicable statute or the Court of Claims." Id., at 632.

Of course the Court was correct. A referral to the Court of Claims under 28 U.S.C. § 2510(a) will be in the form of a letter addressed to the Chief Judge and Judges of the Court of Claims. It will expressly state that the claim is being referred pursuant to 28 U.S.C. § 2510(a) and a copy will be sent to the claimant. See B-150968, May 20, 1963.

C. SPECIFIC TYPES OF CLAIMS

Claims discussed in this Section include several more common types where the agency involved has primary settlement jurisdiction but where GAO is nevertheless involved either in rendering various threshold decisions or in the payment process. The Section also includes several miscellaneous types of claims that are within GAO's settlement jurisdiction.

(1) Federal Tort Claims Act and Related Matters

(a) Federal Tort Claims Act

Under the doctrine of sovereign immunity, the Government cannot be sued without its consent. Prior to 1946, with a few statutory exceptions, the United States had not waived its sovereign immunity in tort and was therefore not liable for the tortious conduct of its employees. E.g., 1 Comp. Gen. 178 (1921). Congress rectified this situation in 1946 with the enactment of the Federal Tort Claims Act (FTCA). The original enactment was contained in Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 812, 842. It has been amended a number of times over the years and is now found at 28 U.S.C. §§ 1346(b) and 2671-2680.

The body of law that has evolved under the Federal Tort Claims Act is voluminous and much of it is beyond the jurisdiction of the General Accounting Office. It is not the purpose of this Section to provide substantive coverage of those areas which are beyond GAO's jurisdiction. Rather, this Section is intended merely to outline the key provisions of the statute, highlight those provisions which relate to GAO's functions, and point out those areas in which the Comptroller General has rendered decisions. A comprehensive reference on the Federal Tort Claims Act is Lester S. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies.

28 U.S.C. § 2671 defines "Federal agency" and "employee of the government" for purposes of the FTCA. The definition of "Federal agency" is broad and has been liberally construed. However, it expressly excludes Government contractors. "Employee" includes temporary as well as permanent employees and those serving without compensation.

Generally, the FTCA applies to all Federal agencies and employees except those specifically excluded. 35 Comp. Gen. 511 (1956). Thus, the FTCA has been viewed by both the Comptroller General and the courts as applicable to legislative branch employees. B-127343, December 15, 1976; McNamara v.

United States, 199 F. Supp. 879 (D.D.C. 1961); McCrary v. United States, 235 F. Supp. 33 (E.D. Tenn. 1964). An early decision held the Act applicable to the Library of Congress. 26 Comp. Gen. 891 (1947). And, GAO has always viewed the Act as applicable to itself. B-189411, March 28, 1978 (non-decision letter). However, whether the FTCA covers Members of Congress as opposed to employees is unclear. B-199413, August 11, 1980.

The application of the FTCA to the judicial branch is also somewhat unclear. Courts have refused to apply the Act to Federal judges performing judicial functions. Foster v. MacBride, 521 F.2d 1304 (9th Cir. 1975); Cromelin v. United States, 177 F.2d 275 (5th Cir. 1949), cert. denied, 339 U.S. 944. But the Act has been applied to a Federal judge performing an "official but non-judicial function" (driving an automobile). United States v. LePatourel, 571 F.2d 405 (8th Cir. 1978) and 593 F.2d 827 (8th Cir. 1979). In Foster v. Bork, 425 F. Supp. 1318 (D.D.C. 1977), the FTCA was held not to cover the Clerk and assistant clerks of the Supreme Court. In Tomalewski v. United States, 493 F. Supp. 673 (W.D. Penn. 1980), the Court, following Bork, held that the Clerk of the district court was not an employee of the United States for purposes of the FTCA. (The Clerk had erroneously failed to follow a judge's order to invest certain funds in an interest bearing account.)

The courts have held that certain types of nonappropriated fund activities are Federal instrumentalities and thus subject to the FTCA, for example, flying clubs on Air Force installations. United States v. Hainline, 315 F.2d 153 (10th Cir. 1963), cert. denied, 375 U.S. 895; Brucker v. United States, 338 F.2d 427 (9th Cir. 1964). However, an equestrian club on an Army post has been held not covered. Scott v. United States, 226 F. Supp. 864 (M.D. Ga. 1963), aff'd, 337 F.2d 471 (5th Cir. 1964).

Noting that the FTCA was never intended to reach employees of all federally funded programs that confer benefits on people, the Supreme Court has held that a community action agency funded under the Economic Opportunity Act of 1964 is not a Federal agency for purposes of the FTCA. United States v. Orleans, 425 U.S. 807 (1976).

28 U.S.C. § 2672, one of the major provisions of the statute, authorizes the administrative settlement of tort claims by the agency whose employee committed the tort. It provides in part as follows:

"The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred * * * ."

The Justice Department's implementing regulations are found at 28 C.F.R. Part 14.

A claim under the FTCA must be for money damages. The FTCA does not cover non-monetary claims such as a claim for the restoration of annual leave. B-171716, March 26, 1971. A claim should be submitted on Standard Form 95 although other forms of written demand are acceptable. The claim must be stated in a "sum certain" (a specific dollar amount). 28 C.F.R. § 14.2.

There is no monetary limit on an agency's administrative settlement authority under section 2672, except that awards in excess of $25,000 require the prior written approval of the Attorney General or his designee. Authority under section 2672 expressly includes compromise.

The act or omission giving rise to the claim must have occurred while the Federal employee was acting within his "scope of employment." Ordinary commuting (travel between one's permanent residence and permanent place of duty) is not within the scope of employment for purposes of the FTCA. E.g., Perez v. United States, 253 F. Supp. 619 (D. Mass. 1966), aff'd, 368 F.2d 320 (1st Cir. 1966).

Section 2672 contains several other important provisions. Subject to the claimant's right to sue, an award under section 2672 is final and conclusive unless procured by fraud. Thus, GAO has no jurisdiction to settle claims under the FTCA except for claims involving GAO employees. B-176147, July 5, 1972; B-161131, April 18, 1967; B-72568, April 19, 1948. (See Section A(3), this Chapter, for discussion of merits vs. cognizability.)

Acceptance by the claimant of an award under section 2672 is final and conclusive on the claimant and is a complete release of any claim "by reason of the same subject matter" against both the United States and the employee involved. Thus, there can be no partial settlements under the FTCA.

Finally, section 2672 provides for the payment of administrative settlements. If the award is $2,500 or less, the agency must pay "out of appropriations available to that agency." If the award exceeds $2,500, it is paid "in a manner similar to judgments and compromises in like causes." This means that awards in excess of $2,500 are paid, upon certification by GAO, from the permanent indefinite appropriation established by 31 U.S.C. § 724a, discussed in Chapter 12, this Manual.

The $2,500 limit refers to the amount awarded to each claimant and not to the aggregate. B-168705-O.M., January 27, 1970. Thus, if three claimants are awarded $1,000 each from the same incident, the agency must pay. If two are awarded $1,000 each and the third is awarded $3,000, the agency pays the first two and the third will be paid from the permanent appropriation. For purposes of applying the $2,500 limitation, the claims of a subrogor and subrogee insurer, even though presented separately, are viewed as interests in the same claim and if the total award exceeds $2,500, it is payable under 31 U.S.C. § 724a. 49 Comp. Gen. 758 (1970).

Occasionally, an award which will be ultimately distributed among several individuals may be stated in a lump-sum in accordance with State law. For example, under the Arizona wrongful death statute, an action is brought in the name of the surviving spouse or legal representative on behalf of other survivors such as children. The award is made in a lump-sum to be distributed in accordance with the Arizona intestacy statute. In B-173975-O.M., September 14, 1971, an FTCA award was made in this form to the surviving spouse and decedent's administrator. The total award exceeded $2,500 although some of the beneficiaries would receive less than $2,500 under the Arizona intestacy law. The award was held payable under 31 U.S.C. § 724a.

With respect to awards to be paid by the agency, there is no obligation on the part of the United States until a final determination of the Government's liability is made by the person authorized to do so. Thus, the appropriation to be charged is the appropriation current at the time such final action is taken. 27 Comp. Gen. 237 (1947); 27 Comp. Gen. 445 (1948). Specific appropriations are not required for the payment of tort claims. Section 2672 authorizes the agency:

"to select for the payment of such claims any appropriation of that agency which is currently available for obligation at the time the claim is determined to be proper for payment and the use of which for such purpose is not specifically proscribed or limited. Also, the word agency is not confined to a particular bureau but embraces the whole of the department or independent establishment. See 28 U.S.C. 2671 defining federal agency. Thus, any appropriation selected by the head of the agency, the use of which is not specifically proscribed or limited and which is currently available * * * for obligation may be used to make such settlements." 38 Comp. Gen. 338, 340 (1958).

The General Supply Fund of the General Services Administration (40 U.S.C. § 756) is an appropriation for purposes of 28 U.S.C. § 2672. B-148229-O.M., May 15, 1962.

Awards payable under 31 U.S.C. § 724a should be submitted to the GAO Claims Group on a Standard Form 1145 voucher. 28 C.F.R. § 14.10. GAO's certification for payment will be in the form of a certification stamp made directly on the voucher. When the voucher so designates, payment will be made jointly to the claimant and his or her attorney. 28 C.F.R. § 14.10.

If payment to a decedent's estate is involved, GAO will require appointment of a legal representative if it is required by the law of the State of the decedent's domicile at the time of death. B-69787-O.M., May 2, 1979. If the settlement involves payment to or on behalf of a minor, appointment of a legal guardian will be generally required if required by State law--for example, if State law limits the amount payable to a parent or natural guardian and the award exceeds that amount. B-176252-O.M., September 5, 1972.

For the most part, payment is made directly to the claimant or the claimant's legal representative. However, the Comptroller General has approved a form of settlement under which a lump-sum is paid in trust to a trustee (usually an institutional trustee), with power to invade the corpus if necessary, and with the proviso that, upon the occurrence of some specified event (for example, the death of the claimant),

the remainder of the corpus and income will revert to the United States. B-162924, December 22, 1967. 11/

The provision in section 2672 that awards in excess of $2,500 shall be payable "in a manner similar to judgments and compromises in like causes," combined with the express inclusion of section 2672 in 31 U.S.C. § 724a, not only makes the permanent appropriation available but also incorporates those limitations which exist with respect to "judgments and compromises in like causes." Thus, to be payable under 31 U.S.C. § 724a, an award must be "final," payment must be "not otherwise provided for," and the payment must be certified by GAO. Questions occasionally arise over the "otherwise provided for" exception. For the most part, agency funds will not be available for FTCA awards greater than $2,500. See, e.g., B-189652, July 17, 1979 (FTCA settlements by the Alaska Railroad). However, reimbursements to owners for loss or damage to vehicles used by the Forest Service are payable from Forest Service appropriations under 16 U.S.C. § 502(d) and not from the permanent appropriation. B-191515-O.M., April 10, 1978. See Chapter 12, this Manual, for a detailed discussion of the "otherwise provided for" concept in the judgment context.

Administrative expenses incurred by an agency in investigating and determining the facts in relation to a claim under the FTCA are chargeable to the agency's current operating appropriations. 29 Comp. Gen. 111 (1949).

In 53 Comp. Gen. 214 (1973), a Federal employee was involved in an accident while operating a motor vehicle within her scope of employment. She was given a traffic citation and a summons to appear in court. The Comptroller General held that, in view of the Government's potential liability under the FTCA, it had a direct interest in the disposition

11/ The permanent judgment appropriation was made available for awards and compromise settlements under the FTCA by Pub. L. No. 89-506 (July 18, 1966), effective with respect to claims accruing six months or more after its date of enactment. Prior to this time, judgments were payable from the permanent appropriation but compromise settlements, regardless of amount, had to be paid from agency funds. A number of earlier decisions make reference to payment from agency funds. While the decisions cited in this Chapter remain valid for the points for which they are cited, any references to payment from agency funds--except for awards of $2,500 or less--are no longer applicable.

of the traffic charge. Therefore, the employee's appearance in court could be regarded as the performance of official duty and the agency could reimburse her travel expenses. (However, the amount of any fine could not be reimbursed. See Section on "Fines and Penalties," Chapter 3, this Manual.)

Section 2672 does not specifically authorize reimbursement of a Government employee who has paid a claim cognizable under the FTCA from personal funds. However, reimbursement has been permitted in rare cases where the payment was made in urgent and unforeseen emergency circumstances and where the interest of the Government in being released from future claims was protected. B-186474, June 15, 1976; B-177331, December 14, 1972. However, as a general proposition, reimbursement will not be authorized. See, e.g., B-152070, October 3, 1963. See also the subsection on "voluntary creditors," infra, this Chapter.

28 U.S.C. § 2674 provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." The elements or extent of damages allowable are thus determined by local law and a matter over which GAO has no jurisdiction. B-130096, January 25, 1957; B-115538, July 2, 1953. Section 2674 also provides that the United States shall not be liable for punitive damages nor for interest prior to judgment. (See Chapter 12, this Manual, with respect to post-judgment interest.)

28 U.S.C. § 2675 prohibits filing suit unless a claim has first been filed with the appropriate agency. Once an administrative claim has been filed, the claimant cannot sue until either (a) the agency has finally denied the claim in writing, or (b) the agency fails to make final disposition within six months, whichever first occurs. Suit cannot be for more than the amount claimed administratively. Judgment will operate as a release to the employee as well as to the Government. 28 U.S.C. § 2676.

28 U.S.C. § 2677 authorizes the Attorney General or his designee to compromise claims after the commencement of suit. A requirement in the original FTCA for court approval was deleted in 1966. Compromise settlements under section 2677 are payable regardless of amount, from the permanent judgment appropriation (31 U.S.C. § 724a).

28 U.S.C. § 2678 sets maximum attorney's fees--20 percent of awards under section 2672 and 25 percent of judgments and settlements under section 2677. Penal sanctions are provided for excessive fees. The attorney's fees are a portion of the amount recovered and not in addition to it.

Under 28 U.S.C. § 2679, the FTCA is the exclusive remedy for tort claims resulting from the operation of a motor vehicle by a Federal employee within the scope of his employment. This is informally known as the "Federal Drivers Act." If an employee is sued in a State court, the case can be removed to a Federal court and the United States substituted as defendant. There are also a number of statutes making the FTCA the exclusive remedy in medical malpractice cases. These are identified in B-114839, January 25, 1979. In other types of cases, however, the FTCA is not exclusive and the employee may still be sued individually or joined as defendant. A judgment against an employee in his individual capacity cannot be reimbursed. See B-114839, supra, and Chapter 12, this Manual.

28 U.S.C. § 2680 lists approximately a dozen exceptions to the FTCA. Several are listed below.

--The "discretionary function" exception: The Act does not apply with respect to an employee exercising due care in the exercise of a statute or regulation, or to the exercise or performance or the failure to exercise or perform a discretionary function. GAO will not review an agency's finding that a claim is within the "discretionary function" exception. B-190362, December 14, 1977.

--The FTCA does not apply to any claim arising in a foreign country. B-199449-O.M., August 7, 1980; B-114839, January 25, 1979.

--FTCA does not apply to claims in respect of the assessment or collection of any tax or customs duty. B-178232, April 13, 1973 (claims for erroneous filing of tax lien by Internal Revenue Service not cognizable).

--FTCA does not apply to claims arising out of the loss or miscarriage of letters or postal matter.

--FTCA does not apply to claims arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

--FTCA does not apply to claims cognizable under the Suits in Admiralty Act or the Public Vessels Act.

--FTCA does not apply to claims for libel, slander, misrepresentation, deceit, or interference with contract rights; nor does it apply to claims for assault, battery, or false arrest or imprisonment except with respect to investigative or law enforcement officers.

The United States district courts have exclusive jurisdiction over FTCA actions. 28 U.S.C. § 1346(b). A tort claim is "forever barred" unless presented in writing to the appropriate agency within two years after the claim accrues or unless suit is brought within six months after the date of mailing of the agency's final denial. 28 U.S.C. § 2401(b). Trial is without a jury. 28 U.S.C. § 2402. A judgment may be appealed to the United States Court of Appeals or, under a little used provision, to the Court of Claims. 28 U.S.C. § 1504.

The Supreme Court has held that the United States is not entitled to recover indemnity from one of its employees for whose negligence it has been held liable under the FTCA. United States v. Gilman, 347 U.S. 507 (1954); B-121593, February 7, 1955. The right of the United States to recover from a third-party tortfeasor is discussed in 57 Comp. Gen. 781 (1978).

If an interagency motor pool vehicle is damaged, the General Services Administration will normally bear the costs incurred. However, if the damage is attributable to negligence by a Federal employee, GSA will charge the costs to the employing agency, including removal and repair or replacement as appropriate. 41 C.F.R. Subparts 101-39.7 and 101-39.8. The propriety of these regulations was affirmed in 59 Comp. Gen. 515 (1980). These regulations apply whether or not a claim has been filed under the FTCA.

If a claimant under the FTCA is indebted to the United States, the amount of the indebtedness should be set off against the award. If the award is $2,500 or less, the agency should make the setoff administratively. If the award exceeds $2,500, GAO will apply 31 U.S.C. § 227 (Chapter 12, this Manual). B-135984, May 21, 1976.

In a different type of setoff situation, a non-veteran claimant had been furnished emergency care by a Veterans Administration hospital and was billed pursuant to statutory authority which required reimbursement to the VA appropriation. The claim was subsequently settled for $25,000 plus the care which had been billed but not paid. The agency was instructed to prepare the voucher for the total amount ($25,000 plus the cost of the care), with the setoff to be credited to the VA appropriation account and the balance paid to the claimant. 51 Comp. Gen. 180 (1971). See also B-138962, July 7, 1959. (The cost of the care was viewed as a setoff of indebtedness because the claimant would have been liable for it but for its inclusion in the tort settlement.)

If a Federal employee injures another Federal employee while both are acting within their scope of employment, a claim for death or personal injury cannot be made under the Federal Tort Claims Act. The Federal Employees Compensation Act (infra, this Chapter), is the exclusive remedy in this situation. B-135984-O.M., June 1, 1977.

(b) Small Claims Act

Prior to the enactment of the Federal Tort Claims Act, Congress had provided limited settlement authority for tort claims in the Act of December 28, 1922, 42 Stat. 1066, known as the "Small Claims Act" or "Small Tort Claims Act." The Small Claims Act authorizes agency heads to:

> "consider, ascertain, adjust, and determine any claim accruing after April 6, 1917, on account of damages to or loss of privately owned property where the amount of the claim does not exceed $1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment."

The 1946 enactment of the Federal Tort Claims Act included a repealer provision, section 424, which was not codified. Section 424(a) repealed all provisions of law authorizing the settlement of tort claims and listed several specific statutes, including the Act of December 28, 1922. However, the repealer was effective only "in respect of claims cognizable under" the new FTCA. Section 424(b) provided that nothing contained in the FTCA shall be deemed to repeal any provision of law authorizing the settlement of claims "not caused by any negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, or any other claim not cognizable under" the new FTCA. See 26 Comp. Gen. 149 (1946).

Thus, the Small Claims Act was repealed to the extent of claims cognizable under the FTCA, but it was not repealed to the extent it authorized settlement of claims not cognizable under the FTCA. Therefore, the Small Claims Act remains a vehicle for the administrative settlement of negligence claims not exceeding $1,000 which are not cognizable under the FTCA nor covered by any other statute. For example, the Comptroller General has recognized that the Small Claims Act remains in effect for claims arising in a foreign country. B-120773, March 22, 1955; B-123479-O.M., June 21, 1955.

The Small Claims Act has also been used to settle claims resulting from the detention of goods or merchandise by customs officers which are specifically excluded from the FTCA by 28 U.S.C. § 2680(c). (The Treasury Department has regulations on the application of the Small Claims Act to claims against that Department. See 31 C.F.R. § 3.20.)

Agency appropriations cannot be used to pay awards under the Small Claims Act. Under the statute as originally enacted, a proposed award had to be certified to Congress as a legal claim and Congress had to make a specific appropriation to pay it. In 1978, 31 U.S.C. § 724a was amended (Pub. L. No. 95-240) so that awards under the Small Claims Act are now payable, upon certification by GAO, from the permanent judgment appropriation.

The Small Claims Act provides that a claim may not be considered unless presented within one year from the date of accrual.

The Act further provides that acceptance of an award shall be deemed to be in full settlement of the claim. See B-75308, May 4, 1948.

The Act is limited to property damage claims and does not include death or personal injury. 2 Comp. Gen. 529, 531 (1923); 10 Comp. Gen. 175 (1930). Subrogation claims by insurers are cognizable. 19 Comp. Gen. 503 (1939); 21 Comp. Gen. 341 (1941).

One decision noted that the Small Claims Act had been used to settle certain property damage claims by Government employees. 20 Comp. Gen. 339, 341 (1941). This would presumably still be true, at least to the extent the claims are not cognizable under the Military Personnel and Civilian Employees' Claims Act of 1964, infra, this Chapter.

Claims under the Small Claims Act are beyond GAO's settlement jurisdiction and are settled by the cognizant agency. 3 Comp. Gen. 22, 24 (1923).

(c) Tort Claims Arising in Foreign Countries

As noted previously, the Federal Tort Claims Act does not apply to "any claim arising in a foreign country." 28 U.S.C. § 2680(k). However, certain agencies have specific authority to settle tort claims arising in foreign countries. Agencies with such authority in the form of permanent legislation are:

--State Department, 22 U.S.C. § 2669(f).

--International Communication Agency, 22 U.S.C. § 1474(5).

--Veterans Administration, 38 U.S.C. § 236.

In addition, two bureaus within the Department of Commerce--the Industry and Trade Administration and the United States Travel Service--have received such authority in annual appropriation acts. All of the statutory provisions authorize the payment of tort claims "in the manner authorized in the first paragraph of" 28 U.S.C. § 2672.

Payment of awards under the "foreign tort" statutes is made in the same manner as payment of "domestic torts" under 28 U.S.C. § 2672--awards of $2,500 or less are paid from agency appropriations and awards in excess of $2,500 are payable, upon certification by GAO, from the permanent judgment appropriation, 31 U.S.C. § 724a. B-199449-O.M., August 7, 1980.

Awards payable from agency funds should be charged to appropriations current at the time of settlement. This follows from the decisions involving the Federal Tort Claims Act discussed previously in this Chapter. 27 Comp. Gen. 237 (1947); 27 Comp. Gen. 445 (1948); 38 Comp. Gen. 338 (1958).

Where "foreign tort" settlement authority derives from annual appropriation acts, its continuing existence will depend on its continuing inclusion in the appropriation acts. B-199449-O.M., supra.

In B-177331, December 14, 1972, cited previously in the discussion of the FTCA, a Veterans Administration employee in the Philippines paid a claim cognizable under 38 U.S.C. § 236 from personal funds and requested reimbursement. He made the payment to avoid detention by the Philippine police and to obtain release of a Government vehicle which had been impounded. Since payment was made in an urgent and unforeseen emergency situation, and since the effectiveness of the release provision of 28 U.S.C. § 2672 was not involved, the Comptroller General authorized reimbursement. However, the general rule remains that reimbursement of a claim paid from personal funds is not authorized.

The apparent purpose of the specific reference to the "first paragraph" of 28 U.S.C. § 2672 in the various "foreign tort" statutes is to make it clear that the authority conferred is limited to administrative settlement authority and does not include the right to sue. B-199449-O.M., supra.

In sum, agencies with specific "foreign tort" settlement authority are not subject to the exclusion of 28 U.S.C. § 2680(k), at least to the extent of administrative settlement.

Agencies which do not have such specific authority may still administratively settle negligence claims arising in foreign countries under authority of the Small Claims Act, supra, but are limited to the $1,000 ceiling contained in that Act.

Finally, under 10 U.S.C. § 2734, the military departments have authority to settle tort claims arising in foreign countries (infra, this Chapter).

(2) Military Personnel and Civilian Employees' Claims Act of 1964

The Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. §§ 240-243, authorizes agencies to settle claims by Government employees for loss or damage to personal property. Prior to the 1964 statute, similar authority had existed for the military departments but no such authority existed for the civilian agencies. E.g., 45 Comp. Gen. 468 (1966). The 1964 Act incorporated the existing authority and extended it to the civilian agencies.

Although the Act authorizes the President to prescribe uniform policies to implement the statute, this authority has not been exercised. Thus, it is up to each department and agency to determine its own policies subject to the statutory criteria.

"Settlement" under the Act is defined as including "full or partial allowance or disallowance." 31 U.S.C. § 240(3). There is no mention of compromise. Denial of a claim constitutes settlement. Macomber v. United States, 335 F. Supp. 197 (D.R.I. 1971).

An agency's settlement of a claim under the Act is "final and conclusive." 31 U.S.C. § 242. Thus, GAO has no jurisdiction to settle claims under the Act except for claims by GAO employees, nor may it question an agency's settlement as long as it was made in accordance with the statutory criteria and applicable regulations. 47 Comp. Gen. 316 (1967). 12/ (See the discussion of merits vs. cognizability, Section A(3), this Chapter.) Also, judicial review is not available. Macomber v. United States, supra. A certifying officer will not be held liable for an erroneous determination by an agency claims officer. B-185497, August 6, 1976.

In view of GAO's limited jurisdiction under the Act, a number of the decisions cited in this Section are largely advisory in nature. They are included, along with several Office Memoranda concerning claims by GAO employees, to provide guidance as to the types of claims that have been considered under the Act. A note of caution must be sounded:

12/ See also: B-192978, February 28, 1979; B-187913, February 9, 1977; B-185497, August 6, 1976; B-185513, March 24, 1976; B-185008, October 29, 1975; B-180161, January 8, 1974; B-157005, August 18, 1965; B-202683, December 9, 1981 (non-decision letter).

If a given decision merely advises that an agency may consider a particular claim, this does not mean that the agency must consider it. Within the limits of cognizability, each agency is free to determine what claims it will or will not consider. Payment of claims under the Act "is not a matter of right but of grace resting in administrative discretion." B-144926, February 23, 1961.

31 U.S.C. § 240 is the definition section. The term "agency" is broadly defined and has been liberally construed. Thus, the Act applies to the Library of Congress. 44 Comp. Gen. 402 (1965); B-163125, February 12, 1968. It also applies to the judicial branch. B-155877, June 22, 1971.

31 U.S.C. § 241 is the key provision of the statute. It provides both the substantive authority and the limitations. Separate subsections cover the military departments and the civilian agencies.

31 U.S.C. § 241 establishes nine elements which must be present for an agency to settle a claim. They are listed separately below.

1. The claim must be by a "member of the uniformed services" or a "civilian officer or employee". A claim by anyone else may not be considered. Thus, the Comptroller General held that the Federal Aviation Agency "community club" in Guam, the property of which was either donated by club members or purchased with club funds, was not a proper claimant and that its claim was therefore not cognizable under the Act. B-190106, March 6, 1978.

The Vice President of the United States is an "officer of the United States" for purposes of the statute. B-202683, December 9, 1981 (non-decision letter).

2. The claim must be for damage to or loss of personal property. The Act does not cover damage to real property. B-197240-O.M., March 17, 1980. However, it does cover lost or stolen cash, such as money representing an advance payment of per diem for temporary duty, if permitted by agency regulations. B-190125, December 28, 1977. Similarly, where several Navy members gave their paychecks to an enlisted member to get them cashed and the enlisted member was robbed at gunpoint, the loss was viewed as loss of personal property cognizable under section 241. B-185008, October 29, 1975.

The Act does not require that claims be filed only by the owner of the property. Thus, an employee who has borrowed property may file a claim under appropriate circumstances, presumably where he has reimbursed the owner for the loss. B-192088-O.M., May 28, 1980.

The claimant needs only to prove the loss or damage. He does not have to prove that it was caused by someone else's negligence. Anton v. Greyhound Van Lines, Inc., 591 F.2d 103 (1st Cir. 1978).

3. Maximum settlement authority is $15,000. Of course, the loss may have been much greater, but a maximum of $15,000 is recoverable from the Government.

The statute does not require that payments received from another source, such as an insurance company, be applied against the $15,000. However, a claimant should not recover twice for the same loss. Thus, the more common approach, which GAO views as consistent with the legislative history, is to deduct third-party recoveries from the statutory limit when the loss does not exceed that limit. If the loss exceeds the $15,000 limit, third-party recoveries should be applied against the dollar amount of the loss, with the $15,000 ceiling then relating to the balance. B-91607-O.M., August 1, 1974. Thus, a claimant with a $10,000 loss who receives $10,000 in insurance payments should be entitled to claim nothing. A claimant with a $25,000 loss who receives $10,000 in insurance payments, however, would still be able to file a claim for up to the $15,000 limit.

If a claimant has a claim against a third party (carrier, insurer, etc.), settlement of a claim under section 241 operates as an assignment of the third-party claim to the Government. 53 Comp. Gen. 61 (1973).

A December 1980 amendment, Public Law 96-519, prompted by the Iranian hostage crisis, authorizes the settlement of claims for loss or damage to personal property in a foreign country up to $40,000 if the loss or damage (1) was incident to an evacuation of United States personnel in response to political unrest or hostile acts, or (2) resulted from acts of mob violence, terrorist attacks, or other hostile acts directed against the United States Government or its personnel. Upon payment of a claim, the United States becomes subrogated to the claimant's rights against the foreign country in which the loss or damage occurred.

Public Law 96-519 contains one important appropriation restriction not applicable to the rest of the Act: Funds may be obligated or expended under the authority granted by Public Law 96-519 only to the extent provided in advance in appropriation acts.

4. The loss or damage must be "incident to service". The Comptroller General has frequently pointed out that neither the Act nor its legislative history defines the term "incident to service." B-169236, April 21, 1970; B-180161, January 8, 1974; B-185513, March 24, 1976; B-187913, February 9, 1977. One court has stated that the loss must bear some substantial relation to the claimant's service or employment. Fidelity-Phenix Fire Ins. Co. v. United States, 111 F. Supp. 899 (N.D. Cal. 1953), aff'd sub nom. Preferred Ins. Co. v. United States, 222 F.2d 942 (9th Cir. 1955), cert. denied, 350 U.S. 837. The phrase is somewhat analogous to "scope of employment" in the Federal Tort Claims Act but the exact relationship has not been definitively established.

Inactive training duty performed by members of the Army and Air Force National Guard constitutes "service" for purposes of the "incident to service" standard. 40 Comp. Gen. 31 (1960).

Some of the more common situations embraced within the term "incident to service" are listed below. It must be emphasized that the extent to which any of these situations is covered by a given agency will depend on that agency's regulations.

--Loss of or damage to household goods or other personal property while in shipment incident to a transfer of official duty station. B-155619, January 18, 1965; B-181483-O.M., July 30, 1974. This may include motor vehicles. B-190652-O.M., December 15, 1977.

--Loss or damage incident to authorized nontemporary storage. 44 Comp. Gen. 290, 292 (1964); B-178243, May 1, 1973; B-180778-O.M., April 17, 1964. The claimant's failure to insure the property does not require disallowance. B-163125, February 12, 1968.

--Loss or damage to a privately-owned motor vehicle while being used for official business other than ordinary commuting. B-185513, March 24, 1976; B-174669, February 8, 1972; B-187262-O.M., January 25, 1977.

If the employee received a mileage allowance under 5 U.S.C. § 5704, no reimbursement may be claimed under that provision since the mileage allowance is a commutation of all operating expenses except for the items specified in section 5704. 15 Comp. Gen. 735 (1936). However, this does not preclude consideration of a claim under 31 U.S.C. § 241. B-185513, supra; B-174669, supra; B-190853-O.M., November 6, 1979.

Other situations which the Comptroller General has advised might properly be considered "incident to service" are:

--Suitcase damaged by airline while employee was travelling at Government expense to attend training session. B-187913, February 9, 1977.

--U-Haul trailer stolen from motel garage incident to transfer of duty station where agency had approved use of trailer. B-180161, January 8, 1974.

--Claim for residential fumigation upon discovery that household goods had been damaged by termites while in storage. B-173369-O.M., June 22, 1977.

However, the Comptroller General expressed doubt that an agency could properly consider a claim for a bicycle stolen from a federally-leased garage. The bicycle was used for commuting to work and the parking facility was provided for the convenience of the employees. B-180994, June 12, 1974.

5. The claim must be "substantiated". The degree of evidence necessary to satisfy this requirement is up to the agency. Thus, GAO denied a claim by one of its employees for sterling silver flatware lost in shipment where the flatware was not listed on the shipper's inventory and there was no other documentary evidence to substantiate that the flatware was in fact included in the shipment. B-201703-O.M., June 8, 1981.

If an agency suspects fraud or misrepresentation, it is not required to deny the entire claim. It may treat each item claimed as a separate claim for adjudication purposes. B-192978, February 28, 1979. A separate item is one which the employee could claim independently. 57 Comp. Gen. 664, 667 (1978).

6. Possession of the property must be "determined to be reasonable, useful, or proper under the circumstances".

This determination is up to the agency and GAO will not question it. See 58 Comp. Gen. 291, 293 (1979) (use of privately-owned vehicle when GSA vehicles were apparently available); B-195295, November 14, 1979 (transporting liquor on Coast Guard aircraft).

7. A claim must be presented within two years after it accrues. The period of limitation may be tolled during time of war or armed conflict.

8. If the loss or damage occurred in "quarters" occupied by the claimant within the 50 states or the District of Columbia, a claim is cognizable only if the quarters were "assigned or otherwise provided in kind" by the United States. This limitation does not apply to quarters outside of the 50 states or the District of Columbia.

Claims by military personnel for damage occurring in Government-owned quarters occupied on a rental basis have been held not excluded under this provision. Fidelity-Phenix Fire Ins. Co. v. United States, supra; B-142446-O.M., June 3, 1960.

Loss occurring in a rental trailer in a private trailer court is not cognizable. 52 Comp. Gen. 487 (1973). However, a trailer park on an Air Force base, regulated and maintained by the base, on which lots were assigned to specific trailers on a rental basis, has been held to constitute "assigned" quarters. Fidelity-Phenix Fire Ins. Co. v. United States, supra.

9. The loss must not have been caused "wholly or partly by the negligent or wrongful act of the claimant, his agent, or his employee". Thus a determination of negligence for purposes of the Federal Tort Claims Act precludes a determination of non-negligence for the same incident under 31 U.S.C. § 241. 58 Comp. Gen. 291 (1979) (previously discussed in Section A(3), this Chapter); B-187844-O.M., July 7, 1977.

If property is shipped using the "commuted rate" method authorized by 5 U.S.C. § 5724(c) in lieu of the "actual expense" method, the carrier is the agent of the employee and a claim for loss or damage attributable to the carrier's negligence is not cognizable under 31 U.S.C. § 241. B-153031, January 28, 1964; B-155208-O.M., November 13, 1964; B-91607-O.M., March 12, 1973. Under the "actual expense" method, the carrier is deemed the agent of the Government. E.g., B-190652-O.M., December 15, 1977.

31 U.S.C. § 243 establishes a maximum attorney's fee of 10 percent of the amount paid in settlement of the claim. Penal sanctions are provided for excessive fees.

As to which appropriation is chargeable with payments under the Act, the Comptroller General has followed the principle applicable under the Federal Tort Claims Act, supra. The rule is stated in B-174762, January 24, 1972, as follows:

> "Where * * * there is no obligation on the part of the United States for the payment of any amount on a claim until a final determination of the Government's liability is made by the person authorized to do so thereunder, the appropriation current at the time such final action is taken is the appropriation obligated for and chargeable with the payment of the amount of the adjudicated claim. [Citations ommitted.]"

(3) Federal Employees Compensation Act

The Federal Employees Compensation Act (FECA), found at Title 5, United State Code, Chapter 81 (§§ 8101 et seq.), provides a broad and comprehensive plan for the compensation of injured Government employees. The Act is a Federal workmen's compensation law which provides compensation for disability and death and medical care for civilian employees of the United States who suffer injuries in the performance of their duties. 5 U.S.C. §§ 8102, 8103; 35 Comp. Gen. 646 (1956). Compensation is not available if the death or injury was caused by the employee's willful or intentional misconduct or proximately by his intoxication. 5 U.S.C. § 8102(a).

In order to be entitled to compensation under FECA, the employee or someone on his behalf must file a claim in writing and on a form approved by the Secretary of Labor. 5 U.S.C. § 8121. There is a three-year statute of limitations but it does not apply if written notice of the injury or death was given to the immediate superior, or if the immediate superior had actual knowledge of the injury or death, within 30 days. Also, the Secretary of Labor may waive the time limitation in "exceptional circumstances." 5 U.S.C. § 8122. Assignment of a claim for compensation under FECA is void, and FECA compensation is exempt from claims of creditors. 5 U.S.C. § 8130.

FECA claims are paid from a fund in the United States Treasury known as the "Employees' Compensation Fund." Congress appropriates money to the Fund on the basis of appropriation requests made by each agency and instrumentality covered by FECA. 5 U.S.C. § 8147.

The responsibility for administering FECA and deciding all questions arising under it rests with the Secretary of Labor or his designee. 5 U.S.C. § 8145. The Secretary's action in allowing or denying a FECA claim is final and conclusive and not subject to review by any other official of the United States or by a court. 5 U.S.C. § 8128. Accordingly, GAO has no direct role in adjudicating FECA claims. B-165874, February 10, 1969; B-172722, October 12, 1971. However, GAO may render decisions in certain ancillary areas, for example, the provision in 5 U.S.C. § 8116 that an employee while receiving FECA compensation may not receive any other salary or remuneration from the United States except "in return for service actually performed." See, e.g., 35 Comp. Gen. 646 (1956). Such decisions would be handled by OGC's Personnel Law group.

FECA is the exclusive remedy for a Federal employee injured "while in the performance of his duty." 5 U.S.C. § 8116(c). See, e.g., Joyce v. United States, 474 F.2d 215 (3rd Cir. 1973) (postal employee hit on head by bar of soap dropped or thrown from restroom window on third floor of Federal building.)

The relationship between FECA and the Federal Tort Claims Act (supra, this Chapter) may be illustrated with two court decisions. Suppose a Federal employee, riding as a passenger in a vehicle being driven by a Federal employee within the scope of his employment, is injured in a collision with another vehicle driven by another Federal employee also within the scope of his employment. The injured employee alleges negligence by both drivers. If the injured person were a private party, he could proceed under the Federal Tort Claims Act. However, since he is a Federal employee, his sole and exclusive remedy is compensation under FECA. Van Houten v. Ralls, 411 F.2d 940 (9th Cir. 1969), cert. denied, 396 U.S. 962, rehearing denied, 397 U.S. 930. (This case involved the identical fact situation described.)

The mere fact that the injured person is a Federal employee does not automatically eliminate the Federal Tort Claims Act. In order for FECA to be the exclusive remedy, the employee must have been injured "while in the performance of his duty." 13/ In Walker v. United States, 322 F. Supp. 769 (D. Alaska 1971), an employee was driving to visit a personal friend while on her lunch break. Her vehicle was struck by a Government-owned and operated train while she was somewhat remote from her actual place of employment although still within the confines of the Air Force base on which she worked. The Court held that the injury did not occur while she was in the performance of official duties. Therefore she was not covered by FECA and could proceed under the Federal Tort Claims Act.

13/ The Federal Tort Claims Act uses the term "scope of employment." The Military Personnel and Civilian Employees' Claims Act of 1964 uses the term "incident to service." FECA uses the term "performance of duty." The differences in terminology have caused some confusion since, while the concepts are obviously similar, the terms are not identical.

(4) Contract Disputes Act of 1978

The Contract Disputes Act of 1978, Public Law 95-563, 41 U.S.C. §§ 601 et seq., established a mechanism for the resolution and payment of claims and disputes relating to express and implied contracts of the executive branch.

Briefly, the procedure is as follows:

(1) The contractor must first file his claim in writing with the contracting officer of the cognizant agency. The contracting officer must then issue a written decision on the claim. The contracting officer's decision is final and conclusive and not subject to review except as provided in the Contract Disputes Act itself.

(2) If the contracting officer's decision is adverse to the contractor, the contractor may appeal to the appropriate agency board of contract appeals or directly to the Court of Claims.

The Act authorizes the establishment of a board of contract appeals within an executive agency if justified by the workload. 14/ Upon appeal by a contractor, the board of contract appeals must issue a written decision and may grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims. Board rules must provide procedures for the expedited disposition of "small claims," defined in the Act as $10,000 or less.

(3) Either the contractor or the agency may seek judicial review of a board decision in the Court of Claims, except that there is no appeal from a determination under the "small claims" procedure unless fraud is involved. Appeal by the agency requires the prior approval of the Attorney General. Except for appeal to the Court of Claims, a board decision is final.

Payment of claims under the Act is covered by section 13, 41 U.S.C. § 612. Judgments against the United States by the Court of Claims and monetary awards to a contractor by a board

14/ As of January 1982, there were 13 boards of contract appeals: Agriculture, Armed Services, Commerce, Corps of Engineers, Energy, General Services Administration, Housing and Urban Development, Interior, Labor, NASA, Postal Service, Transportation, and Veterans Administration.

of contract appeals are to be paid from the permanent judgment appropriation established by 31 U.S.C. § 724a (Chapter 12, this Manual). Section 13(c) requires that the judgment appropriation be reimbursed "by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes." A separate account has been established within the permanent appropriation for Contract Disputes Act payments (20X1743).

Since payment is to be made "in accordance with the procedures provided by" 31 U.S.C. § 724a, the requirements relating to judgments discussed in Chapter 12 of this Manual will be generally applicable. In view of the reimbursement requirement, the provision in 31 U.S.C. § 724a that payment be "not otherwise provided for" will generally not be an issue in Contract Disputes Act payments. However, payment may be made only upon certification by the Comptroller General, and the award or judgment must be "final." Since the Act authorizes the Court of Claims to enter partial judgments, and authorizes a board to grant the same relief available from the Court of Claims, it is possible to have two or more partial judgments or awards in the same case, a result that is normally not permissible under 31 U.S.C. § 724a. Thus, in one case, the principal portion of a board award was held payable notwithstanding that an appeal had been taken on the interest award. 60 Comp. Gen. 573 (1981).

Awards are certified for payment by GAO's Claims Group. Generally, a prerequisite for payment will be the certification by both parties that no further review will be sought. This tells GAO that the award or judgment is final and therefore ready for payment. GAO is considering developing a certification form to provide uniformity and thereby expedite payment.

The reimbursement requirement of section 13(c) raises two issues that have not yet been addressed in decisions:

(1) Whether "available funds" means funds current at the time of the final board or court decision or unobligated balances that may be available for restoration from some prior year (see Chapter 4, this Manual). Precedent from other areas (specifically, the Federal Tort Claims Act and the Military Personnel and Civilian Employees' Claims Act of 1964, supra, this Chapter) suggests the use of funds current as of the final board or court decision, but the extent to which this principle is applicable to reimbursements under the Contract Disputes Act has not yet been determined.

(2) If reimbursement is to be made from current funds, the Act does not indicate the extent to which funds must be diverted or reprogrammed from other projects within the appropriation before seeking additional appropriations from Congress. It may be argued that, since the purpose of the reimbursement requirement is to ensure agency accountability to Congress, it should not operate so as to significantly disrupt other ongoing and necessary projects if this result can be avoided. This reasoning would suggest that the agency should have reasonable discretion in deciding when to use "available funds" and when to request additional appropriations. It would seem to follow that, when additional appropriations are necessary, they should be requested without undue delay, generally with the agency's next request for regular or supplemental appropriations.

Section 12 of the Act, 41 U.S.C. § 611, provides for interest on awards and judgments under the Act. For claims of $50,000 or less, interest is to run from the date the contracting officer receives the claim from the contractor under section 6(a) of the Act "until payment thereof." For claims greater than $50,000, interest runs from the date of the contractor's certification under section 6(c) that the claim is made in good faith and that supporting data is accurate and complete. B-107871, July 31, 1981. Section 12 further provides:

> "The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board."

Public Law 92-41, a 1971 amendment to the Renegotiation Act of 1951, directs the Treasury Department to establish semi-annual interest rates (January 1 through June 30 and July 1 through December 31), taking into consideration private commercial interest rates for new loans maturing in approximately five years. The rates have fluctuated up and down depending on trends in the economy. Although the Renegotiation Board terminated in March 1979, the Renegotiation Act was not expressly repealed, and the Treasury Department has continued to set the interest rates and publishes them in the Federal Register.

While it is clear that the Contract Disputes Act has diminished GAO's claims settlement jurisdiction (31 U.S.C. § 71) with respect to contract claims covered by the Act, it does not affect the Comptroller General's account settlement authority or the authority to render decisions on the

availability of funds (31 U.S.C. §§ 74 and 82d). This is illustrated in 59 Comp. Gen. 232 (1980). In that case, an Army medical officer ordered a cornea from the Georgia Lions Eye Bank for transplant to an eligible patient. Believing that the cornea would be provided free of charge, the officer did not follow procurement procedures. In fact, the Eye Bank customarily charged a $200 processing fee and submitted an invoice to that effect. The question was whether the invoice was a claim which had to be decided under the Contract Disputes Act. Noting that the Act does not define "claim," the Comptroller General concluded that the Act was intended to apply to situations "where the entitlement to recovery or the amount of recovery is disputed by the Government" and not to every simple request for payment. The Eye Bank invoice raised the threshold question of whether a contractual relationship existed at all. The decision further noted:

> "[B]efore an implied procurement contract to which the United States is a party may be legally recognized, questions must be resolved which concern not only the authority of Government officials to enter into or ratify a contractual arrangement, but also whether the purported contract is prohibited by a statute or not within the agency's statutory authorization. Also, there may be questions concerning the availability of funds to pay an invoice resulting from an informal commitment, even if it is clear that there is no legal impediment to recognizing an implied contractual relationship." 59 Comp Gen. at 234.

These are the types of issues the Comptroller General has traditionally decided and this responsibility does not conflict with the disputes-resolving procedures of the Contract Disputes Act. The request for payment (invoice) was held not to constitute a "claim" for purposes of the Contract Disputes Act and therefore remained within GAO's settlement jurisdiction.

GAO's jurisdiction in light of the Contract Disputes Act was also discussed in B-193875-O.M., March 5, 1979, with respect to several specific types of claims:

- --The Act by its express terms does not apply to the procurement of real property (as distinguished from the procurement of construction, alteration, repair, or maintenance of real property).

- --The Act does not affect GAO's jurisdiction to settle claims for bid preparation costs. These do not relate to contracts subject to the Act, but are

grounded on the promise implied in each solicitation (not itself a contract) that offers will be fairly and honestly considered.

--Davis-Bacon Act claims are not subject to the Act because the Comptroller General is specifically authorized to resolve them under 40 U.S.C. § 276a-2.

--The status of loss and damage claims is somewhat unclear. On the one hand, the language of the Act is broad enough so that it could be construed to cover them. On the other hand, loss and damage claims have not traditionally been resolved under the usual "disputes" procedures which the Act was intended to refine, and also could be argued to be grounded in tort. At present, GAO is continuing to settle loss and damage claims.

(5) International Claims Settlement Act of 1949

The International Claims Settlement Act of 1949 (22 U.S.C. §§ 1621 et seq.) established a mechanism for the adjudication of claims by the Government of the United States and by nationals of the United States against a foreign government arising out of the nationalization or other taking of property, in situations where the United States and the foreign government have entered into an agreement whereby the United States has agreed to accept payment of a sum "in en bloc settlement" of all such claims. Claims are adjudicated by the Foreign Claims Settlement Commission, which has authority to render final decisions and make awards under the Act. 22 U.S.C. § 1623(a).

Payments received from foreign governments under claims settlement agreements are deposited in special funds in the Treasury and are permanently appropriated for making payments of awards under the Act. 22 U.S.C. § 1627. Awards in favor of the Government of the United States are credited to miscellaneous receipts. 22 U.S.C. § 1623(g). Other awards are certified by the Foreign Claims Settlement Commission to the Treasury Department for payment from the applicable special fund, in accordance with priorities specified in the Act. 22 U.S.C. §§ 1624, 1627.

In adjudicating claims under the Act, the Commission is to rely first on the relevant provisions of the claims agreement itself, and secondly, on applicable principles of "international law, justice, and equity." 22 U.S.C. § 1623(a).

While payments on allowed claims are made through the Treasury Department, the Comptroller General is responsible for making determinations of entitlement in certain situations. 22 U.S.C. § 1626(c) provides in part as follows:

> "Payments made pursuant to this subchapter shall be made only to the person or persons on behalf of whom the award is made, except that--
>
> > "(1) if any person to whom any payment is to be made pursuant to this subchapter is deceased or is under a legal disability, payment shall be made to his legal representative, except that if any payment to be made is not over $1,000 and there is no qualified executor or administrator, payment may be made to the person or persons found by the Comptroller General to be entitled thereto, without the

necessity of compliance with the requirements of law with respect to the administration of estates;

"(2) in the case of a partnership or corporation, the existence of which has been terminated and on behalf of which an award is made, payment shall be made, except as provided in paragraphs (3) and (4) of this subsection, to the person or persons found by the Comptroller General of the United States to be entitled thereto; * * * "

The exceptions referred to in subsections (3) and (4) relate to corporations for which a receiver or trustee has been appointed. Implementing regulations by the Treasury Department are found at 31 C.F.R. Part 250. Payment in accordance with section 1626 "shall be an absolute bar to recovery by any other person." 22 U.S.C. § 1626(d).

Awards by the Foreign Claims Settlement Commission are frequently divided into installments which are then paid out over a number of years. Following a 1968 amendment to the International Claims Settlement Act (Public Law 90-421, 82 Stat. 420) which raised the dollar amount of 22 U.S.C. § 1626(c)(1) from $500 to $1,000 and substituted the words "any payment" for "total award," GAO now determines entitlement under the statute even if the total award is in excess of $1,000. Where the amount of any individual payment does not exceed $1,000, the Comptroller General has authority to determine the proper recipients of an award under the conditions set forth by 22 U.S.C. § 1626(c)(1). B-167253, July 15, 1969.

GAO's determinations under section 1626(c) are made in the first instance by the Claims Group. If an award is to be paid in installments over a number of years, only the initial claim needs to be submitted to GAO for a determination. Thereafter, the Claims Group's settlement action may be used as precedent as long as the claim remains the same, the amount of payment does not exceed $1,000, and the probative evidence does not change. B-167253, supra.

In making determinations under 22 U.S.C. § 1626(c)(1), GAO recognizes that the distribution of estates is ordinarily a matter of State rather than Federal law. Thus, GAO will normally apply the laws of descent and distribution of the State of the deceased payee's domicile at the time of death. For example, in B-186611, November 9, 1976, the Comptroller General determined that a claim awarded by the Foreign Claims

Settlement Commission was to be divided equally among the awardee's widower and two surviving children. The awardee, a domiciliary of California, died intestate and no administrator was appointed. In determining the proper recipients for this award, the Comptroller General applied the California law governing intestate succession, which provides that the separate property of a decedent survived by a spouse and more than one child passes one-third to the spouse, and two-thirds equally among the children.

GAO also ordinarily gives effect to any priority State law may create in favor of the payment of funeral expenses. In B-172238-O.M., April 9, 1971, an award under the International Claims Settlement Act was claimed by both the awardee's widow and his daughter, the named executrix. The awardee was a New York resident who died testate, however the value of the estate did not justify probate costs. In support of her claim, the awardee's widow filed an itemized receipt, signed by the funeral home manager, for funeral expenses she had paid. Citing the New York law requiring that reasonable funeral expenses be preferred to all debts and claims against a decedent's estate, the Comptroller General determined that the awardee's widow was the proper recipient of the full award, which amounted to less than half of the total funeral expenses. See also B-169969-O.M., September 30, 1970.

An unprobated will generally will not be given precedence over the provisions of the applicable State law. E.g., B-172238-O.M., supra. However, in limited circumstances, GAO may look to a will for evidence of the testator's intent. See B-167740-O.M., September 17, 1969.

22 U.S.C. § 1626(c)(2) charges the Comptroller General with responsibility for determining the person or persons who are entitled to receive awards made by the Foreign Claims Settlement Commission in cases where a recipient partnership or corporation has been terminated. In B-143052, February 1, 1965, such a corporate recipient had been dissolved under New York law for nonpayment of taxes. The Comptroller General considered a number of claims for the award, and determined that the proper recipients were the named President and Treasurer of the corporation, who in their official capacities were authorized to endorse all checks payable to the corporation. Accordingly, the Treasury Department was directed to make the award check payable to both parties. B-143052, September 15, 1961, and B-143052, June 14, 1960, are earlier considerations of this same matter and include discussion of the applicable standards and necessary documentation.

B-160559, June 12, 1967, illustrates a simpler determination in which an award was determined payable to two individuals and a corporation to whom the assets of the dissolved corporation had been transferred. See also B-188312-O.M., April 18, 1977 (payment to terminated partnership determined payable in equal shares to former partners as individuals).

More recently, B-202723, July 22, 1981, involved an award to a corporation which had terminated by operation of law in 1959. Since none of the corporation's directors was still living, the award was held payable to the heirs of the deceased sole shareholder of the corporation.

Claims involving Foreign Claims Settlement Commission awards often present evidentiary problems. This is because the events giving rise to the awards may have occurred many years ago, under unusual circumstances, and the claimants are often heirs or descendants of the original property owners with little "hard evidence" to support their claims. GAO's approach, as with other types of claims, is to require the "best evidence obtainable." Exactly what this will be depends on the circumstances of the particular case. On the one hand, the mere uncorroborated statement of a claimant will not be sufficient to support a claim. Yet on the other hand, when "primary" evidence is unobtainable, GAO will accept "secondary" evidence in the form of pertinent data from which the necessary information can reasonably be constructed. This is really nothing more than an application of the eminently sensible axiom of life that "you do the best you can with what you've got." For the application of these principles to a group of claims under the China Claims Program, see B-201150, May 13, 1981, modified in part by B-201150, December 1, 1981.

(6) Estates of United States Citizens Who Die Overseas

When an American citizen (except a seaman who is a member of a crew of an American vessel) dies overseas or at the time of death is domiciled overseas, and leaves no legal representative in that country, the State Department and, under certain circumstances, the General Accounting Office, have statutory responsibilities concerning the decedent's estate. Detailed provisions governing the disposition of such estates are contained in 22 U.S.C. § 1175. The statutory procedures apply when authorized by treaty provisions or permitted by the laws of the country in which the death occurs or the decedent is domiciled, or when permitted by established usage.

The appropriate United States consular officer, or other diplomatic officer in his absence, becomes the "provisional conservator" of the estate. His duties are spelled out in the statute. First, he must take possession of the personal estate. Second, after taking possession of the personal property, he must inventory and appraise the effects, article by article. Third, he must collect the debts due to the decedent in his jurisdiction and pay from the estate the obligations owed there by the decedent. Fourth, he is to sell at public auction any perishable items in the estate and, after reasonably attempting to notify the next of kin, such other portions of the estate as may be necessary to pay the decedent's debts and funeral expenses. At the expiration of one year from the date of death (or longer if necessary for final settlement of the estate), he is to sell the residue of the estate "with the exception of investments of bonds, shares of stock, notes of indebtedness, jewelry or heirlooms, or other articles having a sentimental value." He must then transmit the proceeds of the sale and any unsold effects to the General Accounting Office. If the decedent's legal representative appears at any time prior to transmission of the estate to GAO, the consular or diplomatic officer is authorized to deliver the estate to the legal representative.

The authority to collect debts due to the decedent does not include the unpaid compensation of a deceased Government employee. 7 Comp. Gen. 396 (1927).

Upon the transmission of an estate to GAO by the State Department, the Comptroller General or his designee becomes the conservator of the estate, with the duty to hold the estate in trust for the legal claimant. For a period of six years from the date of the receipt of the estate by GAO, GAO may consider and settle claims against the estate presented by a "legal claimant." The statute does not define the term

"legal claimant." During the six-year "holding period," GAO may take whatever actions it deems necessary for the conservation of the estate, including selling portions of it. The proceeds of any such sale are deposited in the Treasury in a fund in trust for the legal claimant.

If no claim has been received from a legal claimant by the end of the six-year period, and the State or Territory of the decedent's last domicile in the United States is known, GAO is to transmit the proceeds of any trust accounts established in the Treasury plus any remaining unsold effects to the proper officer of that State or Territory. If the decedent's last domicile in the United States is not known, the trust funds must be covered into the general fund of the Treasury as miscellaneous receipts, and GAO may dispose of any remaining effects as it deems appropriate, including the destruction of any items considered "no longer possessed of any value." Any expenses incurred by GAO in the administration and disposition of the estate are to be deducted from the proceeds of the estate.

In B-174465-O.M., January 10, 1972, the Comptroller General served as conservator under 22 U.S.C § 1175 for an American citizen who died intestate in Hungary. Based on a birth certificate and other evidence (and in the absence of any other claimants), it was determined that a German-born woman was the acknowledged daughter and only surviving heir of the decedent. Accordingly, she was the "legal claimant" and therefore the proper recipient of the residue of his estate, then being held by GAO and consisting of a watch, a wedding ring, personal papers and photographs, and approximately $1,000 in cash. See also B-184160-O.M., October 3, 1975 (where GAO determined that under New York law a public administrator had the same standing as a private, court-appointed administrator and was, therefore, a proper claimant under 22 U.S.C. § 1175) and B-159357-O.M., July 8, 1966 (claim of a cousin of the deceased would precede that of a public administrator).

In A-33582, October 14, 1930, a Post Office Inspector requested the residue of the estate of an American citizen who died in Mexico. The (then) Post Office Department had received information (from various Government agencies) that the personal papers of the decedent contained evidence that he had been living under an assumed name and was, in fact, a man sought for mail fraud. Apparently, the trial of a second man charged in the same case had been continued for a number of years while investigators sought his accomplice. As conservator, the Comptroller General refused the request because

the Inspector was neither a proper heir nor a legal representative of the decedent. However, qualified representatives of the Post Office Department were invited to inspect the effects being held, and GAO offered to provide copies of any documents relevant to the pending court action.

In B-169616-O.M., May 8, 1970, the Comptroller General received the residue of the estate of an American citizen who died in Malta. Among the items of personal property to be held in trust were two check books representing deposits with a Maltese bank. When GAO requested transmission of the funds on deposit, the bank declined, citing a bank policy requiring a letter of indemnity prior to the release of funds to any party other than a depositor's legal heirs. It was determined, however, to be inappropriate for GAO to agree to indemnify the bank for any payments which it might make upon presentment of a claim by a lawful claimant of the decedent. In explaining this position, the memorandum stated:

> "Remittance of the funds to this Office, as the statutory conservator of the deceased's estate, is equivalent to payment of the estate and would relieve the bank of any further obligation to [the decedent's] heirs or lawful claimants. As trustee of the funds, it is this Office's obligation, and not the bank's, to determine to whom the funds are properly payable and thus the bank should refer to this Office any claim to moneys which it receives."

See also B-171430-O.M., March 29, 1971 (Mexican bank refused to transmit proceeds of bank account to GAO because it was prohibited by Mexican law; procedures under 22 U.S.C. § 1175 are not applicable where not permitted by laws of country where death occurs).

On June 3, 1962, 120 Americans (mainly from Atlanta, Georgia) died in a plane crash near Paris, France. Following the tragedy, $631.47 in United States and foreign currencies was delivered to the American Embassy by French authorities. The moneys belonged to the deceased Americans, but under the circumstances individual ownership could not be established. In 43 Comp. Gen. 52 (1963) the State Department asked whether a proposal to donate the "unidentified effects" to two Atlanta charities would be authorized. The plan was apparently the result of correspondence between the American Consul General in Paris and the Mayor of Atlanta, who had been in contact with the decedents' next of kin. Two charities were named because the relatives could not agree upon a single beneficiary. The

Comptroller General held that the plan was not authorized by 22 U.S.C. § 1175, stating:

> "Notwithstanding the practical and ethical considerations giving rise to the Embassy's proposed distribution, we cannot view the contemplated action as a proper extension of the duties and responsibilities imposed by section 1175, both upon the Foreign Service and our Office. In the absence of unanimous concurrence by the various legal claimants, effectuation of the proposed distribution would not be authorized. Rather, under the section and the applicable regulations, the monies involved should now be transmitted to our Office, 'to be held in trust for the legal claimant,' and ultimately distributed, if the parties in interest do not resolve their differences, to the State 'of the last domicile in the United States of the deceased citizen,' apparently herein the State of Georgia."

Problems under 22 U.S.C. § 1175 also arose after a 1977 plane crash at Tenerife, Canary Islands, in which a number of American citizens were killed. Personal effects were recovered initially by Spanish authorities and turned over to Pan American Airlines to aid in establishing the identity of victims. The airline flew the bodies and personal effects to an Air Force base in the United States where the State Department took possession of the effects and transported them to Washington. Some of the items in the State Department's possession could be identified with certainty but many could not. The circumstances had precluded application of the "provisional conservation" portions of 22 U.S.C. § 1175 and State Department regulations (notice and inventory) and strict compliance with the statute had become impossible.

The airline had offered to appraise the effects, attempt to locate heirs, and consider claims, but GAO had informally advised that this procedure was not consistent with 22 U.S.C. § 1175. Subsequently, the State Department proposed to send a letter to each victim's legal representative, asking the legal representative to submit a description of items believed to be in the victim's possession at the time of the disaster. GAO approved this proposal as a reasonable approach under the circumstances, but further advised that, notwithstanding that more than a year and a half had passed since the accident, the State Department should nevertheless comply with those portions of the statute that were still reasonably capable of being satisfied with respect to the items which could be positively identified. B-193039, December 12, 1978 (non-decision letter).

(7) Government Losses in Shipment Act

The Government Losses in Shipment Act (GLISA), 40 U.S.C. §§ 721-729, was enacted in 1937. It applies to shipments by Government agencies and was designed to save the Government money by eliminating the need for the Government to purchase private insurance to obtain protection against losses of valuables in transit. S. Rep. No. 738, 75th Cong., 1st Sess. 5-6 (1937). The Act is administered by the Treasury Department, which has issued implementing regulations at 31 C.F.R. Parts 261 and 262.

The Act applies to "valuables" as defined in 40 U.S.C. § 729 and the implementing regulations. Claims procedures are set forth in 40 U.S.C. § 723. In the event of a loss (loss, damage, or destruction) of valuables shipped in accordance with the regulations, the agency must file a claim for replacement in writing with the Secretary of the Treasury. If the Secretary allows the claim, replacement is made out of a revolving fund established by 40 U.S.C. § 722. The money in the fund comes from congressional appropriations and recoveries and repayments under the Act. The Secretary's determination that a loss occurred or that a given shipment was in accordance with regulations is final and conclusive.

If the Secretary determines that replacement can be effected in whole or in part without loss to the United States by a credit to the account of the department or agency which made the claim, the revolving fund is not used to the extent the credit is deemed sufficient. In such a situation, the Secretary forwards his determination to the Comptroller General and the Comptroller General is authorized and directed to make the appropriate credit in his settlement of accounts.

There is one situation in which GLISA applies to a loss other than a loss in shipment. In the event of loss, damage, or destruction to certain categories of Treasury paper (for example, Documentary Internal Revenue Stamps) while in the custody or possession of the Postal Service acting as sales agent for or on behalf of the Treasury Department, the loss is to be replaced from the GLISA revolving fund. 40 U.S.C. § 724; B-171400, August 4, 1971.

Decisions of the Comptroller General involving GLISA fall generally into three categories. The first group deals with threshold issues of applicability. Thus, a "shipment" for purposes of GLISA includes the local transportation of valuables in the custody of Government employees (messengers). 19 Comp. Gen. 369 (1939), modifying 18 Comp. Gen. 782 (1939). It also

includes contract armored car service. 19 Comp. Gen. 490 (1939). However, the transportation of valuables in the privately-owned automobile of an employee in travel status is not a "shipment" for purposes of the Act. 17 Comp. Gen. 419 (1937). Also, the Act applies only with respect to those items declared by the Secretary of the Treasury to be "valuables." 32 Comp. Gen. 153 (1952); 21 Comp. Gen. 928 (1942).

The second group of decisions involves requests for the relief of accountable officers. These are discussed in the Section entitled "Losses in Shipment," Chapter 10, this Manual.

The third group of decisions concerns 40 U.S.C. § 726, which prohibits the purchase by a Government agency of insurance against loss, damage or destruction in the shipment of valuables except as specifically authorized by the Secretary of the Treasury. The Secretary may authorize such insurance if he finds that the risk cannot be adequately guarded against by the facilities of the United States or that adequate replacement cannot be provided under GLISA and other relevant statutory authorities. (See Chapter 3, this Manual, for a general discussion of the Government's policy on self-insurance.)

Where transportation charges are regularly fixed at a rate which includes the cost to the carrier of indemnity insurance, and the carrier will not accept a Government shipment at a rate exclusive of such cost, the total sum paid to the carrier for the shipment may be considered as transportation costs and payment does not violate 40 U.S.C. § 726. 17 Comp. Gen. 139 (1937). Similarly, payment of a transportation rate based on the real worth of "valuables," higher than the minimum or "release" value provided by tariff rates, does not violate GLISA. Payment of such higher rate places a greater measure of responsibility on the carrier and is thus calculated to minimize the risk of loss. 17 Comp. Gen. 741 (1938).

These two decisions were followed in 34 Comp. Gen. 175 (1954), in which the Comptroller General concluded that the payment of charges for armored car service for the shipment of coins by the Treasury Department, under contracts requiring the contractor to carry designated insurance and where the charges included the cost to the carrier of the indemnity insurance, would not violate GLISA where the carrier would not accept the shipments at a rate exclusive of the additional costs. It was pointed out in that decision that GLISA would provide an inadequate alternative in that the loss of one individual armored car shipment could conceivably exhaust the revolving fund.

An early decision, 22 Comp. Gen. 832 (1943), held that GLISA did not prohibit the purchase of postal insurance. This was modified in 58 Comp. Gen. 14 (1978), in which the issue was the application of 40 U.S.C. § 726 to insured and registered mail. The decision concluded that GLISA prohibited the use of insured mail by the Government since it offers no special or additional service apart from the indemnity feature. Registered mail, on the other hand, affords additional protection as well as insurance. Thus, since the insurance is only incidental to the protective features, GLISA does not prohibit the use of registered mail where administratively determined to be necessary. Registered mail should not be used, however, for the sole or primary purpose of obtaining indemnity. (As a related note, registry fees may be charged to any appropriation or fund available to the agency rather than to the appropriation of the particular activity responsible for the mailing. 36 Comp. Gen. 239 (1956).)

The General Services Administration suggested that the Postal Service should provide a separate fee schedule for Federal agencies which would eliminate the charge for indemnity insurance from registered mail. The Postal Service has expressed the opinion that any new fee structure would have to be applicable to all registered mail users. 58 Comp. Gen. 14, supra. While GAO agrees with the GSA suggestion as a matter of policy, whether the Postal Service has the authority to establish a special rate for Federal agencies is not an issue to be decided by the Comptroller General but must be determined by the Postal Service and the Postal Rate Commission. 58 Comp. Gen. 640 (1979).

(8) Damage to Commercial Rental Vehicles

Occasionally, a Government employee is authorized to use a commercial rental vehicle in the performance of official duties. If the employee negligently injures a third party, the Federal Tort Claims Act (supra, this Chapter) will apply to the same extent as if the employee had been using a Government-owned vehicle. This Section deals with claims by the rental company for damage to the rental vehicle.

Under the typical rental agreement, the rental company assumes responsibility for damage to the vehicle, whether or not caused by the renter's negligence, except for the deductible portion of its commercial insurance policy. The standard rental contract gives the renter the option to purchase additional insurance, commonly called "collision damage waiver" insurance. If the optional coverage is purchased, the renter will generally have no liability to the rental company for damage to the vehicle. If the optional coverage is not purchased, the renter is liable to the rental company for damage to the vehicle up to an amount specified in the contract representing the rental company's deductible, regardless of whether or not the damage was caused by the renter's negligence.

At one time, both civilian employees and military personnel who purchased the optional collision damage waiver coverage could be reimbursed. E.g., 35 Comp. Gen. 553 (1956); B-172721, July 19, 1971. The rationale was that the employee's election to purchase the insurance was not an unreasonable exercise of discretion. However, since the general policy of the Government is not to carry insurance (Chapter 3, this Manual), the Comptroller General also recognized that an employee's failure to purchase this optional coverage should not be viewed as unreasonable. Thus, in 47 Comp. Gen. 145 (1967), the Comptroller General held that an employee could be reimbursed who had declined the collision damage waiver and who was required to pay the rental company $100 (the rental company's deductible exclusion as specified in the rental contract) for damage to the rental vehicle incident to the performance of official business but not attributable to the employee's negligence.

Subsequently, because it was viewed as more economical to the Government to assume the risk of loss covered by a collision damage waiver than to reimburse Federal personnel for the cost of these waivers, the travel regulations applicable to civilian employees and military personnel were revised to prohibit reimbursement of the cost of optional

collision damage waiver insurance. GAO endorsed the change. B-158712, November 16, 1970. Now, if an employee chooses to purchase this optional coverage, it is viewed as a personal expense and not reimbursable by the Government. B-190698, April 6, 1978; B-185454, July 1, 1976; B-184623, October 21, 1975; B-172721, March 13, 1972. This is true even if the employee has been erroneously advised by his agency that he should purchase this insurance. B-181180/B-181187, June 27, 1974.

However, GAO has also recognized that collision damage waiver insurance is not always optional. If the employee had no choice but to purchase the insurance as a condition of renting the vehicle (if, for example, it is required by law or procedure in certain foreign countries), then reimbursement may be permitted. B-189770, September 12, 1978; B-189082-O.M., December 16, 1977; B-179336-O.M., January 23, 1974. The determination of whether collision damage waiver insurance should be reimbursable is within the scope of the applicable travel regulations, and in 55 Comp. Gen. 1343 (1976), the Comptroller General advised the General Services Administration that there was no legal objection to amending the Federal Travel Regulations to permit reimbursement of collision damage waiver insurance in foreign countries if determined to be in the best interest of the Government. See also 55 Comp. Gen. 1397 (1976).

If the employee does not purchase the optional collision damage waiver, as noted above, he will be liable to the rental company for damage to the vehicle up to the deductible amount, whether or not the damage was caused by the employee's fault or negligence. As long as the travel regulations continue to preclude reimbursement of the optional insurance coverage, GAO has concluded that, where an employee has declined to purchase the collision damage waiver and is subsequently required to pay the rental company for damage to the vehicle, the employing agency may allow a claim by the employee for reimbursement, whether or not the damage was caused by the employee's negligence, as long as it occurred within the employee's scope of employment. B-162186, January 7, 1970; B-176235, August 2, 1972; B-158712-O.M., December 13, 1974. Cf. 47 Comp. Gen. 145, supra.

In some instances, the rental company may be willing to file its claim directly with the Government. However, the rental contract is between the company and the employee, and the Government is not a party. Therefore, in most cases, the company will demand payment from the employee, with the employee then filing a claim for reimbursement.

If the damage was caused by the negligence of a third party, the Government, upon paying a claim, will become subrogated to the employee's rights against the third party. There is no requirement that the employee first seek to recover from the third party before filing his claim for reimbursement. B-176235, August 2, 1972.

The preceding discussion applies primarily to the situation where the employee rents directly from a company which is not operating under a "master" contract. If rental vehicles are provided under a master contract, the terms of the contract must, of course, be examined.

In B-202186, March 9, 1982, GAO considered a claim for damage to a commercial rental vehicle under a Federal Supply Schedule contract. Under the contract, the contractor assumed full responsibility for loss or damage to the vehicle, except that the contractor could exclude "the deductible amount as set forth in its normal commercial insurance policy." A rental company in a State where collision insurance was not required argued that its "normal commercial insurance policy" did not include collision coverage and therefore the Government should be liable for the full amount of the damage. GAO found that the intent of the relevant contract provision was that the rental company bear the full risk of loss or damage to its vehicles, except to the limited extent of the deductible that is commonly included in insurance policies. The rental company's decision not to procure commercial collision insurance could not operate to shift that risk to the Government. The claim was therefore denied.

(9) Claims After Expiration of Agency or Commission

Government agencies may cease to exist for a variety of reasons. They may be abolished or Congress may simply refuse to appropriate further funds. Also, a board or commission (Chapter 15, this Manual) may be created as a temporary organization for a limited purpose, for example, to conduct a particular study and prepare a report.

A temporary organization may have an expiration date specified in its enabling legislation. This may be a fixed date or a fixed period of time after the happening of some event. In computing periods of time to determine the happening of one event after the happening of another event, the date of the happening of the first event is excluded and the date of the later event included. Also, a statute takes effect on the date of its approval by the President unless some other date is fixed. Thus, where a commission was established by a statute approved on September 22, 1922, which provided that the commission would cease to exist "one year after the taking effect of this act," the commission was in existence through September 22, 1923. 3 Comp. Gen. 123 (1923). The expiration date may also be a fixed number of days after the submission of a report. See, e.g., B-182081, January 26, 1977.

When an agency or commission ceases to exist, the service of all of its officers and employees is automatically terminated, and none of those officers or employees can thereafter undertake activities on its behalf, whether for the purpose of concluding the affairs of the agency or commission, or otherwise. 14 Comp. Gen. 738 (1935); B-182081, January 26, 1977, aff'd, B-182081, February 14, 1979.

Once an agency or commission expires, its appropriations cease to be available for the incurring of any new obligations. 14 Comp. Gen. 490 (1934); 16 Comp. Gen. 15 (1936); B-182081, supra. However, obligations properly incurred during the life of the agency or commission may of course be liquidated.

To illustrate, the National Commission on State Workmen's Compensation Laws was created by statute as a temporary organization and was directed to report its findings, conclusions, and recommendations to the President and the Congress not later than July 31, 1972, and on 90th day after it submitted its report it was to cease to exist. The Commission submitted its report on July 31, 1972, and thus, according to statute, ceased to exist on October 29, 1972. After the Commission expired, one of its former officials placed several requisition orders

with the Government Printing Office for the printing of several documents relating to the Commission's report. GPO did the printing and then sought reimbursement for its services. The Comptroller General concluded that the person who placed the orders had no authority to obligate funds after the Commission had expired, and that there were, therefore, no appropriations legally available to reimburse GPO. B-182081, supra.

As noted, obligations validly incurred prior to expiration may be liquidated subsequently. Under authority of the Economy Act, 31 U.S.C. § 686 (Chapter 8, this Manual), the General Services Administration may contract with another agency or commission to provide administrative support services, to include the certification for payment of valid claims against the agency or commission not presented until after its expiration. In such a situation, a GSA certifying officer can certify the expired agency's vouchers for payment. However, this authority is limited to instances where the authority is expressly included in a written Economy Act agreement, and only with respect to obligations validly incurred prior to the expiration of the agency or commission. 59 Comp. Gen. 471 (1980).

In the absence of such a written Economy Act agreement, claims against an expired agency or commission may be paid only upon submission to GAO for direct settlement. 3 Comp. Gen. 123 (1923); 14 Comp. Gen. 490 (1934); 14 Comp. Gen. 738 (1935); 33 Comp. Gen. 384 (1954).

(10) Claims for Published Advertisements

Originally enacted in 1870, 44 U.S.C. § 3702 provides:

> "Advertisements, notices, or proposals for an executive department of the Government, or for a bureau or office connected with it, may not be published in a newspaper except under written authority from the head of the department; and a bill for advertising or publication may not be paid unless there is presented with the bill a copy of the written authority."

An agency head may delegate the approval authority required by 44 U.S.C. § 3702. 5 U.S.C. § 302(b)(2).

A long and consistent line of decisions has held that, under the plain terms of the statute, a voucher cannot be paid nor can a claim by a newspaper be allowed unless the prior written authority required by section 3702 has been obtained. Also, in view of the mandatory language of the statute, after-the-fact approval or attempted ratification is not sufficient to remove the statutory bar against payment. 5 Comp. Dec. 166 (1898); 3 Comp. Gen. 737 (1924); 4 Comp. Gen. 841 (1925); 17 Comp. Gen. 693 (1938); 35 Comp. Gen. 235 (1955). As an early Comptroller of the Treasury noted, "If any statute is mandatory this is * * *." 5 Comp. Dec., supra, at 168. The statute does not permit any exception for hardship. 4 Comp. Gen. 841, supra. If an agency cannot pay the newspaper directly, it follows that an employee who pays the newspaper from personal funds may not be reimbursed. 60 Comp. Gen. 379 (1981).

The prohibition in section 3702 applies to the publication of advertisements in a "newspaper." This includes newspapers devoted exclusively to specialized fields of activity if they include "news and information of a general and current nature such as may be found in the ordinary newspaper." 26 Comp. Gen. 76 (1946). See also 25 Comp. Gen. 734 (1946), holding that the entertainment journal "Variety" is a "newspaper." A telephone directory, however, is not a "newspaper." 22 Comp. Gen. 606 (1943). Nor is a business directory published by a police benevolent association (B-182938-O.M., February 26, 1975); nor a high school year-book or high school "newspaper" distributed to the students and staff and containing mostly items of interest to the students and teachers (B-187099-O.M., February 2, 1977).

The prohibition of 44 U.S.C. § 3702 applies to all departments, agencies, boards, commissions, or establishments of the executive branch. 60 Comp. Gen. 379 (1981); 27 Comp. Dec. 134 (1920); 25 Comp. Dec. 348 (1918); 5 Comp. Dec. 700 (1899); B-126299, January 5, 1956. It does not, however, apply to a legislative branch agency. B-194074, April 11, 1979 (National Commission on Air Quality).

In recent years, GAO has recognized the equitable position of the newspapers in claims under section 3702 in that they provided a service in good faith upon the request (albeit unauthorized) of a Government official and the Government received the benefit of that service. Thus, while the claims still cannot be allowed administratively, the Comptroller General will submit them to Congress with a recommendation for the enactment of relief legislation under the Meritorious Claims Act (infra, this Chapter). B-160052, January 22, 1969; B-181337, November 25, 1974; B-183675, August 27, 1975; B-184667, September 25, 1975; B-196440, April 3, 1980; B-199696, September 4, 1980; B-199453, October 2, 1980; B-199465, October 9, 1980; B-199801, October 21, 1980.

GAO has expressed the opinion that the application of current procurement procedures should be adequate to safeguard the Government's interests, and has recommended that 44 U.S.C. § 3702 be repealed or at least that ratification be authorized. B-181337(2), November 25, 1974; B-114829, October 2, 1978; B-203115, May 8, 1981.

As noted above, an agency head may delegate the authority to approve advertisements. A line of early cases recognized that an agency head may, by order or regulation, authorize subordinate officials, such as officials at geographically dispersed field stations, to place or approve advertisements. The order may be general or specific and may or may not designate the newspapers by name, but it should be limited as to territory and the number of newspapers to be employed. The order should also direct the officials to whom it is addressed to place the advertisements in writing. 27 Comp. Dec. 134 (1920); 19 Comp. Dec. 628 (1913); 13 Comp. Dec. 446 (1907). The cases give specific illustrations. Taking advantage of the device suggested in these early cases could eliminate many claims arising under 44 U.S.C. § 3702.

(11) Claims for Damage to Leased Property

Where the United States enters into a leasehold agreement, the validity and the construction of the lease and its consequences on the rights and obligations of the parties present questions of Federal law which cannot be controlled by the law of any State. B-174588, September 6, 1972.

Claims against the Government for damage to leased real property frequently arise from the Government's agreement in the lease to surrender the leased premises in some designated condition of repair, generally either in good order and repair, or in the same state and condition as when received. This general covenant to surrender the premises in good condition or repair, however, is frequently expressly qualified. Most often there is an express exception of usual wear and tear, action of the elements, and acts of God. Because the phrase "wear and tear" cannot be extended to include injuries from the Government's improper or excessive misuse and abuse of the property, the United States may sometimes be liable for the cost of restoring the property. See, e.g., B-177989-O.M., March 23, 1973. Claims for damages to or for restoration of leased property, however, must be considered in light of the purpose for which the property was leased. That is, the Government is not liable unless the damage is over and above the normal wear and tear incident to the purpose for which the property was leased. 5 Comp. Gen. 526 (1926); 4 Comp. Gen. 211 (1924); B-192230, November 27, 1978.

The Government's liability does not derive solely from the terms of the lease. Even in the absence of specific "good repair" and "ordinary wear and tear" clauses, unless the lease expressly provides to the contrary, there is in every lease an implied obligation on the tenant to surrender the leased property at the end of the tenancy in as good condition as at the beginning of the tenancy, except for reasonable wear and tear and damage over which the tenant had no control. 25 Comp. Gen. 349 (1945); 26 Comp. Gen. 585 (1947). One way to determine compliance with this requirement, whether express or implied, is to compare the initial and terminal inspection surveys. B-193722, March 29, 1979.

Some lease provisions may permit the Government to make a cash payment in lieu of restoration so long as the payment does not exceed the diminution in value of the premises resulting from the Federal use and occupancy. However, the fact that the premises may have diminished in value does not, in and of itself, create a liability to pay restoration costs equal to the diminution in value. Rather, the diminution in

value of the premises resulting from the Government's use and occupancy merely serves to limit the amount of any restoration payments. B-181236, October 20, 1977.

The lease may require timely notice of the lessor's demand for restoration. If so, compliance with the notice requirement will be a condition precedent to the lessor's restoration rights. 6 Comp. Gen. 533 (1927). However, if there has been substantial compliance with the notice requirement--that is, if notice is given within a reasonable time after the premises were vacated--and if the lessor's failure to strictly comply with the requirement does not affect the merits of the restoration claim or operate to the prejudice of the United States, the failure will not operate to defeat an otherwise proper restoration claim. 26 Comp. Gen. 585, 588 (1947); 40 Comp. Gen. 300, 304 (1960). The "reasonable notice" principle would generally apply even in the absence of a notice requirement in the lease. 26 Comp. Gen. 585, 588, supra.

Because the Government can restore or further destroy land so long as its occupancy continues, restoration claims should generally not be settled until the Government's occupancy rights terminate. 40 Comp. Gen. 300 (1960) (failure to give timely notice of demand for restoration held not to destroy lessor's restoration rights where Government continued to occupy premises under subsequent lease). Thus, where the Government occupies land under a lease and decides to subsequently acquire the land in fee simple by condemnation, and the fair compensation value of the land is to be based on the current value of the property as if it was in an undamaged condition, claims for restoration of the land cannot be paid so long as the Government continues to occupy the premises under the lease. B-181236, supra. If, however, improvements to the land have been completely destroyed and the Government does not intend to restore them, the considerations which mandate delaying claims for damage to the land itself do not exist with regard to the obligation to restore the improvements. Thus, claims for the restoration of the improvements in B-181236, supra, could be settled without awaiting the Government's acquisition by condemnation.

Although land with improvements and appurtenances is ordinarily considered a single unit for valuation purposes (the "unit rule"), departures from the unit rule have been permitted in appropriate circumstances. One such circumstance where improvements can be valued apart from the rest of the premises to settle a restoration claim is where the improvements have been completely lost or destroyed during a temporary

occupation by the Government, as in B-181236, supra. Claims for restoration of improvements only should be computed on the basis of the replacement or reproduction cost. Thus, in order to account for the ordinary wear and tear which has occurred over a period of years, it is necessary to depreciate the improvements' replacement value as determined on the termination date of the lease so that the amount allowed reflects only the damage done by the Government to the improvements. B-181236, supra.

Although a lease agreement may expressly exempt the Government from restoration liability for certain types of damage, if the Government subleases the property and later assesses its sublessee for the exempted damage, the Government may be found to hold such amounts as are assessed in constructive trust for the lessor. B-177989-O.M., March 23, 1973.

Even if damage exceeds that attributable to normal wear and tear, the Government may avoid liability for restoration if the damage can be attributed to the lessor's breach of an express covenant in the lease to maintain the premises or property in good repair and tenantable condition. The Comptroller General has held that a lessor's obligation to maintain premises or property in good repair and tenantable condition "embraces acts of repair to prevent a decline in the condition of the premises." 48 Comp. Gen. 289, 290 (1968); 21 Comp. Gen. 90 (1941). Painting has been held to be an expense of maintenance included within the "good repair" provisions of a lease. 48 Comp. Gen. 289, supra; 21 Comp. Gen. 90, supra; 6 Comp. Gen. 215 (1926).

If the Government incurs expenses for painting or other services which a lessor is obligated to perform under a lease but has failed or refused to perform, the costs may be recovered by setoff against payments to be made under the lease. 48 Comp. Gen. 289 (1968); 15 Comp. Gen. 1064 (1936).

Where there is a factual dispute involving either discrepancies in the extent of damage, the cost of repairs, or the kind and extent of repair necessary in order to restore items to their original condition less ordinary wear and tear, a claimant must satisfactorily establish his claim by convincing evidence. If a claimant is unable to meet the burden of proof, the Comptroller General will accept the findings of fact of the administrative report submitted by the Government agency involved. B-193722, March 29, 1979; B-192230, November 27, 1978; B-169876, July 12, 1972.

Finally, the very existence of a landlord-tenant relationship may be an issue. A 1964 decision involved a claim by the University of Mississippi for damage to University property resulting from the occupation of the University by Federal troops under Presidential order. The University argued that the occupation constituted an implied contract of lease and thus created a landlord-tenant relationship. Under this theory, the Government was under an implied obligation to return the premises in the same condition as they were in when Federal occupancy began, reasonable wear and tear excepted. Noting the University's opposition to the presence of the Federal troops and the absence of any indication in the record that the United States contemplated paying rent, GAO found no basis to allow the claim under the implied lease theory absent a judicial determination. However, GAO advised that the claim appeared cognizable under the Military Claims Act (infra, this Chapter). 43 Comp. Gen. 711 (1964).

Claims may also involve the rental of personal property. For an extensive discussion of early bailment cases, see A-89545-O.M., March 15, 1938.

(12) Cancelled Hotel Reservations

Ordinarily the cancellation of hotel reservations within a reasonable time prior to the dates of the reservations involves no liability on the part of the Government. 41 Comp. Gen. 780 (1962). However, a claim for the actual cost of unused hotel rooms may be allowed when (1) it is clear that the reservations were made by and on behalf of the Government; (2) there is sufficient basis to conclude that the making of reservations gave rise to a contractual relationship between the hotel and the Government; (3) the Government failed to cancel within a reasonable time; and (4) the hotel attempted to mitigate its damages.

Allowable claims must be distinguished from cases in which an employee is reimbursed on a per diem basis and makes a hotel or motel reservation himself or through an agent on his behalf. When such circumstances arise, the Comptroller General will deny payment on the theory that the Government was not a party to the agreement. 48 Comp. Gen. 75 (1968). The distinction is between cases in which a block reservation is made on a contractual basis between the Government and the hotel through official administrative action, and cases in which the agreement is essentially one between the individual and the hotel, even though the reservation may have been made by some other Government employee on the traveler's behalf. Thus, in B-190503-O.M., December 19, 1977, a member of the Casualty Branch on an Army post, determined by the Army to have been acting "in his official capacity," made motel reservations for an 11-member funeral detail. The bus carrying the detail broke down and the detail had to travel through the night to reach the funeral on time. The reservations were never cancelled and the motel held the rooms open. GAO viewed the agreement to reserve the rooms as an obligation of the Government and allowed the motel's claim for the cost of the rooms. Similarly, the Comptroller General has allowed payment for reservations made by military officials acting in their official capacity where the members for whom the reservations were made had been notified that, because of the nature of their mission, the reservations could not be altered without official approval. B-192767, May 3, 1979.

B-181266, December 5, 1974, illustrates the type of situation in which a claim against the Government will not be allowed. An employee was scheduled to travel from Washington to Kansas City on official business and agency employees in Kansas City made a hotel reservation for him. The trip was cancelled and the Kansas City office cancelled the reservation but not until after the employee had been scheduled to arrive.

The situation was viewed as a transaction between the individual and the hotel which did not obligate the Government. A similar decision is B-192804, December 18, 1978.

Since claims may be allowed only on the basis of legal entitlement, it is necessary to find some contractual or similar binding agreement between the Government and the hotel whereby the Government agrees to either pay for the rooms reserved or cancel within a reasonable time. However, evidence of the contractual arrangement need not necessarily be in writing. In B-194389-O.M., June 25, 1979, facts sufficient to establish at least a quasi-contractual relationship were considered sufficient. In that case, the reservations were initially made by telephone. Later, an advance party inspected and approved the accommodations and follow-up telephone calls were made to remind the hotel of the booking. The hotel relied on the conduct and representations of the Government, and incurred a loss as a result of that reliance. GAO concluded that the booking was viewed by the parties as more than only tentative, and that a contractual relationship existed despite the absence of written evidence. On the other hand, where such facts do not exist, even subsequent issuance of a purchase order by the Government will not provide adequate evidence of a contract. B-181266, December 5, 1974.

Once the existence of a contractual agreement to either pay for the rooms reserved or cancel within a reasonable time is established, the Government can avoid liability only by showing that the time of cancellation was reasonable. What is "reasonable" depends on the specific circumstances involved. For example, in 41 Comp. Gen. 780 (1962), payment was approved for unused rooms when the reservations were cancelled late in the afternoon of the day for which the rooms had been reserved, and the hotel was unable to rent all the rooms after the receipt of the cancellation notice. That holding was followed in 51 Comp. Gen. 453 (1972), in which the reservations were cancelled a week ahead but it was found that the hotel was unable to use the space reserved by the Government despite attempts to do so. Other circumstances such as special events taking place in the city and the relative difficulty of re-letting accommodations on short notice may also have a bearing on reasonableness. B-194389-O.M., June 25, 1979.

The hotel must generally attempt to mitigate its loss, and its attempts to do so will be relevant in evaluating the claim. For example, in one case when the hotel received three days notice of the cancellation of all accommodations being held, it immediately took steps to insure that the cancelled accommodations were re-let. By moving some guests, utilizing

its waiting list, and accepting new bookings for the vacancies, the hotel was able to re-let the majority of the rooms cancelled. These efforts were held sufficient to discharge the hotel's duty to mitigate its losses. B-194389-O.M., June 25, 1979. See also 41 Comp. Gen. 780 and 51 Comp. Gen. 453, supra.

The Government's liability for cancelled hotel reservations will ordinarily be limited to the actual cost of the rooms. B-121198, August 1, 1955. Certain other elements of damage may be allowed if it can be established that they represent a liability of the hotel regardless of occupancy. Thus, a Value Added Tax and a service charge were allowed on a claim by a hotel in London. The tax was based on revenues received by the hotel and payment of the claim counted as revenue. The service charge represented staff wages for which the hotel was also liable regardless of occupancy. B-194389-O.M., June 25, 1979. However, loss of anticipated profits and miscellaneous revenue is too remote and speculative and is not allowable. B-121198, supra. Interest also will not be allowed. B-194389-O.M., supra.

(13) Government Checks

(a) No Time Limit on Negotiating Government Checks

By statute, there is no time limit on negotiating a Government check. 31 U.S.C. § 132(a) provides:

> "All checks heretofore or hereafter drawn on the Treasurer of the United States, including those drawn by wholly owned and mixed-ownership Government corporations, shall be payable without limitation of time: Provided, That where on presentation of any check for payment the Treasurer of the United States is on notice of a doubtful question of law or fact the payment of such check shall be deferred pending settlement by the General Accounting Office."

The point is further emphasized in 31 U.S.C. § 132(c), which specifies that the Barring Act, 31 U.S.C. § 71a (supra, this Chapter), does not apply to Government checks.

The operation of this principle is illustrated in B-140628, September 24, 1959. In that case, a bank in Nigeria asked to be released from its obligation on a bond it had executed indemnifying the United States against any and all claims arising from a certain Treasury check issued in 1942. The check had been indorsed by the payee in favor of an African business concern and was subsequently lost in transit, presumably due to enemy action in World War II. The bank had executed the indemnity bond in connection with the issuance by the United States of a substitute check a few years later. The bank sought release from the bond in view of the length of time it had been outstanding. Citing 31 U.S.C. § 132, the Comptroller General pointed out that "the right to payment on the original check has not been entirely extinguished." Accordingly, the bank's request that its indemnity be cancelled was denied.

Checks drawn on "designated depositaries" are covered in 31 U.S.C. § 132(b). A "designated depositary" is a commercial bank or banking institution designated by the Treasury Department to hold Government funds for the account of the United States. If a check drawn on a designated depositary has not been paid by the end of the fiscal year following the fiscal year in which the check was issued, the amount must be withdrawn from the depositary and deposited for credit to a

consolidated Treasury account. 15/ Claims for the proceeds of unpaid checks are payable from this consolidated account only upon settlement by GAO. This does not mean that all transactions involving "stale" designated depositary checks require GAO settlement. The distinction is between transactions which involve claims for the proceeds of a check and transactions which represent mere bookkeeping adjustments. GAO settlement is required in the former situation but not the latter. B-112924-O.M., May 13, 1974; B-112924-O.M., July 6, 1973.

Thus, "stale check" transactions require GAO settlement in two situations:

(1) Claims for the proceeds of checks drawn on designated depositaries after the funds have been withdrawn and deposited into Treasury account 20X6045 (31 U.S.C. § 132(b)).

(2) Claims for the payment of a check drawn on the Treasurer of the United States involving doubtful questions of law or fact (31 U.S.C. § 132(a)). See B-112924, May 6, 1975.

Section 132 cannot form the basis for a claim where the check itself is not available. B-201707, July 14, 1981.

(b) Lost Checks

If a Government check is lost or destroyed, statutory authority and procedures exist for obtaining a substitute check. The authority and procedures are summarized in Chapter 12, Section D, this Manual, with respect to judgment checks. They are equally applicable to other Government checks.

(c) Statutes of Limitations on Certain Check Claims

The statute of limitations applicable to claims against the United States on Government checks is found at 31 U.S.C. § 122, which provides in pertinent part:

15/ The consolidated account is 20X6045. See Treasury Department Fiscal Requirements Manual (TFRM), Vol. I, Part 4, Chapter 8000.

"Hereafter all claims on account of any check, checks, warrant, or warrants appearing from the records of the General Accounting Office or the Treasury Department to have been paid, shall be barred if not presented to the General Accounting Office or the Treasurer of the United States within six years after the date of issuance of the check, checks, warrant, or warrants involved. * * * "

In 33 Comp. Gen. 684 (1953) (a letter to the heads of Government departments and agencies), the Comptroller General emphasized that the statute precludes GAO from considering claims:

"not received in, presented to, or filed with the General Accounting Office within the statutory period of limitation. Also, the courts have held that a governmental official ordinarily lacks power to waive statutory limitations enacted for the Government's benefit." (Emphasis in original.)

Legislation in 1957 amended section 122 to permit filing with the Treasurer.

GAO has also taken a position against granting exceptions to the statutory bar. In B-169097, March 10, 1970, the Comptroller General was asked for comments on a private relief bill for a retired Federal employee. The former employee claimed the proceeds of a refund check issued in the sum of certain disability fund contributions which had been deducted from his salary. Government records established that a check in the proper amount was drawn, sent to the claimant at his proper address, subsequently paid and then destroyed as authorized by law, but the employee nevertheless claimed that he never received the refund. There was no record that the retiree had filed a claim either with GAO or the Treasury Department within the six-year limit. In declining to support enactment of the private legislation, the Comptroller General stated:

"It has not been the policy of our Office to recommend enactment of private bills * * * for the relief of claimants whose claims are barred under such statutes of limitation. Bills for that purpose, if enacted, would constitute preferential legislation and would tend to defeat the purposes for which the barring statute was originally enacted, one of which is to relieve the Government from considering claims after it has lost its right of recourse against the endorsers of the check and, as in this case, after some of the related Government records have been destroyed."

Under the terms of the statute, the six-year bar only applies to checks "appearing * * * to have been paid." In B-180143, February 26, 1974 (a claim for the proceeds of certain military allotment checks), the Comptroller General explained that this determination depends on whether a check appears on the Treasury Department's "outstanding check list." If a check is not included on the outstanding list, it indicates that on some prior date the check was either paid or a substitute was issued. Therefore, a claim on a check which does not appear on Treasury's outstanding list must be filed within six years of its date of issue, or be forever barred. In the cited case, although the statute of limitations was tolled by the Soldiers' and Sailors' Civil Relief Act of 1940 (see Section B(1), this Chapter), the claim had not been filed within six years of the claimant's separation from active military service and was accordingly barred. See also B-168491, December 15, 1969; B-201707, July 14, 1981.

In B-174370, February 22, 1972, the tolling of the statute by the Soldiers' and Sailors' Civil Relief Act required that a claim for mustering-out pay, presented within six years of military retirement, be considered timely filed. However, in noting that filing within the statutory limit does not guarantee favorable action on the claim itself, the Comptroller General stated, "the mere suspension or tolling of a statute of limitations does not perfect an otherwise unsupported claim." In this case the claim was denied because the checks were not on the outstanding list and the claimant could not present evidence to rebut the resulting presumption that the checks had been properly negotiated.

A similar limitation period to that provided by 31 U.S.C. § 122 is applicable to the United States with respect to court actions brought by the Government to enforce the liability of any endorser, transferor, depositary, or financial agent in cases involving a forgery or other unauthorized use of Federal checks. 31 U.S.C. § 129 prohibits the Government from bringing such court actions after six years from the date the check was presented for payment. The statute provides:

> "No proceeding in any court shall be brought by the United States or by any agency or official of the United States to enforce the liability of any endorser, transferor, or depositary, or financial agent, arising out of a forged or unauthorized signature or endorsement upon or alteration of any check, checks, warrant, or warrants issued by the Secretary of the Treasury, the Postmaster General, the United States Postal Service, the Treasurer

and Assistant Treasurers of the United States, or by disbursing officers and agents of the United States, unless such proceeding is commenced within six years after the presentation to the Treasurer of the United States or other drawee of such issued checks or warrants for payment of such check, checks, warrant, or warrants, or unless within that period written notice shall have been given by the United States or an agency thereof to such endorser, transferor, or depositary, or financial agent of a claim on account of such liability. Unless a court proceeding shall have been brought or such notice given within the period prescribed in this section, any claim against such endorser, transferor, or depositary, or financial agent on account of such liability shall be forever barred: Provided, That in connection with any claim presented to the General Accounting Office or the Treasurer of the United States within the time limitation prescribed by section 122 of this title, the period within which such a proceeding may be brought or such notice given shall be extended by an additional one hundred and eighty days, and unless such notice shall be given or a court proceeding brought within such extended period any claim against such endorser, transferor, depositary, or financial agent on account of such liability shall be forever barred."

The limitation of 31 U.S.C. § 129 may be relevant in considering certain claims against the United States. In B-145720, June 13, 1961, a claim was filed in 1960 for the proceeds of a check issued in 1952. The six-year limitation of 31 U.S.C. § 122 had been tolled by the Soldiers' and Sailors' Civil Relief Act so the claim was not time-barred. Since the claimant could offer no evidence to support the possibility of forgery, the claim was denied. Failure to file the claim for more than six years, however, provided another reason for disallowance even though it did not result in barring the claim. The Comptroller General advised the claimant that "your delay in filing your claim nullified the Government's right of recourse against the indorsers under * * * 31 U.S.C. 129." See also B-165756, February 4, 1969, affirmed upon reconsideration, B-165756, April 21, 1969.

(d) Forged or Altered Checks

In considering claims involving forged or altered checks, the Comptroller General will apply established law relating to negotiable instruments and the rights of a holder in due course.

In 3 Comp. Gen. 626 (1924), the Comptroller General considered the rights of a holder in due course in a case where the payee of a Government check fraudulently raised the amount from $153.83 to $653.83. The City National Bank of Tuscaloosa, Alabama, the claimant in this case, accepted the check and credited the payee's account for the higher amount. Subsequently the bank sent the check to the Federal Reserve Bank of Atlanta and was given credit for $653.83. However, when the Treasury Department discovered the alteration and made a demand on the bank, it refunded the entire amount to the Government. It was determined that the bank, as a holder in due course, was entitled to payment of $153.83 on the forged check. Following general negotiable instruments law, the Comptroller General stated that "a holder of the instrument in due course * * * not a party to the alteration may enforce payment of it according to its original tenor."

In B-133923-O.M., November 18, 1957, the amount of a Government check which was apparently irregular when issued was increased by the payee. Noting the considerable skill used by the forger in this instance, GAO found that the claimant had no notice of the alteration. Therefore, the claimant qualified as a holder in due course and could enforce payment of the original amount of the check under 3 Comp. Gen. 626 above.

On the other hand, in 27 Comp. Gen. 674 (1948), the Comptroller General found that a claimant bank was on notice of irregularities on a check which had been materially altered. In this case, the payee erased the number "3" and wrote "5" in pencil, raising the amount of the check by $200. Other erasures and pencil marks were added across the face of the check, such that the instrument could not be considered "complete and regular on its face" when it was presented for payment. In concluding that the bank did not qualify as a holder in due course, the Comptroller General stated that the alterations were so apparent "as would put an average prudent man on notice of the irregularity." Accordingly, the bank was not entitled to reimbursement for the original amount of the check.

In a case where the amount of a Government check was raised by $5, the Comptroller General considered the obligation of the payee who made the alteration. The question presented in B-54418, January 25, 1946, was whether the payee would be required to refund the entire amount of the check as originally drawn or could simply refund the amount of the increase. The Comptroller General stated "While a party to a material alteration cannot enforce payment, [3 Comp. Gen. 626] does not necessarily require recovery of the original amount

of the altered check which has been paid." Under the particular circumstances of the case, it was determined that the Treasury Department was authorized to accept a $5 money order from the payee in full settlement. However, this was viewed as an exception to Treasury's general procedure under which a payee who fraudulently altered a Government check was held to have extinguished the Government's obligation to him and was therefore no longer entitled to the original amount.

A revolving fund, known as the "Check Forgery Insurance Fund," has been authorized to be established in the Treasury for making payments to an innocent payee or special indorsee where a check has been negotiated on a forged indorsement. 31 U.S.C. §§ 561-564.

(14) Voluntary Creditors

A "voluntary creditor" for purposes of this discussion is someone who makes a payment from personal funds which he is not legally required or authorized to make, ostensibly on behalf of the Government, and then claims reimbursement from the Government. The concept is related to subsection (b) of the Antideficiency Act which prohibits the acceptance by the Government of voluntary services. The Antideficiency Act is covered in detail in Chapter 5, this Manual. This subsection is limited to claims for reimbursement by persons who have made payments from personal funds. It is included in this Chapter because the cases invariably arise in the form of claims against the Government. The claimant is usually, but not necessarily, a Government officer or employee.

The rule has been stated as follows:

> "The rule is well established that, except for certain personal services such as duly authorized travel expenses, payments must be made directly to the public creditor by an authorized disbursing officer of the United States out of public funds and that no officer or employee of the Government can create a valid claim in his favor by paying obligations of the United States from his own funds. [Citations omitted.] Exception to the rule has not been recognized except in cases involving the expenditure of personal funds in the Government's interest under urgent and unforeseen emergencies." 33 Comp. Gen. 20 (1953) (B-115761).

In other words, with limited exceptions, you cannot voluntarily pay something you think the Government should pay and expect to be reimbursed.

If the payment in question is prohibited by law (either expressly prohibited by statute or beyond the agency's authority), a claim for reimbursement must be denied because no legal basis for reimbursement can exist where the agency could not have made the payment directly. In these situation, the "voluntary creditor" rule is usually cited as an additional, although secondary, basis for disallowance. Although the voluntary creditor rule is relevant, these are not "pure" voluntary creditor cases.

An early decision, 3 Comp. Gen. 681 (1924), involved a claim by the Dry Branch Coal Company for the expense of hiring a private detective. A mine superintendent discovered that two

men had broken into the Dry Branch post office and that "one had been shot in the leg and the other had fled up the creek." He called a company official who, being unable to contact post office authorities, called a private detective. (The decision does not disclose why he did not call the police.) The detective pursued and apprehended the suspect as he was about to board a train. The company paid the detective and filed a claim for reimbursement. In view of the statutory prohibition against the employment of private detectives (5 U.S.C. § 3108; see Chapter 3, this Manual), the claim had to be denied. The decision further stated:

> "[T]he voluntary intervention of claimant in the matter can not operate to authorize the making indirectly of a payment that could not legally be made directly." 3 Comp. Gen. at 681.

In 2 Comp. Gen. 581 (1923), a Federal prohibition officer for the State of Indiana sought review of a prior settlement denying his claim for the cost of materials he had purchased in order to paint nine signs. He had painted the signs for the Indiana Health Exposition after State officials asked him to maintain a prohibition booth at the fair. Concluding that appropriations for the enforcement of the National Prohibition Act were not available for the expenses of participation in fairs or expositions without further statutory authority, and also noting the voluntary creditor rule, the Comptroller General denied the claim for reimbursement.

More recently, an employee of the Environmental Protection Agency had certain notices placed in newspapers in violation of 44 U.S.C. § 3702 (supra, this Chapter). He paid the newspapers from personal funds and filed a claim for reimbursement. Since the agency could not have paid the claim directly, the Comptroller General denied the claim for reimbursement, citing 3 Comp. Gen. 681, supra, and also the voluntary creditor rule. 60 Comp. Gen. 379 (1981).

Cases have also arisen in the context of the prohibition against paying from appropriated funds the cost of food furnished to Government employees without specific authority (see Chapter 3, this Manual). In a case which predated the Postal Reorganization Act of 1971, a Post Office official brought in carry-out restaurant food, purchased from personal funds, for a group of employees who were presiding as election officials at a union election which lasted well past the normal dinner hour. The lives of the employees were not a stake and they were not there for the purpose of protecting Government property. In view of the prohibition on furnishing free food

to civilian employees, and further noting the voluntary creditor rule, the Comptroller General denied reimbursement. 42 Comp. Gen. 149 (1962). See also B-185159, December 10, 1975, and B-129004, September 6, 1956, stating the rule as follows:

> "[N]o person is authorized to make himself a voluntary creditor of the United States by incurring and paying obligations of the Government which he is not legally required or authorized to incur or pay and reimbursement therefor generally is not authorized."

However, an exception was permitted in another case involving food, 53 Comp. Gen. 71 (1973). In that case, the unauthorized occupation of a building in which the Bureau of Indian Affairs was located necessitated the assembling of a cadre of General Services Administration special police, who spent the whole night there. 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 expenditure was incidental to the protection of Government property during an extreme emergency, and approved reimbursement. The decision, however, was specifically limited to the facts of the case, with a caveat that such situations in the future would be handled on a case-by-case basis. A similar exception was permitted in B-189003, July 5, 1977 (FBI agents stranded in office during severe blizzard).

The preceding cases all involve expenditures which would be legally questionable even if made directly by the agency. In cases where the expenditure in not improper per se, the application of the voluntary creditor rule is the sole issue. The rationale in the latter cases appears to be that established machinery and procedures exist for determining the Government's liability and for making payments from appropriated funds and permitting reimbursement for payments made from personal funds allows the individual, at least to some extent, to usurp the Government's prerogative. The rule in this context has been termed a "rule of accounting." 18 Comp. Dec. 297 (1911).

In an early decision, an Army commissary officer paid a "commutation of rations" from his own pocket to a soldier about to be discharged because there were no public funds immediately available. Reimbursement was denied. The payment, while a convenience to the soldier, was "purely voluntary" and also unnecessary in that the soldier could readily have obtained his payment elsewhere or could have

filed a claim. 11 Comp. Dec. 486 (1905). Similarly, reimbursement was denied to a certifying officer who had paid a portion of a disputed travel voucher to another Government employee from personal funds. 33 Comp. Gen. 20 (1953) (B-115761). The certifying officer's belief that the payment was correct was immaterial.

More recently, a National Park Service employee used personal funds as a security deposit against a claim for rent due by the Government for space in a privately-owned trailer park. The Federal employee, under the impression, later found to be erroneous, that the rental claim was valid, used his own funds in order to secure the release of a Government-owned trailer which the trailer park owner had originally threatened to hold as security. The Comptroller General held that, although time was a factor (the vehicle had to be winterized for occupation in another location), release of the trailer could have been accomplished through other means and therefore there was no basis to permit an exception to the rule. The claim for reimbursement was denied. B-184982, October 13, 1976.

Employees at an Air Force hospital who bought their own uniforms were voluntary creditors and could not be reimbursed. 46 Comp. Gen. 170 (1966). Similarly, an Army employee who purchased safety orthopedic shoes for use in his work as an automotive mechanic could not by his own voluntary action obligate the Government to pay. B-162606, November 22, 1967. The fact that the Government could have furnished the items but failed to do so (the uniforms under 5 U.S.C. § 5901 and the safety shoes as special equipment under 5 U.S.C. § 7903) did not give the employees the right to, in effect, make the determinations on their own and circumvent the failure by buying the items themselves and then expecting the Government to pay. (These clothing statutes are discussed further in the Section entitled "Personal Expenses and Furnishings," Chapter 3, this Manual.)

For additional cases applying the voluntary creditor rule, see 24 Comp. Dec. 155 (1917); 3 Comp. Gen. 70 (1923); 7 Comp. Gen. 104 (1927); 8 Comp. Gen. 627 (1929); 18 Comp. Gen. 424, 425 (1938).

As indicated in the statement of the rule at the beginning of this discussion, exceptions are recognized albeit infrequently, and only where the payment is clearly in the Government's interest and under an urgent and unforeseen emergency situation. The phrase "urgent and unforeseen emergency" does not necessarily imply a life-or-death situation,

although it does require more than mere convenience or an employee's belief that something is a good idea. Thus, reimbursement was authorized in B-177331, December 14, 1972, when an employee paid a claim resulting from an automobile accident in a foreign country in order to avoid detention by the local police and to obtain release of the impounded Government vehicle. See also B-186474, June 15, 1976. 16/ In addition, protection of Government property in an emergency situation can form the basis of an exception. 53 Comp. Gen 71, supra,

The Comptroller General has also recognized that the need to complete a mission in urgent and unforeseen circumstances can justify an exception. The concept arose in B-195002, May 27, 1980, in which an Air Force sergeant purchased certain items from personal funds to be used in connection with the installation of Air Force communications equipment in Italy. For various reasons, the items could not be promptly acquired through established procedures and the mission would have been impaired without them. The Comptroller General approved reimbursement, stating:

> "Of course, when an employee expends his own funds in what he judges to be the interest of the Government, he does so at his own risk; no legal liability of the Government is created unless the Government ratifies his action as falling within the exception * * * and agrees to reimburse him. However, it would be shortsighted indeed not to recognize that this kind of initiative by the employee in an emergency is very valuable and, when it results in preserving a Government property interest, the employee should not be penalized through denial of reimbursement."

16/ B-177331 and B-186474 have been cited previously in this Chapter. See Sections on "Federal Tort Claims Act" and "Tort Claims Arising in Foreign Countries," supra.

(15) Interagency Claims

(a) Damage Claims Between Government Agencies: The General Rule

As a general rule a Federal agency or other Government entity may not pay claims for damage to public property of another Government agency or establishment. This rule is based on the premise that ownership of public property is in the Government and not in the individual departments. Therefore, such a claim between two Government agencies would, in effect, be a claim by the United States against itself. 17/

The elements of the rule are indicated in the following excerpt from 46 Comp. Gen. 586, 587-88 (1966):

> "In those cases where the rule has been applied, there are uniformly involved agencies or instrumentalities of the United States performing governmental functions with Federal funds and replacement of the loss or repair of the damage incurred was required to be effected with Federal funds."

Thus, the rule is merely a way of determining which Government pocket will bear the expense in certain situations. Whether it will apply in a given case depends on whether all of these factors are present. In addition, some of the cases suggest that a further test is whether the funds are "subject to the control of the accounting officers of the Government." E.g., 25 Comp. Gen. 49, 54 (1945). However, analysis of the cases reveals that this is not a material factor as long as both parties are Government agencies or instrumentalities and the funds involved are "Federal funds."

The application of the rule is illustrated in 25 Comp. Gen. 49 (1945), in which the Navy Department asked whether its appropriations were available to pay claims for damages

17/ The rule is sometimes referred to as the "interdepartmental waiver doctrine." See e.g., 41 Comp. Gen. 235, 237 (1961); 59 Comp. Gen. 93 (1979); 60 Comp. Gen. 406 (1981). The term seems to have evolved from language in 25 Comp. Gen. 49, 55 (1945), approving a "mutual waiver" of damage claims by the Navy and two Government corporations. The term is somewhat inapropos in that, if there is no legal basis for a claim to begin with, there is really nothing to "waive."

caused by Navy vessels to vessels and other property of the Inland Waterways Corporation and the Defense Plant Corporation. It was determined that both corporations were "instrumentalities of the United States" performing governmental functions with Federal funds. Accordingly, the Comptroller General held that Navy funds were not available to pay the damage claims and stated:

> "With respect to Government departments and agencies whose funds are subject to the control of the accounting officers of the Government, it has been held repeatedly that these funds are not available for payment of claims for damages to the property of other Government departments or agencies." Id., at 54.

The decision further pointed out that the result would be the same in the reverse situation--damage to Navy property caused by corporation vessels--since the Navy would not have legally enforceable claims against the corporations.

Other early cases applying the general rule to vessel damage claims are 6 Comp. Dec. 74 (1899); 6 Comp. Gen. 171 (1926); 9 Comp. Gen. 236 (1930).

Non-statutory exceptions have been recognized where the elements of the rule noted above are not present. Thus, in 41 Comp. Gen. 235 (1961), GAO found that the Interior Department was not prevented from presenting a claim against the Air Force for damages to the San Carlos Irrigation Project. In this case the crash of a Civil Air Patrol plane damaged a power line on the San Carlos project. Subsequently, the Bureau of Indian Affairs asked the Comptroller General to decide whether its claim on behalf of the Pima Indians, the project beneficiaries, would represent a claim by one Government agency against another in contravention of the general rule. In determining that the rule did not preclude the claim for damages in this instance, the Comptroller General held that, although the San Carlos Irrigation Project was an instrumentality of the United States, the project funds were moneys held in trust by the Government for the Pima Indians. If the general rule were applied, the expense of repairing the damage would be borne not by the Government but by the project beneficiaries. The decision cautioned, however, that Air Force regulations under the Military Claims Act and Federal Tort Claims Act (supra, this Chapter) precluded claims by Government instrumentalities, and since agency settlements under both statutes are final and conclusive, GAO could not require the Air Force to treat the claim as cognizable.

Applying similar reasoning, the Comptroller General found in B-159559, August 12, 1968, that Navy appropriations were available to pay a claim for damage to property of the Ryukyu Electric Power Corporation. The Corporation, while an instrumentality of the United States Civil Administration of the Ryukyu Islands, was not an instrumentality of the United States Government. Further, while funds available to the Civil Administration were Government funds, they were in the nature of a trust account held for the sole benefit of the Ryukyuan people.

The reverse situation was presented in 46 Comp. Gen. 586 (1966), when the Department of Agriculture sought to file a claim against the Government of American Samoa for losses due to improper storage of donated agricultural commodities. Following the rationale of 41 Comp. Gen. 235, supra, GAO found that the general rule would not have prevented a claim by the Interior Department on behalf of the Samoan people against a Federal agency for damage to Samoan Government property. Therefore, it necessarily followed that a Federal agency, in this case the Department of Agriculture, could present a claim against the Samoan Government. The decisive factor was that the Government of American Samoa was not an instrumentality of the United States Government, at least for purposes of this rule, and the fact that the funds of both parties were subject to audit by GAO was immaterial. The same result applied to a claim against the Trust Territory of the Pacific Islands. B-160506, August 15, 1967; B-160506, April 10, 1970. (A claim for damage to donated agricultural commodities was held subject to the general rule, and therefore precluded, in B-136949, September 8, 1958, where both parties were Government agencies.)

Another element of the rule, noted above, is that the agency sought to be charged must have been performing a governmental function. The absence of this element justified an exception in 14 Comp. Gen. 256 (1934), where a claim was allowed for damage to an Army dredge caused by a Government-owned vessel employed solely as a merchant vessel.

Of course, the rule against one Government agency paying claims for damage to public property in the custody of another Government agency only applies in the absence of statutory authority to the contrary. For example, the General Services Administration is required by law to establish and maintain an interagency motor pool system. In 59 Comp. Gen. 515 (1980), GAO determined that 40 U.S.C. § 491 authorizes GSA to recover all costs connected with operating the system from agency users. Since the expense of repairing damaged vehicles is clearly one of the costs contemplated by the statute, the

Comptroller General concluded that it is proper for GSA to charge the using agency with the cost of repair of GSA vehicles damaged through the negligience or misconduct of a driver employed by that agency. The most important statutory exception is the Economy Act, discussed later in this Section.

(b) Interagency Loans of Personal Property

Questions concerning interagency reimbursements for property damage occur most frequently when Government property has been loaned by one agency to another. Again, it is well-established that where public property in the custody of one Federal agency or establishment is temporarily loaned to another department or establishment, the cost of repairs or replacement upon return of the property, being for the future use and benefit of the loaning establishment, may not be charged against the borrowing agency's appropriations. In 10 Comp. Gen. 288 (1930), GAO determined that the Bureau of the Census was not authorized to reimburse the Marine Corps for the cost of replacing and repairing furniture temporarily borrowed by the Bureau, notwithstanding an understanding between the parties that the furniture would be returned to the Corps in as good condition as when loaned. In reaching this conclusion the Comptroller General stated:

> "The rule has long been established that where one department loans property or equipment to another it is not entitled to charge for its use or depreciation, or to have lost property replaced or damaged property repaired upon its return to the loaning establishment. * * * [T]he ownership of public property is in the Government and not in a department or branch thereof having possession of the property, and, accordingly, an executive department may not lawfully be reimbursed for the value of such property loaned to and lost by, another department. * * * If appropriations of an establishment to which property is loaned are not chargeable with the cost of replacing articles lost or for use and depreciation of the property, obviously they are not chargeable with the costs of repairs to restore the property to its former condition upon its return to the loaning establishment. Such repairs are not for the benefit of the borrowing establishment but are for the future use and benefit of the establishment to which the property is returned." Id., at 289.

In an early application of this general principle the Quarantine Service was not authorized to reimburse the Army

for a borrowed mule which had drowned. 10 Comp. Dec. 222 (1903). In another decision the cost of replacing a lantern loaned by the Commerce Department's Lighthouse Service and washed away during a heavy storm could not be charged to the borrowing establishment. 22 Comp. Dec. 390 (1916).

An exception was permitted in 10 Comp. Gen. 563 (1931) for property loaned for exhibit purposes only. In that case, the Architect of the Capitol loaned a model of the United States Capitol to a commission established to administer the Government's participation in the 1927 International Exposition in Seville, Spain. At the close of the Exposition, the model was returned with its dome shattered. The Comptroller General construed the resolution establishing the commission as requiring by implication that property be returned in as good condition as when borrowed. An additional factor in that case may have been that there appeared to be no funds under the control of the Architect of the Capitol remaining available to make the repairs.

Another application of the general rule is that an agency may not charge another agency for depreciation of property loaned to it or made available for its use. 25 Comp. Dec. 682 (1919); 8 Comp. Gen. 600 (1929).

Revolving funds

The rule does not apply when the appropriation to be charged with the cost of the use or depreciation of loaned property is a reimbursable or revolving fund. In 3 Comp. Gen. 74 (1923), the Interior Department requested an advance decision concerning which account should be properly charged for the depreciation of certain Bureau of Reclamation equipment used for general Interior Department investigations. Concluding that the the cost of depreciation of the Bureau's equipment should be charged against the Interior appropriation for general investigations, the Comptroller General stated:

> "The general rule is that where a branch of the service permits the use of its equipment by another there is no authority to demand a return or compensation based on use alone. * * * This applies equally with respect to interbureau matters; however, the rule is predicated on appropriations not reimbursable. The reclamation fund is reimbursable, and the use of equipment purchased therefrom is on a somewhat different basis, the equipment being an asset which should not be permitted to be depreciated from use on other than objects for which the fund was created."

Repairs for the future use of the borrowing agency

The general rule is based on the premise that repairs will be for the primary use and benefit of the loaning agency. This assumes that the repairs will be made when the borrowing agency's use of the property is completed or substantially completed. It therefore does not apply when the borrowing agency's use of the property is not completed. Thus, where repairs are necessary for further use of loaned property by the borrowing agency, and therefore for its benefit, the cost is properly charged to the borrowing agency. For example, in 5 Comp. Gen. 162 (1925), the Comptroller General held that repairs to the engine of a seaplane loaned by the Navy to the Coast Guard were authorized under Coast Guard appropriations if the repairs were required for the continued use of the plane by the Coast Guard. See also unpublished decision of September 1, 1921, 1 MS Comp. Gen. 712 (no file number).

Economy Act exceptions

Section 601 of the Economy Act of 1932 (31 U.S.C. § 686) provides general authority for Government agencies to enter into reimbursable interagency agreements. (See Chapter 8, this Manual.) In view of this statutory provision, GAO has modified the holding of 10 Comp. Gen. 288 (above) and similar decisions prohibiting the payment of claims for damage to property loaned by one agency to another. The exception, however, applies only in cases where under 31 U.S.C. § 686, the agencies have agreed that the borrowing agency will pay for such repairs, subject to the availability of appropriations.

In 30 Comp. Gen. 295 (1951), the Bureau of Land Management of the Interior Department loaned a motorboat to the Agriculture Department's Soil Conservation Service (Soil Service) under a written agreement that the Soil Service would "return the boat in as good condition as when received, normal wear and tear excepted." Repairs to the boat's motor were necessary to satisfy this agreement and the Agriculture Department asked GAO whether the repair cost was a proper charge against the Soil Service appropriations. The Comptroller General held that such payment was proper, stating:

> "Since the statute permits the payment for property which is transferred from one department to another, there would appear to be tacit recognition of property ownership rights in the various departments and agencies possessing such property.

> Likewise, the provisions of section 601, permitting, for a consideration, the total transfer between departments of material, supplies, and equipment on a permanent basis, would appear to sanction, as well, lesser transactions between departments on a temporary loan basis * * *." Id., at 296.

In another case, the Air Force loaned two planes to the Army under an agreement which provided that the Army would be liable for damage to or destruction of the property from any cause. As a result of a crash, one plane was completely destroyed. In B-146588, August 23, 1961, GAO held that the Army could properly reimburse the Air Force for the lost property. The Comptroller General stated:

> "[T]he rule prohibiting replacements of or repairs to property generally, no longer applies to loans of personal property as between Government agencies when the loan agreement provides that the borrowing agency must return the property in as good condition as when loaned and that the expense of placing the property in such condition would be borne by that agency, subject, of course, to the availability of its appropriations."

See also 38 Comp. Gen. 558 (1959).

No exception to the general rule is recognized unless there is an agreement that the borrowing agency will reimburse the loaning agency for the use, repair or replacement of the property. For example, in 25 Comp. Gen. 322 (1945), the Army lost a 50-ton ball bearing jack borrowed from the Engineers office. The Comptroller General noted that the parties had not entered into an Economy Act agreement providing for reimbursement although they could have done so. Therefore, the general rule applied and the Army was not authorized to pay for the lost property. See also B-137208, December 16, 1958, in which the Navy had agreed to help the Interior Department transport supplies at a fixed per diem rate of reimbursement. Since no property was actually loaned, there was no authority for Interior to pay the cost of repairing damage to the Navy ships.

(c) Claims Involving Real Property

In 31 Comp. Gen. 329 (1952), GAO held that the Economy Act exception does not apply to interagency claims for damage to real property because 31 U.S.C. § 686 and the decision

interpreting its provisions (30 Comp. Gen. 295, above) apply only to personal property. In this case the Comptroller General found that the Army was not authorized to reimburse the Agriculture Department for the cost of restoring national forest lands damaged by Army personnel during military operations, despite an agreement which provided that the Army would "budget for restoration monies, to the extent mutually agreed upon between the Departments of Agriculture and Army." That same year, GAO was asked to reconsider this decision. In requesting reconsideration the Agriculture Department cited the statutory authority of the Secretary of Agriculture to regulate "the use and occupancy of national forest lands." However, the Comptroller General determined that the imposition of charges for the authorized use of forest lands by other Federal agencies would exceed the Secretary's authority, and again found reimbursement to be unauthorized. 32 Comp. Gen. 179 (1952). The Comptroller General stated:

> "The principles of law underlying the rule here involved are set forth fully in 10 Comp. Gen. 288 * * *. The concepts stated there are so firmly embedded in the substantive law of the United States as to require specific statutory authority to overcome the rule." 32 Comp. Gen. at 180.

Accordingly, it was determined that the Selective Service System was not authorized to make repairs to offices provided for its use in Federal buildings, under the control of another agency, in order to restore them to the same general conditions existing at the time of assignment. 26 Comp. Gen. 585 (1947).

The decision in 32 Comp. Gen. 179, supra, was followed in 44 Comp. Gen. 693 (1965), in which the Comptroller General held that the Army was not authorized to reimburse the Interior Department for damage to roads in a national park recreation area resulting from use of the park for military maneuvers. The following year, Congress acted to make the Army's appropriations available to pay such restoration costs, but the provision was not continued. Therefore, GAO applied the general rule once again in 59 Comp. Gen. 93 (1979), holding that Army appropriations were not available to reimburse the Forest Service to restore land in a national forest damaged in military training exercises.

An exception to the general rule against interagency reimbursements for damage to real property was found in 60 Comp. Gen. 406 (1981) concerning lands in the public domain which, by definition, are not dedicated to any specific

purpose. Under the Federal Land Policy and Management Act of 1976, the Bureau of Land Management, Interior Department, administers lands withdrawn from the public domain for agency use. In reference to a proposed regulation, Interior asked GAO whether, when such land is withdrawn and then relinquished, reimbursement by the borrowing agency to restore the land to its original condition would be contrary to the general rule. The Comptroller General held that the Bureau is not a typical "lending agency" because the relinquished land is not for its future use and benefit, as in other instances. Accordingly, an enforceable condition in the withdrawal agreement that the borrowing agency will restore the land is not prohibited by the general rule. This is to be distinguished from the national forest situation dealt with in 59 Comp. Gen. 93, supra. (For an extensive discussion of real property issues, see Chapter 9, this Manual.)

Offset of interagency damage claims improper

Interagency claims are not to be collected by offset. For example, no reduction in Standard Level User Charge (SLUC) payments may be made when a Government agency rents space in a building owned or leased by the General Services Administration and there is damage to or loss of furniture, equipment or supplies as a result of building failures. The fact that a commercial landlord would have been liable under the same circumstances does not create an exception to the general rule governing claims for damages between Federal agencies. 57 Comp. Gen. 130 (1977). Accordingly, where paper supplies of the Government Printing Office located in a GSA storage facility were destroyed when water leaked through the building's roof, the Comptroller General held that GPO was prohibited from reducing its SLUC payments by the amount of the loss. 59 Comp. Gen. 515 (1980).

Similarly, the Comptroller General held in 59 Comp. Gen. 505 (1980) that it was improper for the Air Force to offset its SLUC payment to GSA to collect an unrelated debt. Disputed interagency claims should be submitted to GAO for settlement. (User charges are discussed further in Chapter 8, this Manual.)

A Federal agency may use setoff to collect a claim against the Government of the District of Columbia since the United States Government and the District of Columbia Government are separate and distinct legal entities. However, for reasons of public policy, it should not use setoff against amounts withheld from the salaries of its employees for payment of the employees' D.C. income tax. 60 Comp. Gen. 710 (1981).

D. PAYMENT OF CLAIMS: SOURCE OF FUNDS

Administrative claims are paid in one of three ways:

(1) From operating appropriations available to the agency whose activities gave rise to the claim;

(2) From some existing appropriation or fund other than the agency's operating appropriations; or

(3) From an appropriation made by Congress specifically for that claim. Whichever of these methods applies to a given claim will apply to the exclusion of the other two.

Payment from agency appropriations

This is the most common method and must be applied unless one of the other methods is prescribed by statute. Thus, the typical claim relating to the compensation or allowance of a Federal employee is paid from the "Salaries and Expenses" appropriation of the employing agency. A contract claim decided by the contracting officer and not further appealed is paid from the contracting agency's procurement appropriations. Other examples are claims under the Military Personnel and Civilian Employees' Claims Act of 1964 and administrative awards of $2,500 or less under the Federal Tort Claims Act, supra, this Chapter.

Where the events giving rise to the claim occur in one fiscal year and settlement occurs in a later fiscal year, a question may arise as to which fiscal year's appropriation is chargeable. The governing principle, stated in a number of earlier decisions, is that a claim against an annual appropriation is chargeable to the appropriation for the fiscal year in which the liability was incurred. E.g., 18 Comp. Gen. 363, 365 (1938).

As a general proposition, claims involving property damage or personal injury will be chargeable to the fiscal year in which the final determination of the Government's liability is made. The theory is that there is no obligation on the part of the Government until the claim is adjudicated and allowed. Thus, administrative awards of $2,500 or less under the Federal Tort Claims Act are payable from current year funds. 27 Comp. Gen. 237 (1947); 27 Comp. Gen. 445 (1948); 38 Comp. Gen. 338 (1958). Similarly, payments under the Military Personnel and Civilian Employee' Claim Act of 1964 are chargeable to current year funds. B-174762, January 24, 1972.

These cases are an outgrowth of an earlier decision which had reached the same result under a statute authorizing the (then) War Department to pay claims for damage caused by American forces abroad. 1 Comp. Gen. 200 (1921). This decision would still apply to similar statutes such as 10 U.S.C. § 2734 (see below) to the extent payment must come from agency appropriations.

GAO applied the same reasoning and result to expenses of hospitalization and related transportation paid by the State Department under the discretionary authority of the Foreign Service Act of 1946, 22 U.S.C. §§ 1156(a), 1157(a). Under the statute, there is no obligation until the State Department administratively determines that the illness or injury occurred in the line of duty and not as the result of misconduct. B-80060, September 30, 1948.

Contract claims are chargeable to appropriations current at the time the basic contract was executed if they are based on "antecedent liability." A contract claim is based on antecedent liability if the modification or adjustment is within the general scope of the original contract and is made pursuant to a provision, such as a "Changes" clause, in the original contract. Contract claims not based on "antecedent liability" are chargeable to appropriations current when the claim is allowed. For example, a contractor provided supplemental research services under a contract with the Interior Department without the issuance of written contract amendments. Since the Government received the benefit of the services and ratified the transaction, the contractor was entitled to be paid. The work was within the general scope of the original contract and the Government's liability was viewed as deriving from the "Changes" clause. Therefore, the contractor's claim was chargeable to funds available at the time the original contract was executed. B-197344, August 21, 1980. For further discussion and case citations, see Chapter 4, this Manual, subsection entitled "Contract Modifications and Amendments Affecting Price" in the Section on "Bona Fide Needs."

Claims by Federal employees for compensation and related allowances are chargeable to appropriations for the fiscal year in which the work was performed. If the claim covers more than one fiscal year, the payment must be prorated accordingly. If the applicable appropriation account is insufficient to pay the claim, the agency must seek a deficiency appropriation. See, e.g., 54 Comp. Gen. 393 (1974) (claim for statutory salary which claimant had previously improperly waived); 47 Comp. Gen. 308 (1967) (payment resulting from recrediting of sick leave); B-171786, March 2, 1971 (overtime).

Where the claimant did not perform any work, the situation is somewhat unclear. An example would be restoration after an improper termination, where the period of wrongful termination is deemed valid service under the Back Pay Act. One case, 58 Comp. Gen. 115 (1978), held that agency contributions to an employee's retirement account, where not payable from the permanent judgment appropriation, must be prorated among the fiscal years covered. While the case does not discuss administrative payments of back pay, it implies that back pay under the Back Pay Act, Title VII of the Civil Rights Act, and the Veterans Preference Act should be treated similarly. However, in a case involving legislation prior to the Back Pay Act, GAO concluded that back pay resulting from restoration could be charged to current year funds since the administrative action directing the restoration could be viewed as creating the Government's obligation. B-113279-O.M., January 30, 1953.

Payment from separate appropriation or fund

In a number of instances, the source of funds is prescribed by statute. If this is the case, the agency does not have a choice. It must use the prescribed source and may not use its regular operating appropriations. This follows from the requirements of 31 U.S.C. § 628 (Chapter 3, this Manual) and the rule that a specific statutory provision governs over a more general one (Chapter 2, this Manual).

Several claims of this type--payable from some existing fund other than the agency's operating appropriations--have been discussed earlier in this Chapter. Thus, claims under the Federal Employees Compensation Act and the Government Losses in Shipment Act are paid from a specific fund established for that purpose. Claims under the Small Claims Act and administrative settlements greater than $2,500 under the Federal Tort Claims Act are paid from the permanent judgment appropriation, 31 U.S.C. § 724a. Congress may require an agency to reimburse the fund, for example, awards by boards of contract appeals under the Contract Disputes Act of 1978. The point to be noted about these cases is that, even though the agency may not use its own appropriations, a fund is available for immediate payment.

Some claims in this category which have not been covered previously in this Chapter will be discussed later in this Section.

Payment from specific congressional appropriation

There are also several instances in which there is no source of funds available for immediate payment. If the

legislation governing a particular type of claim requires specific appropriations, then payment must await congressional action. Statutes of this type frequently require that the agency's determination be reported to Congress for its consideration or certified to Congress as a "legal claim." Examples are:

--Administrative settlements under the Suits in Admiralty Act, 46 U.S.C. § 749, where there is no available agency appropriation or insurance fund. At one time, a permanent appropriation existed for these (46 U.S.C. § 748) but it was repealed in 1935.

--Admiralty claims settled by the Army, Navy, Air Force, and Coast Guard under, respectively, 10 U.S.C. § 4802, 10 U.S.C. § 7622, 10 U.S.C. § 9802, and 14 U.S.C. § 646. Under these statutes, the applicable agency head may settle and pay admiralty claims up to a specified limit. If the settlement exceeds the specified limit, the claim must be certified to Congress. GAO has no settlement jurisdiction under these admiralty statutes. B-126162, March 16, 1956.

--31 U.S.C. § 224a: Claims for death or personal injury of a foreign national caused by a Government employee in a foreign country in which the United States has privileges of extraterritoriality. Settlement authority is conferred upon the State Department and is limited to $1,500. See B-120773, March 22, 1955.

--31 U.S.C. § 224b: Claims for damage to persons or property caused by an agent of the Federal Bureau of Investigation acting within his scope of employment. Settlement authority is limited to $500 in any one case. (An arrangement has been worked out whereby the FBI is paying these claims from current operating appropriations. See B-115234, February 24, 1981 (non-decision letter).)

--42 U.S.C. § 223: Claims for damage caused by Public Health Service vessels. Settlement authority is limited to $3,000 in any one case.

--42 U.S.C. § 2207: Claims resulting from certain nuclear or other explosive detonations in the conduct of programs undertaken by the Department of Energy.

--42 U.S.C. § 2211: Claims resulting from a nuclear incident involving the nuclear reactor of a United States warship, excluding combat activities.

--Vessel accident claims in excess of $120,000 under section 1415 of the Panama Canal Act of 1979. See B-197052, April 22, 1980, and B-197052, February 4, 1981.

Administrative claims payable from permanent judgment appropriation

As noted above, several types of administrative claims are now payable from the permanent judgment appropriation, 31 U.S.C. § 724a. Three types discussed previously in this Chapter are: awards by boards of contract appeals under the Contract Disputes Act, subject to reimbursement by the contracting agency; administrative settlements greater than $2,500 under the Federal Tort Claims Act; and claims under the Small Claims Act.

A 1978 amendment to the permanent judgment appropriation incorporated several claims which formerly required specific appropriations. They are: Small Claims Act, supra; Military Claims Act, 10 U.S.C. §§ 2733, and 2734; National Guard Claims Act, 32 U.S.C. § 715; and section 203 of the National Aeronautics and Space Act of 1958, as amended, 42 U.S.C. § 2473(c)(13).

The Military Claims Act authorizes the settlement of death, personal injury, and property damage claims caused by a member or employee of the military departments or the Coast Guard acting within his scope of employment or incident to the department's non-combat activities. 10 U.S.C. § 2733 covers claims in the United States and is limited to claims not cognizable under the Federal Tort Claims Act. 10 U.S.C. § 2734 covers claims in foreign countries. Settlements under 10 U.S.C. §§ 2733 and 2734 are final and conclusive. 10 U.S.C. § 2735. The National Guard Claims Act is patterned after 10 U.S.C. § 2733 and covers the Army and Air National Guard. It also is expressly limited to claims not cognizable under the Federal Tort Claims Act, and settlements under it are final and conclusive. Under the Military and National Guard Claims Acts, the cognizant agency is authorized to make an advance "emergency" payment of up to $1,000 before the formal filing of a claim, to be deducted from the ultimate settlement. 10 U.S.C. § 2736. The NASA statute applies to claims resulting from the conduct of NASA's functions. Each of the statutes mentioned in this paragraph includes a two-year period of limitation.

Each of the four statutes -- 10 U.S.C. §§ 2733 and 2734, 32 U.S.C. § 715, and 42 U.S.C. § 2437(c)(13)--contains similar payment authority. The cognizant agency may settle and pay claims for not more than $25,000. If a claim in excess of $25,000 is determined to be meritorious and otherwise cognizable under the particular statute, the agency pays the first $25,000. Prior to 1978, the excess over $25,000 had to be reported to Congress for a specific appropriation. As a result of the 1978 amendment, the agency now submits the excess over $25,000 to GAO for certification under 31 U.S.C. § 724a.

GAO has no jurisdiction to settle claims under the Military Claims Act because the agency's settlement action is final and conclusive. 41 Comp. Gen. 235 (1961); B-180082, March 1, 1974. However, the Comptroller General may address issues of cognizability. Thus, in 43 Comp. Gen. 711 (1964), the University of Mississippi filed a claim for damage resulting from the occupation of the University by Federal troops under Presidential order in the racial conflicts of the early 1960's. While GAO saw no basis to consider the claim under the "implied contract of lease" theory proposed by the claimant, it noted that it didn't see why the claim could not be considered as cognizable under the Military Claims Act as incident to the non-combat activities of the Army. See also 51 Comp. Gen. 125 (1971) and the discussion of merits vs. cognizability in Section A(3), this chapter.

GAO has further noted that an agency's regulations restricting cognizability under the Military Claims Act have the force and effect of law, 40 Comp. Gen. 691 (1961); and that it has no authority to require an agency to construe its regulations to permit cognizability in a given case, 41 Comp. Gen. 235 (1961).

There is no authority to pay interest on a claim under the Military Claims Act. B-154102, June 16, 1974. See also the discussion of interest, Section E, this Chapter.

Claims under the Military and National Guard Claims Acts submitted to GAO for payment under 31 U.S.C. § 724a are subject to the requirements in the permanent appropriation that payment be certified by GAO and that the award be final. The concept of finality with respect to a National Guard Claims Act settlement was discussed in B-198029, May 19, 1980. The claim was for damage resulting when an Air National Guard plane crashed into a grain elevator in Montana, totally destroying the business. Some elements of damage could readily be determined with certainty, such as the expenses of removing debris and the destroyed inventory. Other

elements, however, primarily the value of the building, would take much longer. In view of the hardship imposed on the claimant through no fault of his own, the Air Force requested payment of a partial settlement, to consist of those elements which had been determined with certainty and agreed upon, with the balance of the settlement to be submitted after the value of the building had been determined. GAO noted that the purpose of the finality requirement was to protect the Government against loss by premature payment of an award or judgment which might later be modified upon review or appeal. However, there is no judicial review of a settlement under the National Guard Claims Act, nor is the settlement subject to review by any other administrative body. Therefore, since further review was unavailable, the claimant had signed a release covering the items of damage included in the partial settlement, and the award for each item was complete and final with respect to that item, GAO concluded that the partial settlement could be certified for payment. GAO cautioned that the decision would not be applicable in any situation which might ultimately come before a court, such as the Federal Tort Claims Act.

E. INTEREST

(1) General

One of the most firmly established principles in the claims area is the rule that interest in not recoverable against the United States unless it is expressly authorized in the relevant statute or contract. The rule is an application of the doctrine of sovereign immunity. Restated, the Government is not liable for interest unless it has consented to be liable for interest either by the enactment of legislation or by contractual agreement.

Interest on judgments against the Government is covered in detail in Chapter 12, this Manual. This Section deals with interest on administrative claims. Of course, both of these are applications of the same rule. The interest prohibition has been recognized frequently and consistently not only in decisions of the Comptroller General (for an early decision of the Comptroller of the Treasury, see 8 Comp. Dec. 498 (1902)), but also by the courts. United States v. North Carolina, 136 U.S. 211, 216 (1890); United States v. Goltra, 312 U.S. 203, 207 (1941); United States v. Thayer West Point Hotel Co., 329 U.S. 585 (1947); United States v. Louisiana, 446 U.S. 253 (1980). See also cases cited in Chapter 12, Section G, this Manual. The rule does not permit the payment of interest on equitable grounds and applies even where the Government has unreasonably delayed payment. E.g., Grey v. Dukedom Bank, 216 F.2d 108, 110 (6th Cir. 1954); Muenich v. United States, 410 F. Supp. 944, 947 (N.D. Ind. 1976).

The interest prohibition applies to claims arising in foreign countries as well as to claims arising in the United States. 45 Comp. Gen. 169 (1965). It does not apply, however, to contract obligations of the District of Columbia Government, which is liable for interest on its contract obligations the same as a private corporation. 33 Comp. Gen. 263 (1953). (There must nevertheless be some obligation which has been violated. See B-180565, May 31, 1974.)

The types of situations in which interest has been claimed encompass the full spectrum of claims against the Government. One large category, employee claims, is discussed separately later in this Section. Examples of other situations in which claims for interest have been disallowed are: B-147064, October 11, 1961 (claim for rental and related expenses on requisitioned property in Germany); B-154102; June 16, 1974 (claim under Military Claims Act); B-187877, April 14, 1977 (delay in payment for goods delivered);

B-195265, August 17, 1979 (delayed reimbursement by Labor Department of benefit payments to employee trust); B-194389-O.M., June 25, 1979 (claim for cancelled hotel reservations); B-192230, January 9, 1979 (non-decision letter) (claim for damage to leased property).

As indicated, the United States is liable for interest if specfically authorized by statute. An example is contract claims under section 12 of the Contract Disputes Act of 1978, 41 U.S.C. § 611 (supra, this Chapter). See Monroe M. Tapper & Associates v. United States, 611 F.2d 354 (Ct. Cl. 1979) for a discussion of the scope of section 12. Similarly, private relief legislation may occasionally provide for interest in situations where it would not otherwise be payable. See, e.g., B-182574-O.M., July 19, 1979. In B-187866, April 12, 1977, the Comptroller General concluded that interest could be paid on a claim for which Congress had made a specific appropriation where the appropriation language did not specify interest but it was clear from the legislative history that the amount appropriated included interest.

An exception to the interest prohibition involves takings under the Fifth Amendment, in which interest may be included as part of the "just compensation." See B-191032-O.M., July 7, 1978, and Chapter 12, Section G, this Manual. However, in a case where it was apparent that the Government would condemn certain land had the owner not agreed to a lease, the Comptroller General held that the lease agreement was nevertheless a voluntary agreement rather than a "condemnation" and that the payment of interest on claims arising under the lease would be unauthorized. B-181236, October 20, 1977.

If the necessary authority for the payment of interest does not exist in a particular context, it follows that appropriations are not legally available for that purpose, and some decisions have employed that rationale. Thus, the Comptroller General has held that appropriations of Federal agencies are not available for the payment of interest or penalties to the Internal Revenue Service on account of late forwarding or underpayment of employment taxes in the absence of legislation expressly making Federal agencies liable for interest and penalties the same as private parties. B-161457, May 9, 1978.

(2) Interest Provided For in Contract

Under the rule stated at the outset of this Section, interest is recoverable against the United States if it is expressly authorized by statute or if it is expressly provided for in the relevant contract.

Until 1971, GAO's position was that interest could be provided for in a contract only if there was some statutory authority for it. The rationale was that a contractual stipulation to pay interest for a delay in payment could end up obligating the Government beyond the period of obligational availability of the appropriation, thereby violating the Antideficiency Act. This rule was expressed in 22 Comp. Gen. 772 (1943). As a result of a Supreme Court decision, GAO changed its position in 51 Comp. Gen. 251 (1971) and overruled 22 Comp. Gen. 772. The 1971 decision recognized that the Government could become liable for interest by contract even without express statutory authority. The potential Antideficiency Act problem could be averted by a reservation of funds. Thus, the United States can be liable for interest either if it is expressly provided by statute, or even if there is no express statutory authority, if it is provided in the relevant contract. 18/ See, e.g., 56 Comp. Gen. 55 (1976). Absent authority from either source, interest may not be paid. E.g., B-187877, April 14, 1977.

The discussion on contract claims in 51 Comp. Gen. 251 is no longer relevant in view of the interest provisions of section 12 of the Contract Disputes Act of 1978 (supra, this Chapter). However, the decision remains relevant insofar as it relates to interest on simple demands for payment which have not become claims.

Several decisions have involved "late payment charges" for overdue accounts. Whether or not the Government is liable for these depends essentially on when the Government was notified of their existence. If the Government has notice of the charge at or before delivery and the charge is accepted by an

18/ Pre-1971 interest decisions must be read with caution. Although 51 Comp. Gen. 251 expressly overruled only 22 Comp. Gen. 772, other early decisions exist which hold that statutory authority is required in order for a contract to provide for interest. See for example, 5 Comp. Gen. 649 (1926) and A-12671, February 1, 1926. To the extent inconsistent with 51 Comp. Gen. 251, these early decisions would no longer be followed even though they have not been expressly overruled.

authorized official, for example, if notice is included on a delivery receipt and "accepted" in the form of a notation on the delivery receipt, the Government will be bound. B-183628, May 8, 1975; B-183047, February 27, 1975. However, payment of late payment charges is not authorized where the first notice appears on a claimant's invoice. B-183628, supra; B-195123, July 11, 1979; B-197856, March 5, 1980. These principles apply equally whether the charge is termed a "late payment charge" or a "service charge." B-183047, supra; B-103315, February 14, 1972; B-199915, September 8, 1980.

Generally, the parties should specify in the contract exactly what will constitute the "effective date of payment" for purposes of determining the Government's liability for late payment charges. If this is not done, the Government is obligated to issue and mail its checks sufficiently in advance to assure receipt, in the regular course of the mails, on or before the delinquency date. If the Government does not meet this obligation, it will not be able to avoid liability for the late payment charges merely because it issued the check before the delinquency date. 61 Comp. Gen. ___ (B-201384, December 29, 1981).

Public utilities commonly levy late payment charges on overdue accounts and questions have arisen frequently in this context. The rule here is that the Government is liable for late payment charges on overdue utility bills where the terms of the utility company's applicable published rate schedule so provide. B-173725, September 16, 1971; B-184962, November 14, 1975; B-188616, May 12, 1977; B-189149, September 7, 1977; B-195202, November 15, 1979 (non-decision letter). The rationale, as stated in B-173725, supra, is that "since the Government accepted this utility service with the understanding that its obligation for payment would be governed by the published rate schedule, it is also bound by the late payment clause contained within that schedule."

Although most of the decisions use the terms "late payment charge" and "interest charge" interchangeably, courts in several jurisdictions have held that a late payment charge by a utility is not really "interest" but is a device to permit the utility to recoup its costs which are directly attributable to payment delays and thereby avoid indiscriminately charging all users for the delays of some. The Comptroller General has accepted this reasoning and has held that the Government may be liable for late payment charges contained in a utility's published rate schedule under the general terms of a contract, even in the face of a specific contract provision prohibiting the payment of any "penalty or interest." B-194905, July 6, 1979; B-186494, July 22, 1976.

The general prohibition with respect to interest has been applied to liquidated damages provided for by contract and remitted by the Comptroller General under 41 U.S.C. § 256a. B-197972, June 18, 1980. Under the principles discussed above, the contract presumably could have expressly provided for interest upon remission.

Where a contract has been executed in violation of the Antideficiency Act (Chapter 5, this Manual), and payment under the contract has been delayed due to the unavailability of funds, modification of the contract to provide for the payment of interest on amounts which subsequently become due and payable would be unlawful since it would necessarily increase the amount of the deficiency appropriation needed to liquidate the overobligation and would constitute a new and additional violation of the Antideficiency Act. 55 Comp. Gen. 768 (1976); B-132900, June 3, 1976 (non-decision letter).

Finally, interest on capital borrowed to finance the performance of a Government contract may generally not be allowed as a reimbursable item of cost under the contract. E.g., 27 Comp. Gen. 690 (1948). However, it has been allowed to a nonprofit institution which had borrowed money to finance a contract with the Department of Agriculture for the implementation of certain programs under the National School Lunch Act. B-185016, July 8, 1976. For other exceptions, see B-154442, November 29, 1968; B-166235-O.M., June 25, 1969.

NOTE: Legislation enacted on May 21, 1982, will change some of these rules. The new law is Public Law 97-177, the Prompt Payment Act. It provides generally that a Federal agency which acquires property or services from a business concern shall be liable for interest if it does not make payment by the required payment date (30 days after receipt of a proper invoice unless the contract specifies some other payment due date). The Office of Management and Budget is to issue implementing regulations. The new law applies to the acquisition of property or services on or after October 1, 1982, and will be reflected more fully in a future revision of this Section.

(3) Employee Claims

The quest to recover interest from the Government has touched just about every type of claim asserted by Federal civilian employees and military personnel. Since statutory authority for interest does not exist in this area, claims for interest have been consistently disallowed.

Thus, the Back Pay Act (5 U.S.C. § 5596) does not authorize the payment of interest on awards of back pay resulting from unjustified or unwarranted personnel actions. 54 Comp. Gen. 760 (1975) (unfair labor practices determined by the Department of Labor); 53 Comp. Gen. 824 (1974) (improper separation); Van Winkle v. McLucas, 537 F.2d 246 (6th Cir. 1976), cert. denied, 429 U.S. 1093; Fitzgerald v. Staats, 578 F.2d 435 (D.C. Cir. 1978), cert. denied, 439 U.S. 1004.

Similarly, there is no authority for the Government to pay interest on an employment discrimination claim under Title VII of the Civil Rights Act of 1964, as amended. 58 Comp. Gen. 5 (1978); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977); Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978); Guilday v. Department of Justice, 485 F. Supp. 324 (D. Del. 1980).

Where interest cannot be awarded directly, it may not be awarded indirectly in the guise of an "inflation factor" or "cost-of-living factor." Saunders v. Claytor, 629 F.2d 596 (9th Cir. 1980), cert. denied, 450 U.S. 980; Blake v. Califano, 626 F.2d 891 (D.C. Cir. 1980); Chewning v. Schlesinger, 471 F. Supp. 767 (D.D.C. 1979). (All of these are Title VII cases.) See also B-159399, October 14, 1981.

Other types of employee claims in which interest has been disallowed are as follows:

--Overtime: 53 Comp. Gen. 264, 269 (1973); B-189181, June 20, 1978.

--Payments resulting from the correction of military records under 10 U.S.C. § 1552: B-195129, April 28, 1980; B-173513, August 10, 1971.

--Reimbursement for collection of excess charges on shipment of household goods: B-193856, March 26, 1980.

--Relocation expenses: B-182276, April 10, 1975.

--Travel expenses: B-193346, March 20, 1979.

--Severance pay: B-165072, May 13, 1969.

--Delayed payment of reenlistment bonus: B-179968-O.M., May 24, 1974.

--Reimbursement for erroneous deduction of allotment: B-178330, March 11, 1974.

--Payments received under the Missing Persons Act: B-159399, October 14, 1981.

--Payment to State retirement fund on account of State employee temporarily assigned to Federal agency under Intergovernmental Personnel Act of 1970: B-192415, March 1, 1979.

Interest was authorized in a case where the Army had erroneously retained a member's funds under the Uniformed Services Savings Deposit Program beyond the planned phase-out of the program. Since the statute authorizing interest on the deposits had not been repealed, the Government was obligated to pay interest until the deposit was actually returned. B-183769-O.M., April 6, 1976.

(4) Computation

When interest is payable, it is computed by a very precise formula. GAO's formula was stated in B-60952, July 2, 1953, as follows:

> "[T]he computation of interest in Government transactions [is] calculated for a fractional part of a year on the basis of the actual number of days within the period involved, using such number of days as the numerator and the actual number of days in the particular (calendar) year as the denominator--including either the beginning or ending date of the period, but not both. * * * [I]nterest is computed on the basis of 365 days per year, or 366 days in a leap year."

See also 1 Comp. Gen. 411 (1922); 15 Comp. Gen. 871 (1936); 15 Comp. Gen. 992 (1936); 22 Comp. Gen. 656 (1943); A-51618, November 21, 1934.

Naturally, this formula will apply only where some other formula is not specifically prescribed by statute.

F. FALSE OR FRAUDULENT CLAIMS

A number of statutory provisions deal with false or fraudulent claims and impose both civil and criminal penalties.

Civil penalties are provided in the False Claims Act, 31 U.S.C. §§ 231-235. Under the False Claims Act, a person who presents a false or fraudulent claim against the Government or uses false documents in connection with such a claim is liable for a forfeiture in the amount of $2,000, plus double the amount of damages sustained by the United States as a result of the fraud, plus the costs of suit. The statute was intended, so said one district court, "to protect the treasury against the hungry and unscrupulous host that encompasses it on every side * * *. " United States v. Griswold, 24 F. 361, 366 (D. Ore. 1885), aff'd, 30 F. 762 (C.C. Ore. 1887). Suit may be brought by the United States or by any person in the name of the United States. A suit brought by a private informer is known as a "qui tam" action and the informer is called the "relator." The suit is styled "United States ex rel. (name of relator) v. (defendant)." 31 U.S.C. § 235 prescribes a six-year statute of limitations.

The False Claims Act is a penal statute and therefore subject to strict construction. Cahill v. Curtiss-Wright Corp., 57 F. Supp. 614 (W.D. Ky. 1944). It permits recovery only when it is shown that the defendant (claimant) has made a false, fictitious, or fraudulent claim for money or property against the Government based on the Government's alleged liability to the claimant. E.g., United States ex rel. Kessler v. Mercur Corp., 13 F. Supp. 742 (S.D.N.Y. 1935), aff'd, 83 F.2d 178 (2d Cir. 1936), cert. denied, 299 U.S. 576.

In addition, there are criminal penalties for making false or fraudulent statements or representations to Government agencies (18 U.S.C. § 1001) and for possessing false documents with the intent to defraud the United States (18 U.S.C. § 1002).

Since the False Claims Act and 18 U.S.C. §§ 1001 and 1002 are penal statutes, their enforcement is the responsibility of the Department of Justice and GAO will not render decisions under them. See B-149372, February 14, 1978, and Chapter 1, this Manual.

There is also a statutory provision--28 U.S.C. § 2514--requiring forfeiture to the United States of a claim "by any person who corruptly practices or attempts to practice any fraud against the United States in the proof,

statement, establishment, or allowance thereof." This provision applies only to claims filed in the Court of Claims. It does not apply to a claim which has been settled by payment, nor does it affect the recovery of money paid out as a result of fraud. 41 Comp. Gen. 206 (1961); 41 Comp. Gen. 285 (1961); B-158404-O.M., August 1, 1966.

However, the fact that only the Court has power to declare a forfeiture under 28 U.S.C. § 2514 by no means suggests that an agency should pay a claim if fraud is suspected. In addition to the various statutes mentioned above, there are principles, set forth in decisions of the Comptroller General, for the handling of false or fraudulent claims at the administrative level.

The starting point is the rule that the fraudulent presentation of a claim vitiates the claimant's rights in the entire claim. 14 Comp. Gen. 150 (1934); 17 Comp. Gen. 61 (1937); 20 Comp. Gen. 507 (1941); 23 Comp. Gen. 907 (1944). If fraud is suspected, the claim should be viewed as one of doubtful validity and should be disallowed, leaving the claimant to pursue the matter in the Court of Claims which has the authority to declare a forfeiture under 28 U.S.C. § 2514. 41 Comp. Gen. 206 (1961); 41 Comp. Gen. 285 (1961); B-186020, June 28, 1976.

The application of the above rule varies somewhat depending on the type of claim involved. With respect to contract claims, the Comptroller General has stated:

> "[U]nder the rule which has been judicially recognized for so long and so often declared in decisions of our Office that it has become a landmark in the disposition of claims involving irregularities and possibly fraudulent practices against the United States, it is the plain duty of administrative, accounting and auditing officers of the Government to refuse approval and to prevent payment of public moneys under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken." 44 Comp. Gen. 110, 116 (1964).

See also 17 Comp. Gen. 61 (1937) (payment under rental agreement); 23 Comp. Gen. 907 (1944) (bailment); 14 Comp. Gen. 150

(1934); 20 Comp. Gen. 507 (1941); B-152676, August 26, 1968. The principle has also been applied with respect to fraudulently altered Government checks. See B-54418, January 25, 1946.

In the decision from which the above quotation was taken, 44 Comp. Gen. 110 (1964), the Armed Services Board of Contract Appeals made an award to a contractor suspected of fraud. The Justice Department had declined to proceed under the False Claims Act, but stated that its decision had been prompted by practical considerations and that it nevertheless believed that there was "substantial evidence of fraud." The Board thereafter rendered its decision but expressly disclaimed jurisdiction over the issue of fraud. The Board noted, however, that the issue of fraud was not foreclosed because:

> "[W]e are not unmindful of the fact that administrative, accounting, and auditing officers sometimes refuse payment of public moneys when they have a reasonable suspicion of fraud, thus reserving the matter for scrutiny in the Courts. In this case the Court would be in a position to try and decide the fraud issue over which this Board has no jurisdiction * * *."

Faced with this, the Army asked whether it could properly pay the ASBCA award. Noting that determinations of fraud are beyond the power of contracting officers and boards (which the ASBCA had expressly recognized), and noting further the forfeiture provisions of 28 U.S.C. § 2514, the Comptroller General concluded that the Board's decision did not impose an obligation on the United States and payment was therefore not authorized. The effect of this was to leave the contractor to his remedy in the courts which would have the power to try the issue of fraud and declare a forfeiture if appropriate. Cf. B-154628, May 31, 1966. Although 44 Comp. Gen. 110 predates the Contract Disputes Act of 1978, the Act expressly recognizes that agencies are not authorized to settle or pay claims involving fraud.

In subsequent decisions, GAO has recognized that partial settlement might be authorized where the Government has received direct benefit for services performed, has suffered no monetary loss as a result of the fraud, and where the fraud was not committed for the purpose of securing payment of the claim. 45 Comp. Gen. 406 (1966); B-171759, June 10, 1971. Generally, however, the rule remains that a claim tainted by fraud cannot be divided so as to allow recovery on part of it. 44 Comp. Gen. 110, supra.

Although the above principles apply equally to claims for pay and allowances, the Comptroller General has held that each separate item of pay and allowances may be treated as a separate claim even though they are included on a single voucher. 41 Comp. Gen. 285 (1961). Thus, the suspicion that some items on a voucher may be false or fraudulent does not necessarily require disallowance of the entire voucher. For further elaboration on the application of the fraud principles to claims for pay and allowances, see 57 Comp. Gen. 664 (1978); 59 Comp. Gen. 99 (1979); B-194159, October 30, 1979.

The approach followed in the pay and allowance cases has also been applied to claims under the Military Personnel and Civilian Employees' Claims Act of 1964. See B-192978, February 28, 1979 (Section C(2), supra, this Chapter).

In all types of claims, there is a presumption in favor of honesty and fair dealing and the burden of establishing fraud rests with the party alleging it. E.g., B-187975, July 28, 1977. With respect to claims within GAO's settlement jurisdiction, a claimant has a right to have his claim adjudicated in GAO even though the cognizant agency may consider the claim to be fraudulent. The agency's decision that the claim is fraudulent does not foreclose this right. 57 Comp. Gen. 664, 667 (1978). Also, the Department of Justice's failure to prosecute a claimant does not preclude the Government from taking appropriate denial or recoupment action. Id., at 669.

If evidence of fraud is discovered after the claim has been paid, the Government should seek to recoup the funds. Recoupment should be made to the same extent and amount as the denial of an unpaid claim based on fraud. 41 Comp. Gen. 285 (1961); 57 Comp. Gen. 664 (1978). Thus, if the entire claim would have been denied, the entire amount should be recouped. If only one item on a voucher would have been denied, only that item need be recouped.

G. MERITORIOUS CLAIMS ACT

(1) General

GAO has frequently pointed out that its claims settlement jurisdiction is limited to considerations of legal liability and that it has no authority to pay claims based solely on equitable considerations. Insofar as the actual payment of claims is concerned, this is true. The Comptroller General has, however, been given a measure of "equity jurisdiction" by statute--the so-called Meritorious Claims Act. 19/ Enacted on April 10, 1928, and now found at 31 U.S.C. § 236, the Act provides:

> "When there is filed in the General Accounting Office a claim or demand against the United States that may not lawfully be adjusted by the use of an appropriation theretofore made, but which claim or demand in the judgment of the Comptroller General of the United States contains such elements of legal liability or equity as to be deserving of the consideration of the Congress, he shall submit the same to the Congress by a special report containing the material facts and his recommendation thereon." 20/

It is important to note that the Meritorious Claims Act does not authorize the actual payment of anything. It merely authorizes the Comptroller General to submit a favorable recommendation to Congress. Meritorious Claims Act recommendations are acted upon the form of private relief bills rather than the inclusion of the items in general appropriation acts. A-25269, April 8, 1929. Thus, the Act in effect authorizes GAO to recommend private relief legislation. GAO's recommendation will always include draft language for the bill.

Of course, anything the Comptroller General can submit under the Meritorious Claims Act can be handled by regular private relief legislation. The difference is that the Meritorious Claims Act case comes to Congress over the recommendation

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19/ Others are the waiver statutes, 5 U.S.C. § 5584 and 10 U.S.C. § 2774, covered in the Personnel Law Manuals, and 41 U.S.C. § 256a which authorizes the discretionary remission of liquidated damages.

20/ Early decisions occasionally use the name "Equitable Claims Act." E.g., B-36492, August 27, 1943. However, "Meritorious Claims Act" has become much more common.

of an agency with expertise in investigating and adjudicating claims, presumably making the congressional task easier. In fact this was the purpose of the Act. See S. Rep. No. 684, 70th Cong., 1st Sess. 3-4 (1928).

While the Act does permit GAO to recommend action on certain claims not otherwise payable, it is nevertheless strictly limited. By its terms it applies only in cases where there is no appropriation legally available for payment. It does not apply to a case where, if the claim were otherwise payable, existing appropriations could be used for its payment. A-18647, October 25, 1928; A-21129, January 17, 1929; A-63014, September 19, 1935; B-155149, October 21, 1964.

Also, the Comptroller General has construed the Act as applicable only to claims within GAO's settlement jurisdiction. Of course this means all claims except those for which settlement authority has been expressly granted to some other agency. Numerous decisions state this position 21/ and several of the earlier cases point out that it is supported by the Act's legislative history (e.g., B-121302, October 6, 1954). The rationale here is that the Act should not be construed to permit GAO to circumvent a determination that has been expressly committed by statute to another agency.

Combining these two concepts, a claim is cognizable under the Meritorious Claims Act if it is a claim which GAO:

> "could consider with a view of making an allowance thereon but for the lack of any authority in previously enacted statutory law, or appropriation made in pursuance of law authorizing the payment of such claims." A-18647, October 25, 1928; B-121302, October 6, 1954.

There are therefore three conditions which must be met before the Comptroller General will report a claim under the Meritorious Claims Act: (1) the claim must be cognizable by

21/ B-50013, August 2, 1945 (Act applies to claims which GAO would have jurisdiction to settle and allow but for the lack of an appropriation); B-115905, December 10, 1953 (non-decision letter); B-121302, October 6, 1954; B-141810, February 10, 1960; B-144735/B-144817, February 10, 1961; B-147909, January 22, 1962; B-149624, October 10, 1962; B-151903, July 11, 1963; B-170252, July 23, 1970; B-185428, January 29, 1976.

GAO under its claims settlement jurisdiction; (2) the claim must be one for whose payment existing appropriations are not legally available; and (3) the Comptroller General must judge the claim to have sufficient legal or equitable merit to warrant special consideration by Congress. The third condition introduces the element of discretion.

One commenter noted that the Meritorious Claims Act "was rarely used until recently." (Note, Private Bills in Congress, 79 Harv. L. Rev. 1684, 1688 (1966).) While the source of this may have been interviews with GAO employees (Id. at 1684, note), in fact the opposite is true. The Act was used quite often in its early years--17 claims were submitted to Congress in 1928, 16 in 1929, and 20 in 1930. Usage dropped sharply and there were few submissions in the 1940's and 1950's. Usage has increased somewhat in recent years but there are still only a very few claims submitted each year (for example, approximately 10 for the period 1978-1980). Perhaps the major reason for this overall decline is that the statutory framework for the settlement and payment of claims against the Government is vastly more sophisticated than it was in 1928. The trend in favor of the Government's waiver of its sovereign immunity was still in its infancy in 1928 and there are now many more types of claims for which administrative or judicial recourse is available.

In any event, GAO has not considered it appropriate to flood the Congress with Meritorious Claims Act recommendations, and it may certainly be said that GAO has used the Act sparingly. Perhaps in part because of this, most of the Comptroller General's recommendations under the Act have been enacted. Thus, of the 53 claims reported in 1928 through 1930, 51 were enacted. Out of 31 submitted between 1948 and 1976, 28 were enacted. 22/

GAO views the Meritorious Claims Act as "an extraordinary remedy limited to extraordinary circumstances." E.g., 53 Comp. Gen. 157, 158 (1973); B-160743, March 24, 1967. Thus, cases reported for congressional consideration have generally involved equitable circumstances of an unusual nature which are unlikely to constitute a recurring problem. B-186000-O.M., September 22, 1976. GAO feels that frequently recurring problems are preferably dealt with by general remedial legislation. See B-36492, August 27, 1943; 17 Comp. Gen. 720, 724 (1938).

22/ The primary source of these statistics is a study done by a GAO attorney in 1977 (B-150882-O.M., March 17, 1977).

The Meritorious Claims Act does not apply with respect to transactions to which the United States is not a party. B-172991, February 23, 1972; B-163051, May 2, 1968. Nor does it apply to disallowances in the accounts of disbursing or other accountable officers. A-12928, January 5, 1929; A-46674, January 25, 1933.

Also, read literally, the Act applies only to claims against the United States and not to claims by the United States. A-5249, June 18, 1928. Thus, the Act would not be available in general debt cases, especially since the Federal Claims Collection Act (infra, this Chapter) provides standards for compromise and termination. However, it has been applied in cases involving overpayments to Government employees where termination of collection action is inapplicable. These have generally been cases involving "mixed" claims, that is, claims including both the cancellation of remaining indebtedness and the refunding of amounts already repaid (B-165384, November 13, 1968; B-160178, January 27, 1969; B-177097, January 19, 1973), although some more recent cases involve only the cancellation of indebtedness (B-186218, November 10, 1976; B-195167, February 21, 1980). Also, these are cases either (a) which are not covered by applicable waiver statutes (B-195167 and B-186218, supra) or, (b) for which waiver would not provide adequate relief (B-160178, supra).

If a claim submitted to GAO for adjudication includes a request that it also be considered under the Meritorious Claims Act, it will be considered initially by GAO's Claims Group. If the Claims Group determines that a substantial basis exists for reporting a claim to Congress, the matter is referred to the Office of General Counsel. If the legal staff concurs, the report is prepared for the Comptroller General's signature. B-186000-O.M., September 22, 1976.

Some of the earlier documents suggest that a Meritorious Claims Act request may be considered only if submitted directly by the claimant. However, the statute does not require this and as a practical matter it is necessary only if the statute of limitations (infra, this Section) is likely to be a problem. Thus, GAO will consider a request submitted by the cognizant agency. See B-41316, August 26, 1944. Requests may also come in through Members of Congress. In addition, GAO will self-initiate a Meritorious Claims Act report in appropriate circumstances. B-196171-O.M., February 1, 1980.

The approach used in evaluating Meritorious Claims Act requests was summarized in 18 Comp. Gen. 454, 457 (1938):

> "The propriety of affording relief under the [Meritorious Claims Act] is a matter of discretion to be exercised according to the circumstances of each particular case. However, this discretion is not an arbitrary one, but is required to be exercised in accordance with fixed principles and precedents."

There are no formal standards for judging if a specific claim is one which GAO is likely to endorse under the Act. Rather, each claim is considered on its own merit and in light of available precedent (to the extent it is useful), to determine if it contains the necessary elements of legal or equitable liability.

It must be emphasized that there have been literally hundreds of requests for relief under the Meritorious Claims Act. Many of the older cases have become obsolete by virtue of changes in legislation. Many others are simply not susceptible of generalization. With this in mind, the remainder of this Section attempts to draw some guidelines for the presentation and consideration of these claims.

(2) Categories of Claims Generally Not Reported

(a) Statute of Limitations

The Barring Act, 31 U.S.C. § 71a (supra, this Chapter), expressly applies to the Meritorious Claims Act. Also, for emphasis, it is repeated verbatim at 31 U.S.C. § 237. Thus, if a claim is not received by GAO with six years after it accrues (or longer for certain wartime claims or if the period is extended by the Soldiers' and Sailors' Civil Relief Act of 1940, as discussed earlier in this Chapter), GAO is precluded as a matter of law from submitting it under the Meritorious Claims Act, regardless of the equities.

For example, B-153568, March 16, 1964, involved the claim of a veteran for the redemption of certain military payment certificates he had received during his service in World War II. The claim was not filed with GAO until 1964. Because the claim was not filed within the period prescribed by the Barring Act (then ten years) nor within five years after the establishment of peace, the Comptroller General had no authority to report the claim to Congress under the Meritorious Claims Act.

There are numerous decisions illustrating the effect of the Barring Act on GAO's authority under the Meritorious Claims Act. See B-144246, November 10, 1960; B-150129, November 15, 1962; B-153148, January 22, 1964, affirmed in B-153148, December 2, 1964; B-156046, September 12, 1967; B-134038/B-138771, May 23, 1968; B-106890, August 11, 1970; B-171732, March 24, 1971; B-189816, August 29, 1977.

A claim may be presented which is still within the period of the Barring Act, but which is barred by some other more specific limitation period provided by statute or regulation. Early decisions established the proposition that a claim which is time-barred by any statutory or regulatory limitation period will not be reported to Congress under the Meritorious Claims Act. As stated in 14 Comp. Gen. 324 (1934), the Act "was not intended for employment as a means to revive claims barred by a statutory or regulatory limitation."

This conclusion follows from the application of established principles of equity, stated as follows in 18 Comp. Gen. 454, 457 (1938):

> "It is a principle of long standing, governing the exercise of equitable jurisdiction, that when there is a complete and adequate remedy at law, and

> the party aggrieved fails to take advantage of such remedy, such party will not be permitted to assert it in equity unless he was prevented by fraud or mistake or by circumstances beyond his control. [Citation omitted.] Where an adequate remedy at law has been lost through either positive negligence or mere failure to seek it at the proper time, equity will not interpose to grant relief."

See also A-72406, August 4, 1936; A-44115, December 12, 1932.

These early decisions predated the Barring Act--that is, the limitation period involved in the pre-1940 decisions was the only available time limitation. However, since a specific provision governs over a more general one, the principle continues to be applicable and has been followed after the enactment of the Barring Act. For example, GAO denied Meritorious Claims Act relief to a claimant seeking a customs refund who had failed to pursue available administrative remedies within the time periods prescribed by the customs laws. B-115724, August 7, 1953. See also B-40645, April 21, 1944; B-124678, August 31, 1955; B-126162, March 16, 1956.

Thus, a claim which is time-barred, either by 31 U.S.C. § 71a or by some other more specific statutory or regulatory limitation, will not be submitted under the Meritorious Claims Act.

(b) Tort Claims

Numerous decisions have established the proposition that GAO does not view the Meritorious Claims Act as applicable to tort claims. 10 Comp. Gen. 175 (1930); 13 Comp. Gen. 406 (1934); 14 Comp. Gen. 429 (1934); 15 Comp. Gen. 1114 (1936); 16 Comp. Gen. 642 (1937); B-50013, August 2, 1945.

This result follows from the application of two somewhat related principles, not always stated in the decisions: first, the Meritorious Claims Act applies only to claims which are within GAO's settlement jurisdiction, and second, where Congress has enacted legislation providing relief for a certain type of claim, it must be presumed that Congress intended for that legislation to prescribe the limits of available relief.

The early decisions cited above involve mostly allegations of negligence by a Government employee and arose before the 1946 enactment of the Federal Tort Claims Act, at a time when only limited relief was available under the Small Claims Act and a few other miscellaneous statutory provisions. (The

Federal Tort Claims Act and Small Claims Act are both discussed earlier in this Chapter.) The expanded relief available under the Federal Tort Claims Act has reduced the number of Meritorious Claims Act requests arising from tort claims. Nevertheless, the rationale of the early decisions remains equally applicable and the position has been reiterated in a number of post-Federal Tort Claims Act cases. For example, the Comptroller General declined to invoke the Meritorious Claims Act on behalf of a claimant who sought reimbursement for the loss of a rutabaga crop which was destroyed by the application of a pesticide recommended by a Department of Agriculture official. B-160780, February 8, 1967. See also B-114352, April 28, 1953; B-120691, July 28, 1954; B-120853, October 4, 1954; B-141810, February 10, 1960; B-147909, January 22, 1962; B-162545, October 10, 1967; B-204766, March 2, 1982.

In related group of cases, the Comptroller General has declined to proceed under the Meritorious Claims Act on behalf of Government employees who paid tort claims from personal funds. See 34 Comp. Gen. 490 (1955) (employee sued in individual capacity claimed amount paid in out-of-court settlement plus attorney's fees incurred in defending suit); B-145191, April 7, 1961 (employee paid damages to avoid being sued). These cases were based in part on the traditional non-applicability of the Meritorious Claims Act to tort claims and in part on the absence of Government liability where the employee is sued in his individual capacity. Generally, a party injured by the tortious conduct of a Government employee may proceed either against the Government under the Federal Tort Claims Act or against the employee in his individual capacity. Since enactment of the Federal Drivers Act (28 U.S.C. § 2679) this is no longer true for motor vehicle cases (the two cases cited were motor vehicle cases which predated the Federal Drivers Act), nor for medical malpractice cases, but it remains true for other tort cases.

GAO also refused to recommend relief under the Meritorious Claims Act in a motor vehicle case arising after the Federal Drivers Act in which the employee voluntarily paid for the damage to the other automobile from personal funds. B-152070, October 3, 1963. The decision noted that the employee's payment was merely in satisfaction of his own liability. While this statement is incorrect in view of the Federal Drivers Act, the decision offers an additional rationale--the "negligence aspect negates any element of equity." An additional reason, not stated in the decision, is that the employee was a "voluntary creditor" (see infra, this Section).

Relief was recommended in a 1957 case in a claim resulting from the wrongdoing of a Government employee. The Western Union Telegraph Company had installed equipment on an Army installation and by agreement permitted the equipment to be used for unofficial messages by military personnel. Army personnel collected the charges for the Company's credit. An Army employee converted (embezzled) several thousand dollars of these receipts. The employee was prosecuted but recoupment was not possible. Since there was no way to pay the Company's claim from appropriated funds, the Comptroller General reported it to Congress under the Meritorious Claims Act, stating that "the Government's responsibility for the funds attached immediately upon their receipt, and is not merely that of an employer for an employee's tort." B-131464, September 4, 1957.

There is an additional reason why it would be inappropriate for GAO to use the Meritorious Claims Act on behalf of a claimant whose claim is cognizable under the Federal Tort Claims Act. A statute enacted in 1946 along with the Federal Tort Claims Act provides that no private bill authorizing or directing "the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act * * * shall be received or considered" in the Congress. 2 U.S.C. § 190g. The statute also applies to private bills for a pension, the construction of a bridge across a navigable stream, and the correction of military or naval records. While 2 U.S.C. § 190g has been repealed insofar as it relates to the Senate (S. Res. 274, 96th Congress, November 14, 1979), it remains in force for the House of Representatives. Thus, it would be inappropriate for GAO to recommend private relief legislation in the face of a statute expressing the policy of at least one House of the Congress against receiving or considering such legislation. See B-180597, May 10, 1974; B-162545, October 10, 1967.

(c) Res Judicata

The Meritorious Claims Act could not have been intended to authorize GAO to, in effect, reverse the judgments of courts. Thus, a claim which has been unsuccessfully pursued in court will not be submitted under the Meritorious Claims Act. A-28480, September 19, 1929; A-55736, June 25, 1934.

(d) Interest

As discussed earlier in this Chapter, interest is not recoverable on claims against the United States unless expressly authorized in the relevant statute or contract. Where interest

is not otherwise authorized, a claim for interest will not be submitted under the Meritorious Claims Act. A-22423, February 1, 1929; A-27042, September 10, 1929; A-28455, March 1, 1930. This applies equally to interest on judgments against the United States (see Chapter 12, this Manual). A-14295, September 10, 1928.

(e) Voluntary Creditors

As discussed previously in this Chapter, subject to limited exceptions, one who attempts to make himself a "voluntary creditor" of the United States by making a payment from personal funds may not be reimbursed. The claim of a voluntary creditor which cannot be paid under the principles previously discussed will not be reported to Congress under the Meritorious Claims Act. B-87319, May 16, 1950; B-127799, August 24, 1956; B-157057(2), July 12, 1965.

One reason for this, although not stated in the decisions, is that a voluntary creditor claim is not a claim which could be allowed but for the lack of an available appropriation. If the claim were otherwise allowable, existing appropriations would be available for its payment.

(f) Personal Expenses

GAO will not recommend relief under the Meritorious Claims Act to reimburse a claimant for expenditures which are essentially personal in nature and for which there is no basis for Government liability. B-136707, December 14, 1962 (attorney's fees where not authorized by statute); B-185734, June 14, 1977 (attorney's fees); B-185612, August 12, 1976 (attorney's fees); B-147628, December 28, 1961 (occupancy tax levied on military member by French municipality).

The cases in which an employee incurs expenses when sued in tort in his individual capacity (supra, this Section) may also be viewed as falling within this category.

A claim for attorney's fees was submitted under the Meritorious Claims Act in B-181660, September 30, 1974. The claimant, a General Services Administration employee, had separated a GSA supervisor and another GSA employee who were fighting and, as a result, was named a co-defendant in a civil suit brought by the employee. When GSA denied the claimant's request for Government representation, he retained private counsel. Claimant renewed his request for representation and this time GSA referred it to the local United States Attorney who provided the necessary legal representation. The claim

for the cost of retaining private counsel prior to being represented by the U.S. Attorney was seen as having sufficient equity to merit congressional consideration.

(g) Cost or Eligibility Limitations

A statute or regulation may impose various limitations and the party affected is charged with knowledge of these restrictions. A cost limitation may be a ceiling on the amount of funds that can be spent on a project or may be a limit on the amount payable on a certain type of claim, for example, the $15,000 limit in the Military Personnel and Civilian Employees' Claims Act of 1964 (supra, this Chapter). An eligibility limitation for purposes of this discussion refers to a time limit on some entitlement, for example, an allowance payable for a specified number of days.

As a general proposition, a claim for an amount in excess of a cost or eligibility limitation set by statute or regulation will not be reported to Congress under the Meritorious Claims Act. B-98615, November 2, 1950; B-134650, May 14, 1959; B-161920, September 1, 1967; B-201277, February 20, 1981; B-142433-O.M., May 4, 1960; B-147496-O.M., January 4, 1962.

To illustrate, 10 U.S.C. § 2674 establishes cost limitations on "minor construction" projects for the military departments. In B-147086, September 20, 1961, a contractor claimed an amount which would cause the "minor construction" limitation to be exceeded. The Comptroller General determined that reporting the claim to Congress would be inappropriate.

However, a claim for an amount in excess of the "minor construction" limitation was reported in B-154061, February 15, 1965. In that case, the contractor (claimant) was only one of several on the project and had no way of knowing that the limit might be exeeded. Therefore, adherence to the cost limitation was not a matter within the contractor's control.

Relief was also recommended in B-145318, December 16, 1969. A construction contractor on a housing project offered to perform certain additional work and the contracting officer accepted. However, a change order could not be issued because the maximum insurable mortgage amount was subsequently obligated for other work on the project. Relief was deemed appropriate because the contractor had acted in good faith, the Government retained the benefit of the work, and the work could have been paid for at the time the additional cost was agreed to without exceeding the statutory limitation.

(h) Contributing Fault by Claimant

Older court decisions on equity jurisdiction frequently state that a party seeking equitable relief must have "clean hands." Although not in those terms, the Comptroller General applies this concept in considering requests for relief under the Meritorious Claims Act. Simply stated, GAO does not view the Meritorious Claims Act as an appropriate means to rescue someone who has contributed to his own predicament.

The following cases in which Meritorious Claims Act relief was denied will serve to illustrate:

--B-186000, September 22, 1976: Claim by Air Force officer for tuition payments to a foreign university. Even after counseling, claimant did not follow applicable regulations for having payments approved.

--B-177437, March 9, 1973: Claim for lost equity in real property sold at foreclosure sale as result of nonpayment of mortgage. Claimant alleged that default resulted from Army's erroneous discontinuance of his allotment. Army records revealed that claimant had signed a form requesting discontinuance of the allotment.

--B-165901, January 28, 1969: Air Force member shipped household goods knowing that applicable regulations did not authorize shipment at Government expense in his particular situation.

--B-154149, June 5, 1964: Government employee induced claimant's husband to endorse benefit check and leave it with him for later delivery. Employee then cashed the check and pocketed the proceeds. Claimant argued that the dishonest employee had obtained the check under false pretenses, which was obviously true, but claimant had been present when her husband turned over the check and had acquiesced in the transaction.

--8 Comp. Gen. 239, 243 (1928): Lapse of insurance because of nonpayment of premiums by claimant.

--B-152070, October 3, 1963: Claim for reimbursement by employee who had paid for damage resulting from automobile accident caused by his negligence.

(i) Statutory Prohibition

Claims for items expressly prohibited (as opposed to merely not authorized) by statute or statutory regulation are generally not reported to Congress under the Meritorious Claims Act. The premise is that one who works for or deals with the Government must be charged with knowledge of pertinent restrictions.

An example is 32 Comp. Gen. 337 (1953). Under Interior Department regulations then in existence, a qualified person could request that certain public lands be sold at auction. If the request was approved, the applicant was required to publish notice of the sale at his own expense. The regulations expressly provided that the lands could be withdrawn from sale even after publication of the notice and that such withdrawal would create no liability on the part of the United States. The Comptroller General advised that the Department could amend its regulations to permit reimbursement of the notice expenses in withdrawal cases. Absent such an amendment, however, the claimant must be held to have assumed the risk that the lands might be withdrawn. Since the claimant must be charged with notice of the regulations, neither legal nor equitable basis would exist to justify a Meritorious Claims Act recommendation. See also 17 Comp. Gen. 720 (1938).

The cost or eligibility limitation cases discussed above further illustrate this principle.

The statutory prohibition rule is not an absolute. Exceptions have been recognized where the equities are particularly strong and especially where the Government has received clear benefit from work or services performed. See, for example, the published advertisement cases discussed later in this Section. See also B-154061, February 15, 1965, and B-145318, December 16, 1969, discussed above under "cost or eligibility limitations." The statutory prohibition rule, therefore, while certainly relevant, can be overcome by sufficiently strong equities.

(j) Availability of Other Administrative Settlement Procedures

As a general proposition, the Comptroller General will not report to Congress under the Meritorious Claims Act claims for which other administrative settlement procedures are available by law. For the most part, this is merely an application of the previously noted principle that GAO views the Act as applicable only to claims within its settlement jurisdiction.

Also, the existence of another administrative settlement procedure suggests that appropriations are available to pay the claim if otherwise allowable and that, therefore, the claim is not one which could be allowed but for the lack of an available appropriation.

The most frequently recurring cases in this category have been tort claims which, because of the large number of cases, have been treated in a separate subsection above.

B-163051, May 2, 1968, provides a further illustration. A construction company claimed reimbursement for expenditures made in connection with a proposed construction project in the Sudan. The Sudanese government was to fund the project with a loan from the U.S. Agency for International Development. However, following the 1967 Middle East war, AID financing for projects in the Sudanese Republic was suspended, and a guaranty contract was executed between AID and the contractor. Under foreign assistance legislation, the President was given the authority to settle claims involving investment guaranty operations and these settlements were to be final and conclusive. Since the claim was not within GAO's settlement jurisdiction, the Comptroller General declined to invoke the Meritorious Claims Act, stating:

> "[I]nsofar as the claim might be considered a claim against the United States under the Contract of Guaranty, * * * Congress has specifically conferred jurisdiction to make final settlements of claims arising under such guaranty operations upon the President, and pursuant to delegations of authority that jurisdiction has been vested in the Agency for International Development."

This principle has also been applied in the following contexts:

--Claims cognizable under the Military Personnel and Civilian Employees' Claims Act of 1964 and its predecessors (supra, this Chapter). B-203204, July 24, 1981; B-185428, January 29, 1976; B-144926, February 23, 1961. 23/

--Claims cognizable under the Military Claims Act (supra, this Chapter). B-149624, October 10, 1962; B-121302, October 6, 1954.

23/ This type of claim was not viewed as reportable to Congress under the Meritorious Claims Act even before the 1964 legislation. See 38 Comp. Gen. 314 (1958).

--Claims under the disability compensation laws administered by the Veterans Administration. B-170252, July 23, 1970.

--Claims arising under the Tariff Act of 1930. B-138338, February 12, 1959.

--Claims against Government corporations not subject to GAO's claims settlement jurisdiction (supra, this Chapter). B-115905, August 12, 1953, amplified by B-115905, December 10, 1953 (non-decision letter).

(k) Preferential Treatment

As noted previously, claims submitted to Congress under the Meritorious Claims Act are generally limited to those cases which are unusual. For the most part, the Comptroller General has declined to report claims which reflect recurring situations. The rationale is that to recommend relief in a case where the circumstances are commmon or likely to recur might result in the preferential treatment of one individual over others similarly situated. A statement frequently found in the decisions is that:

> "[T]o report to the Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances." B-164814, August 10, 1970.

The preferential treatment rule is often used as additional support in cases involving the previously discussed denial categories, for example, B-134038/B-138771, May 23, 1968 (claim barred by statute of limitations). However, it is also used as independent grounds for denial in many cases which do not fall within any of the other categories. See, e.g., B-164814, supra; B-165886, March 24, 1969; B-197982, February 26, 1981; B-171483, March 19, 1971. B-171483 illustrates a fairly common situation, a loss incurred by a Government employee incident to a permanent change-of-station assignment which was subsequently cancelled.

A 1975 decision involved claims by several employees of a Government contractor. The claims were for reimbursement for loss and damage to personal property resulting from a fire in Government-owned quarters on a United States island possession in the Pacific. Contractor employees are not covered by the Military Personnel and Civilian Employees' Claims Act of 1964, and relief was unavailable under the Federal Tort Claims Act because there was no evidence of negligence by

Government personnel. Based on a straight application of the preferential treatment concept, GAO declined to invoke the Meritorious Claims Act. B-183208, June 30, 1975.

It is important to note that the denial of a claim under the Meritorious Claims Act because it reflects a common or recurring situation refers to the nature of the claim and not to the particular fact pattern. Two recent cases in which Meritorious Claims Act requests were denied will illustrate. In both cases the fact patterns were certainly unusual but the nature of the claim was viewed as not particularly unusual and therefore within the preferential treatment rule.

In B-201284, April 21, 1981, the claimant corporation had expended a substantial sum to develop an exhibition of works from the Hermitage Museum of Leningrad. The exhibit was scheduled to tour the United States as part of a Government sanctioned effort to promote trade and cultural relations with the USSR. However, when the Administration declined to issue a certification necessary to protect the art objects from judicial process in this country, the exhibition was cancelled. Alleging unique circumstances, the claimant requested reimbursement of its costs.

It was determined, however, that the loss was caused by a change in U.S. foreign policy following the Soviet invasion of Afghanistan, and that as a result the claim was neither unusual nor unlikely to recur. In declining to submit the case under the Meritorious Claims Act, the Comptroller General noted losses to other U.S. concerns as a result of the invasion and stated:

> "[M]any individuals and businesses were affected to their detriment in this particular shift of policy. It is also true that we can expect that others may in the future suffer from changes in United States Government relations with foreign governments. Economic damages may well be wide spread when significant deterioration occurs in the relations between governments. We have specifically declined to recommend relief to the Congress under similar circumstances. See 53 Comp. Gen. 157 (1973). To recommend relief for some parties and not others would be unfair."

In B-199071, July 16, 1980, the claims of two U.S. servicemen who participated in a failed mission to rescue American hostages held in Iran were considered for possible

submission under 31 U.S.C. § 236. Both men had accrued annual leave in excess of 60 days, by statute the reimbursable maximum. One of the soldiers was killed during the raid and the other received serious injuries resulting in his retirement. Despite the unusual factual circumstances, the claims for reimbursement for accrued annual leave in excess of the 60-day limit were not submitted under the Meritorious Claims Act because forfeitures of excess annual leave are not uncommon.

Compare B-205984, June 15, 1982, in which private funds temporarily in the custody of the State Department were lost during the seizure of the American Embassy in Tehran, Iran, in 1979. Although the incident produced no legal liability on the part of the United States, GAO found sufficient equitable considerations to warrant relief under the Meritorious Claims Act.

The preferential treatment rule must be applied with scrutiny. On the one hand, anything that happens once may happen again and this alone should not be enough to eliminate a case from consideration. Yet on the other hand, the failure of Congress to deal in more general terms with a demonstrably recurring situation may indicate a congressional view that the situation should not be compensable from public funds. At the very least it suggests that remedial legislation might be desirable as an alternative to the piecemeal approach of individual relief bills. Also, there are situations where the preferential treatment rule is subordinated by compelling equities, such as the published advertising cases, infra, this Section.

(3) Categories of Claims Which Have Been Reported

Because GAO has viewed the Meritorious Claims Act as an extraordinary remedy to be used only in unusual circumstances, it is much more difficult to generalize with respect to the claims which have been reported to Congress. Nevertheless, some categorization is possible. As with several of the denial categories, placement of a case within a particular category does not guarantee that it will be reported. Each case must be examined on its own merit.

(a) Act of God or the Public Enemy

GAO will generally recommend relief for claims resulting from an "act of God" or of the "public enemy."

In B-177096, December 22, 1972, relief was recommended where a transferred Government employee was unable to sell his house within the statutory period required for reimbursement of real estate expenses because damage caused by Hurricane Agnes necessitated extensive repairs to the property.

In B-69985, June 10, 1948, relief was recommended where the claimant had purchased Government property located at a U.S. Marine detachment in China, but was unable to take possession due to the Japanese occupation of the base on December 8, 1941. A similar, more recent case is B-205984, June 15, 1982, discussed under "Preferential Treatment," supra.

One older and seemingly inconsistent case exists. Meritorious Claims Act relief was denied in B-44825, October 17, 1944, where a contractor incurred increased costs when performance was delayed by a tornado.

The "act of God" must be the direct cause of the loss for which relief is sought. In 17 Comp. Gen. 1012 (1938), the claimant had imported and paid the customs duties on 30,000 pounds of seed. The seed was released to the claimant pending final clearance by the Department of Agriculture. Shortly after release but before the claimant could be notified, the seed, while in storage in the claimant's plant, was destroyed in a flood. The claimant sought refund of the customs duties. Since the Government's right to the duties accrued on importation and was not affected by the subsequent destruction of the goods, there was no legal basis for the refund, nor were there sufficient equities to warrant a Meritorious Claims Act recommendation.

(b) Congressional Precedent

GAO will generally recommend relief under the Meritorious Claims Act where Congress has enacted private relief legislation in similar circumstances.

In B-165541, January 29, 1969, relief was recommended where the parents of a U.S. soldier incurred the expense of tranporting their son's car from North Carolina (where it was stored prior to the son's departure and subsequent death in Vietnam) to California since the amount was considerably less than the Government's cost of transportation would have been, and Congress had previously granted relief in similar circumstances. See also B-163823, April 29, 1968, in which a claim involving a nearly identical situation was reported.

Relief was also recommended in B-165384, November 13, 1968, involving the erroneous overpayment of special diving pay to a Navy diver. The claimant had acted in good faith and Congress had enacted relief legislation in the identical case of another member of the same diving team.

Conversely, the Comptroller General has declined to recommend relief under the Meritorious Claims Act where private relief legislation has been introduced but not enacted. A-30375, February 12, 1930; B-141780, February 15, 1965; B-141780, March 28, 1966.

(c) Unconsummated Offer of Employment

On several occasions, the Comptroller General has recommended relief under the Meritorious Claims Act on behalf of a claimant who had received an offer of Government employment and incurred a loss when, through no fault of his own, the offer could not be consummated.

Relief was recommended in the following cases:

--Claimant, given an appointment by the Interior Department as a Home Economics teacher at an Indian school, traveled to her new job at her own expense. Upon arrival, she discovered that the school did not have a Home Economics department, whereupon she returned home. The claimant was unable to start the job for which she had been hired through no fault of her own. A-30416, February 17, 1930.

--Claimant was offered a Forest Service position in Wisconsin, accepted the offer and sold his home in Michigan. Upon reporting for work, he was informed of a delay in his formal appointment because of a question over his veteran's preference eligibility, whereupon he returned to Michigan and accepted private employment. Claimant had acted in good faith at all times. B-148149, May 16, 1962.

--Claimant accepted what he understood to be a firm offer of employment. It turned out to be merely an invitation to participate in a training session as part of a selection process. He was advised that he would not be considered for regular employment at a particular location, but he might be considered for placement elsewhere, and was told to return home to await a possible phone call. B-158406, March 23, 1966.

In B-160747, August 2, 1967, a case somewhat similar to B-158406, supra, but factually distinguishable in several respects, GAO declined to recommend relief. The claimant in B-160747 had not resigned his prior position and continued to receive pay during the period he was enrolled in the Government training program. Also, upon being advised of his failure to qualify for the desired position, he was never asked to simply stand by to await a possible further assignment. This claimant was therefore not in the same equitable position as the claimant in B-158406.

(d) Published Advertisements

As discussed earlier in this Chapter, claims by newspapers for published advertisements procured in violation of 44 U.S.C. § 3702 must be disallowed. However, the Comptroller General routinely reports these to Congress under the Meritorious Claims Act. See B-160052, January 22, 1969; B-181337, November 25, 1974; B-183675, August 27, 1975; B-184667, September 25, 1975; B-196440, April 3, 1980; B-199696, September 4, 1980; B-199453, October 2, 1980; B-199801, October 21, 1980.

The basis for submitting these is essentially an "unjust enrichment" theory--the newspaper provided a service in good faith expecting to be compensated and the Government received the benefits of that service. Also, although 44 U.S.C. § 3702 is a prohibitory statute, it merely establishes a procedural requirement as a condition precedent to payment and does not prohibit the procurement of advertisements per se.

However, in a case where the Government had merely asked for a price quotation and the newspaper ran the advertisement based on that request, the newspaper did not stand in the same equitable position and GAO declined to make a Meritorious Claims Act recommendation. B-198568-O.M., October 21, 1980. Similarly, where an employee paid a newspaper from personal funds, the Comptroller General refused to submit the employee's claim for reimbursement to Congress under the Meritorious Claims Act. B-1586, March 20, 1939.

(e) Miscellaneous Unjust Enrichment and Related Cases

If the Government receives the benefit of work or services performed in good faith by someone--a Government employee or otherwise--who justifiably expected to be paid, it is inequitable for the Government not to pay. In some instances, however, there may be valid legal reasons why direct payment cannot be made. In such cases, and where the claimant is free from fault (for example, has not missed the statute of limitations), GAO will be inclined to favorably consider Meritorious Claims Act relief.

In B-160178, January 27, 1969, the claimant took a GS-9 job with the Army after working only 12 days as a GS-6 with the Justice Department, a violation of the so-called Whitten Amendment which required at least one year in the next lower grade. Payment of his salary was therefore technically illegal. However, since the claimant had successfully performed his GS-9 duties for over a year, the Comptroller General recommended relief under the Meritorious Claims Act. The effect of requiring recoupment of the salary would have been that the Government received the benefit of the claimant's work without having to pay him.

Similarly, relief was recommended in B-153742, July 8, 1964, where a temporary civilian employee continued to work under the good faith impression that his temporary appointment had been extended for a second time although such an extension was prohibited.

In an early case, a Treasury agent employed a Canadian attorney to help with the extradition of a fugitive who had violated the narcotics laws. Because of a statutory prohibition then in existence, there was no authority to pay the attorney. Since the services had been rendered in good faith and the Government received the benefit, GAO submitted a Meritorious Claims Act recommendation. A-30342, February 12, 1930.

The essence of these cases is that the Government would be unjustly enriched at the claimant's expense by benefiting from uncompensated services performed in good faith. Note also that this rationale has been sufficient to overcome a statutory prohibition in several cases. (See "Statutory Prohibition," supra, this Section.)

Relief has also been recommended in a few cases for services performed in good faith where it turned out that the Government did not receive the contemplated benefit or the benefit was speculative. The claimant in A-26703, July 10, 1929, rendered undertaker's services at the request of the (then) Veterans Bureau, but it was later discovered that the deceased had never performed any military service. The claimant had no way of knowing and had acted in good faith. Undertaker's services were also involved in B-104517, February 9, 1953, in which the claimant had buried four unidentified individuals killed in an Air Force plane crash, but could not be paid because it could not be clearly established that the decedents were Air Force or Air National Guard members.

(4) Contract Claims

Contract claims generated many requests to the Comptroller General for Meritorious Claims Act relief in the early years of the statute. There have been much fewer in recent years, largely because many claims are cognizable under modern contract claims procedures (e.g., Government-caused delays).

Contract claims, because of their variety, are impossible to categorize as either reportable or not reportable. As with any other type of claim, Meritorious Claims Act recommendations have been made on only a small percentage. In addition to the principles already discussed in this Section, some further guidelines may be noted for contract cases.

One who contracts with the Government is not automatically guaranteed a profit, and the mere fact that a contractor incurs a loss rather than a profit does not justify a Meritorious Claims Act recommendation. 9 Comp. Gen. 378 (1930); B-163274, December 20, 1968.

Losses sustained by a contractor occasioned by the suspension of work due to exhaustion of funds will not be reported to Congress under the Act. A-29731, January 13, 1930; A-37562, April 30, 1932; B-118869, March 30, 1954. See also B-147197-O.M., October 27, 1961.

Also not reportable under the Meritorious Claims Act are claims for bid preparation costs. A-90260, December 6, 1937. (If otherwise allowable, these could be paid from existing appropriations.)

Ordinarily, in a requirements contract, the Government has no liability if it orders less than the stated estimate. E.g., B-158239, March 11, 1966. Losses resulting from this situation will not justify a Meritorious Claims Act recommendation. 37 Comp. Gen. 688 (1958). However, relief has been recommended where the Government did not correctly state its estimate. In an early case, a contracting officer erroneously put 4,000 sacks of flour instead of 4,000 pounds in the solicitation. Upon being notified that its bid was accepted, the contractor made commitments for 4,000 sacks, much more than the Government needed. Since the contractor's loss was directly attributable to the Government's error in stating the estimate, the Comptroller General recommended relief under the Meritorious Claims Act. A-26191, April 30, 1929.

GAO has declined to recommend relief where a contractor's costs have increased due to inflation (54 Comp. Gen. 1031 (1975)) or to the devaluation of the dollar (53 Comp. Gen. 157 (1973)).

A number of contract claims have been reported to Congress under the Meritorious Claims Act. They tend to be cases where there is a direct connection between the Government's actions and the claimant's loss and frequently involve elements of "unjust enrichment" (benefit to the Government from work for which the contractor justifiably contemplated payment). Two cases have been noted above in the discussion of cost or eligibility limitations (B-154061, February 15, 1965, and B-145318, December 16, 1969). A few other examples are set forth below:

--B-194135, November 19, 1979: Contract with Army required contractor to upgrade three Army wastewater treatment facilities. After performance was successfully completed and the contractor partially paid, it was discovered that one of the facilities was the property of the local school board and not the Army.

--B-136117, August 26, 1958: Contractor suffered losses under a salvage timber sales contract due to the Government's error in estimating the amount of timber to be cut. Although a small percentage of error in such estimates is normal, this contract was "believed to have contained the largest percentage of error ever made in the Government's estimate of timber to be sold."

--B-164582, May 6, 1969: Claim by logger for losses sustained under timber sale contract due to work stoppage required to clear insect-infested timber purchased at Government's urging and in purported reliance on Government's promise to give favorable consideration to time extension for performance.

--B-134386, October 7, 1958: Claim for costs incurred in preparation for anticipated contract, sustained when claimant was erroneously notified that it was the successful bidder.

--B-136897/B-139976, February 8, 1961: Claim for losses incurred in performance of contract for manufacture of sleeping bag cases as a result of Government's failure to furnish proper drawings. Armed Services Board of Contract Appeals had denied claim because actual loss was not susceptible to a reasonable adjustment supported by a preponderance of evidence. Contractor subsequently agreed to accept $50,000, which Army considered a reasonable estimate of the damages the contractor had suffered, and based on this agreement, GAO recommended relief.

--B-163778, December 21, 1970: Claimant purchased land from Post Office Department under agreement to construct vehicle maintenance facility and lease it back to the Post Office Department. Claimant incurred substantial expenses incident to mutual termination of contract when it was discovered that the construction was precluded by a city zoning ordinance.

(5) Erroneous Advice by Government Employee

It is well-established that, except as otherwise provided by statute, the Government is not bound by erroneous acts done, or erroneous advice given, by its officers or employees. See, e.g., B-181432, November 12, 1975. This rule has generated a large number of requests to the Comptroller General for relief under the Meritorious Claims Act. Typically, an erroneous payment is made as the result of administrative oversight, or expenses are incurred in reliance on representations by a Government employee which turn out to be wrong. Since the claimant has no legal recourse, he seeks equitable relief.

The "erroneous advice" cases are the most difficult of all to attempt to classify. Although most have been denied, many have been reported. Also, most of the cases involve the intricacies of personnel law which are beyond the scope of this Manual. This Section, therefore, is intended merely to point out the various lines of cases and to emphasize that each case will turn on its own particular equities.

In a long line of cases where Government employees have been given erroneous advice concerning their entitlement to reimbursement for various travel and relocation expenses, or where per diem rate schedules or other guidelines have been misinterpreted or misapplied resulting in overpayments, GAO has not recommended relief under 31 U.S.C. § 236. For recent examples, see B-199612, January 15, 1981; B-195374, September 14, 1979; B-195242, August 29, 1979; B-191121, March 20, 1979; B-198351-O.M., June 18, 1980; B-195930-O.M., December 19, 1979. Denial is usually based on the preferential treatment concept, the decisions frequently noting that the situation is a recurring one. That this is unfortunately true is evidenced by the large number of cases. In terms of equity, GAO's position can be justified in that, as a general proposition, it is not inequitable for someone to have to bear an expense he would have incurred in any event or to have to give back money he never should have received in the first place.

The preferential treatment concept was also used to deny Meritorious Claims Act relief in "erroneous advice" cases where a Farmers Home Administration employee, contrary to regulations, represented to a creditor that the Government would guarantee a borrower's obligations. B-168300, December 3, 1969; B-168300, December 4, 1969.

However, where the equities in a particular case clearly favor the claimant, GAO has recommended relief under the Meritorious Claims Act. In this way, GAO has been able to use the Act

to mitigate the occasional harsh or inequitable results of the "erroneous advice" rule. See, for example, the cases discussed above under the heading "Unconsummated Offer of Employment," where the claimant acted in good faith and incurred expenses he would not have incurred but for the Government's erroneous representations. Following are further illustrations:

--B-154694, August 11, 1964: Claimant shipped maple sugar products to the United States exhibition at a trade fair in Sweden in reliance on representations by Commerce Department officials that the products could be sold. Claimant returned the goods to the United States upon learning that retail sales would not be permitted.

--B-171598, March 24, 1971: Claimant was sued by a former landlord in Rhodes, Greece. His superiors erroneously advised him that he was diplomatically immune and therefore did not have to appear in court to defend the suit. A default judgment was rendered against the claimant which he was required to pay.

--B-201059, March 9, 1981: Military member on temporary active duty incurred medical expenses for treatment of a non-emergency condition at a civilian facility. Member had been advised that Army would pay, but Army could not pay because member had not obtained prior authorization required for use of civilian facility.

--B-148568, September 27, 1962: Court-martial denied claimant's request for a civilian expert witness based on a decision of the Comptroller General, whereupon claimant procured the witness himself. However, the court-martial had overlooked another Comptroller General decision under which the request could have been approved.

--B-195167, February 21, 1980: Claimant was paid travel and relocation expenses incident to a transfer from the U.S. Postal Service to the Forest Service. The transfer and payment had occurred shortly after the Postal Service succeeded the former Post Office Department and before the Comptroller General issued his decision that the Postal Service was not a "Federal agency" for purposes of the statutory reimbursement of the expenses in question.

See also B-189537, December 11, 1978; B-190014, August 30, 1978; B-186218, November 10, 1976.

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PART II. CLAIMS BY THE GOVERNMENT

A. ROLE OF GAO

Just as the Government may owe money to members of the public, members of the public may owe money to the Government. In testimony before the Senate Committee on Governmental Affairs in April 1981, GAO pointed out that, at the start of fiscal year 1981, receivables from United States citizens and organizations exceeded $139 billion. 24/ Much of this is paid routinely, but a sizeable portion is not, and the Government is forced to pursue claims against its debtors. To illustrate, GAO further pointed out in its testimony that, as of September 30, 1979, $24 billion due from U.S. citizens and organizations was delinquent. Debt claims arise from many Government activities: for example, tax assessments; sales of Government goods and services; Federal housing and student loan and loan guarantee programs; overpayments to employees, contractors, veterans, and annuitants.

Just as any business, if the Government cannot collect amounts owed to it, it must write off the debts as uncollectible. The losses, however, do not simply disappear. The business passes its debt losses on to the consumer; the Government must similarly pass its losses on to its consumer, the taxpayer. This Part will discuss how the Government goes about collecting its debts and GAO's role in that process.

GAO's role in debt collection stems from two statutes. The first is 31 U.S.C. § 71, the fundamental source of GAO's claims settlement authority. The origin and meaning of 31 U.S.C. § 71 have been discussed in Part I of this Chapter and are no different in the debt context.

The second statute is the Federal Claims Collection Act of 1966. GAO has a special role under this statute and prescribes implementing regulations jointly with the Justice Department. The statute and regulations are discussed in detail in Section B, infra.

24/ "Improving the Collection of Debts Owed the Government," Statement of Milton J. Socolar, Acting Comptroller General of the United States, before the Senate Committee on Governmental Affairs, April 23, 1981, page 2.

Debt collection activities at GAO are handled in the first instance by the Debt Branch, Claims Group, Accounting and Financial Management Division. As with the payment side, the Office of General Counsel provides legal advice to the Claims Group upon request.

On the payment side, decisions of the Comptroller General serve two functions: interpreting statutes and adjudicating the merits of particular claims. On the debt side, there are still decisions interpreting statutes but there are many fewer decisions adjudicating individual claims. There are several reasons for this. The uniform procedures under the Federal Claims Collection Act eliminate the need for many decisions. Also, the typical debt case tends to be fairly clear-cut at least in terms of its legal foundation, and problems are more likely to relate to collection procedures than to the existence of the debt itself. Finally, while most claimants are aggressive in pursuing payment claims at least through available administrative channels, the average debtor is much less likely to take an active role.

In the performance of GAO's audit and oversight functions, the Comptroller General has issued numerous reports on debt collection. Of Government-wide significance are the following:

--The Government Needs To Do A Better Job of Collecting Amounts Owed by the Public, FGMSD-78-61, October 20, 1978.

--The Government Can Be More Productive in Collecting Its Debts by Following Commercial Practices, FGMSD-78-59, February 23, 1979.

--The Government Can Collect Many Delinquent Debts by Keeping Federal Tax Refunds As Offsets, FGMSD-79-19, March 9, 1979.

--Unresolved Issues Impede Federal Debt Collection Efforts--A Status Report, CD-80-1, January 15, 1980.

--Federal Agencies Negligent in Collecting Debts Arising From Audits, AFMD-82-32, January 22, 1982.

Two of the above reports, FGMSD-78-59 and CD-80-1, contain appendices listing several dozen GAO reports in specific debt collection areas.

B. FEDERAL CLAIMS COLLECTION ACT OF 1966

(1) Overview

Prior to 1966, there were no uniform policies or procedures for debt collection throughout the Government. While GAO made some efforts by virtue of its audit and claims settlement functions, debt collection lacked a Government-wide statutory basis and procedures varied greatly from agency to agency.

Lack of adequate statutory powers also hampered debt collection. For example, GAO had long construed the authority to "settle and adjust" claims as not including the authority to compromise. B-133616, October 25, 1957; B-122319, August 21, 1956. Although a few agencies had specific compromise authority, most, GAO included, did not. To make things worse, to simply terminate collection action would have been viewed as giving away Government property, which no Government official has the right to do.

Thus, the administrative agency had to attempt to collect the full amount of the debt. If the agency was unsuccessful, it had to refer the claim to GAO, which again could do nothing more than to attempt to collect the full amount. If GAO's efforts were similarly fruitless, the claim went to the Justice Department, and it was only there that compromise could be considered. Under this system, the Justice Department was burdened with referrals of worthless as well as collectible debts. Congress was also burdened with many requests for private relief legislation.

In 1966, Congress took the first major step toward establishing a Government-wide system of debt collection. This, of course, was the enactment of the Federal Claims Collection Act of 1966, 31 U.S.C. §§ 951-953. The legislation had been recommended by the Justice Department and was largely a joint GAO-Justice effort. Enactment stemmed from the congressional belief that giving agencies the authority to compromise claims would result in increased collections since agencies would be able to settle claims while they were fresh and while the debtors still had the ability to pay. Also, Congress considered it a better business practice for agencies to handle their own claims since agency staffs are more likely to be familiar with the facts and legalities of the claims. See S. Rep. No. 1331 and H.R. Rep. No. 1533, 89th Cong., 2d Sess. (1966).

The Federal Claims Collection Act of 1966 provides the basic legal framework for agency collection of debts owed to the United States, with oversight by the General Accounting Office and the Department of Justice. 25/ For debts not exceeding $20,000, the Act authorizes compromise, suspension, or termination of collection action in limited circumstances. The Act further authorizes GAO and the Justice Department to jointly issue implementing regulations. These regulations, the Federal Claims Collection Standards, or "Joint Standards," are found in Title 4 of the Code of Federal Regulations (4 C.F.R.), Parts 101 through 105. Agencies may issue their own regulations, but they must conform to the Joint Standards. 31 U.S.C. § 952(a). GAO will review these agency regulations as part of its audit function. 4 C.F.R. § 101.1. Thus, the statute provides the framework and basic criteria, and the regulations fill in the details. Procedural guidance in addition to the Joint Standards is contained in Title 4 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies (4 GAO).

An agency's failure to comply with the Joint Standards is not available as a defense to a debtor. 4 C.F.R. § 101.2.

Prior to the Federal Claims Collection Act, as noted above, statutory compromise authority did exist in a few situations. For example, the Small Business Administration has compromise authority. Similarly, the Veterans Administration can compromise claims arising from its loan guarantee programs. Another example is the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653.

Section 4 of the Federal Claims Collection Act, 31 U.S.C. § 953, provides that the Act shall not diminish any existing authority to settle or compromise claims. The intent of this provision is to preserve existing authority to compromise claims in excess of the $20,000 limit applicable under the Federal Claims Collection Act. However, it does not make the existing authority exclusive so as to prelcude GAO's compromise authority within the limits of the Federal Claims Collection Act. Thus, GAO could accept a compromise offer on a VA claim under $20,000 which VA had previously rejected and referred to GAO as uncollectible. B-160819-O.M., February 10, 1967.

25/ A brief description of the statute may be found in "The 89th Congress and Government Litigation" by Sidney B. Jacoby, 67 Colum. L. Rev. 1212 (1967).

The joint regulations should be followed in the disposition of civil claims under statutes other than the Federal Claims Collection Act, to the extent that the other statutes, or authorized regulations issued under them, do not establish their own collection standards. 4 C.F.R. § 101.4. This includes civil penalties. B-170686-O.M., April 4, 1972.

The joint regulations do not apply to tax claims, antitrust claims, or any claim as to which there is an indication of fraud. 4 C.F.R. § 101.3.

(2) Agency Collection Action

(a) Affirmative Duty to Collect

The term "agency" for purposes of the Federal Claims Collection Act includes all elements of the executive and legislative branches of the Federal Government. 31 U.S.C. § 951(a).

Under 31 U.S.C. § 952(a), each agency is required to attempt collection, in accordance with the Joint Standards, of all claims of the United States for money or property arising out of the activities of, or referred to, that agency. As the Comptroller General noted in commenting on the bill that became the Federal Claims Collection Act, this was the first general statutory requirement for Government agencies to collect their debts. B-117604, June 3, 1966. The requirement of 31 U.S.C. § 952(a) applies without regard to the amount of the debt.

Although the statute and regulations are directed primarily at the recovery of money, they are not intended to deter an agency from pursuing "conversion claims"--claims demanding the return of specific property or, in the alternative, either the return of the property or the payment of its value. 4 C.F.R. § 101.5.

Since agencies may not use the Economy Act, 31 U.S.C. § 686 (Chapter 8, this Manual) to delegate statutory functions to other agencies, an agency may not delegate its claims collection function to another agency under an Economy Act agreement. Administrative services in the claims collection area may be provided under the Economy Act, but they cannot include the taking of final compromise or termination action. B-117604(7)-O.M., June 30, 1970.

Agency collection action should be aggressive and timely with effective follow-up. 4 C.F.R. § 102.1. Agencies should use all reasonable means of collection consistent with good business practice and the debtor's ability to pay, such as

attempting to locate the debtor, seeking the cooperation of other agencies in appropriate circumstances, and the other procedures discussed in this Section. 4 GAO 69.2. For example, where a debtor corporation has dissolved and under State law the corporation's assets become the property of the shareholders, subject to any claims not paid at the time of dissolution, the agency may try to obtain from the appropriate State agency a list of shareholders or an accounting of the distribution of assets, or it may seek payment from a statutory agent. See B-184396-O.M., August 8, 1975.

Agencies should collect claims against a partnership from partnership assets, if any. Otherwise, the Government should look to individual assets of any general partners not adjudged bankrupt. See, e.g., B-161821-O.M., August 3, 1967; B-161821, November 28, 1967 (non-decision letter). The Government need not forbear collecting from a surety even though there is a possibility of recovery from the principal. See B-160740, February 13, 1969 (non-decision letter).

Where debtors are jointly and severally liable to the United States, the Government is not required to collect a proportionate share from each. The Government may collect the entire amount from one debtor, leaving it to that debtor to seek contribution from the others, if that is determined to be the best way to liquidate the indebtedness as quickly as possible. 58 Comp. Gen. 778 (1979); 4 C.F.R. § 103.6.

If a debtor is deceased, the Government may collect from the estate or from a distributee of property from the estate, and is not bound by restrictions imposed by State law. For example, in 58 Comp. Gen. 778 (1979), the debtor, a Wisconsin domiciliary who had received overpayments of Supplemental Security Income benefits, died without repaying the debt. The agency failed to file a claim with the probate court as required by the Wisconsin Probate Code. The Comptroller General held that the decedent's daughter, a distributee of the decedent's property under the estate, was liable for the debt even though the estate had been closed. Wisconsin law provided that the filing requirements did not apply to claims by the United States, but the result would have been the same even without such a provision since State law cannot invalidate a claim of the United States. If, however, the Government does formally file its claim in probate proceedings, it will be bound by the determination made by the State court. Id., at 781-782.

Agencies seeking to collect statutory penalties, forfeitures, or other debts provided for as an enforcement

aid or for compelling compliance should consider suspending or revoking licenses or other privileges in cases of inexcusable, prolonged, or repeated failure to repay indebtedness. 4 C.F.R. § 102.7. Also, as a collection tool, an agency which makes, guarantees, or insures loans is to give serious consideration to disqualifying a debtor (lender, borrower, or otherwise) from doing further business with it if the debtor fails to pay a debt within a reasonable time. Id. An agency holding security or collateral should liquidate it if the debtor does not pay within a reasonable time, if the liquidation can be accomplished through the exercise of a power of sale in the security instrument or non-judicial foreclosure, unless the cost of disposing of the collateral will be disproportionate to its value. 4 C.F.R. § 102.8.

Prior to 1979, agencies generally did not report delinquent debts to credit bureaus although there was no prohibition against it. A 1979 change to the Joint Standards directed agencies to develop and implement procedures for reporting delinquent debts to commercial credit bureaus. 4 C.F.R. § 102.4. However, the new regulation has received very limited use. Problems arose over the application of the Privacy Act and the credit bureau industry will not participate if the bureaus will be subject to the Privacy Act. Recent legislation has exempted credit bureaus from the Privacy Act, but only in limited situations--the Veterans Administration (Public Law 96-466) and the Department of Education (Public Law 96-374). GAO supports extending legislation of this type to all Government agencies. 26/ (Note: This paragraph refers only to having the debt reflected in the debtor's credit history, as opposed to sending it to a private collection agency. Use of collection agencies is a separate matter entirely and is discussed later in this Section.)

(b) Written Demand for Payment

One of the first steps the agency must take is to begin sending the debtor written demands for payment ("dunning letters") which inform the debtor of the consequences of failure to cooperate. The first letter should tell the debtor the basis of the indebtedness, the payment due date, and the applicable requirements for charging interest (infra, this

26/ GAO testimony of April 23, 1981, supra, note (24), page 4.

Section). If applicable, the letter should also advise that a delinquent debt will be reported to a commercial credit bureau, with the consequent negative effect on the debtor's credit rating.

There should normally be three progressively stronger demand letters at not more than 30-day intervals, unless prior response indicates that more demand letters would be futile, or unless the statute of limitations (Section D, infra) is about to expire. Naturally, the agency should respond promptly to any communications from the debtor.

The requirements for demand letters are found in 4 C.F.R. § 102.2.

(c) Collection in Installments

Agencies should collect claims in full in one lump-sum whenever possible. However, an agency may accept payment in regular installments if the debtor is financially unable to pay the debt all at once. 4 C.F.R. § 102.9. See B-160158, October 18, 1966; B-182423, November 25, 1974. The size and frequency of installment payments should be reasonably related to the size of the debt and the debtor's ability to pay. For example, in a case in which collection efforts would have been futile because the debtor's assets were heavily mortgaged, GAO did not object to the debtor's proposal to pay ten percent of the debt at once and three percent of the balance monthly thereafter until the debt was liquidated. B-134871, October 20, 1966 (non-decision letter).

Payments should be large enough so that the Government can liquidate its claim within three years whenever possible. The agency should attempt to obtain an executed confess-judgment note for unsecured claims, but this is not an absolute prerequisite to accepting installment payments. 4 C.F.R. § 102.9.

Interest should be charged whenever payments are being made in installments. See Section B(3), infra.

(d) Collection by Offset

The creditor agency should always explore the possibility of collecting a debt by setoff. 4 C.F.R. § 102.3. The Government's right of setoff is discussed more fully in Section C, infra.

(e) Abatement Pending Congressional Action

Private relief bills are used not only to authorize payments to claimants but also to relieve debtors of indebtedness. A question often asked is whether collection action must continue while Congress is considering a private relief bill. GAO explained its policy in this regard in a decision to the Secretary of the Army, B-168579, February 17, 1970. GAO's policy is to suspend collection action pending congressional consideration of private relief legislation, even though there is no requirement to do so. Suspension or abatement should not be automatic but should be based on a request by the sponsor of the bill or an appropriate congressional committee, plus an administrative determination that the circumstances justify suspension. Where the debt has not yet been referred to GAO as uncollectible, there is no need to request GAO's approval.

Normally, abatement is allowed until the end of the session of Congress in which the bill is introduced. B-168579, supra. See also B-168762, February 16, 1970; B-165053, August 23, 1968; B-164339, August 20, 1968; B-163495, August 20, 1968; B-161734, July 7, 1967; B-161309, June 13, 1967. If the bill is introduced late in the session, collection action may abate until the end of the next full session. B-162507, October 13, 1967; B-159788, November 28, 1966; B-152680, October 28, 1966; B-159708, September 23, 1966. (Presumably, collection action should promptly resume if the sponsor is not re-elected.)

If Congress has not acted on a particular relief bill during the session in which it was introduced, the repeated introduction of the same bill in future Congresses should not in itself form a basis for continuing suspension of collection, especially if prompt collection is considered necessary to protect the Government's interests. B-168579, supra. However, GAO has agreed to continue suspension for one additional session where the bill passed the House but the Senate did not act during the session of introduction (B-161734, February 9, 1968; B-157220, December 23, 1966), and in one case where Congress took no action (B-168762, February 17, 1971).

Although abatement is generally permissible only if relief legislation is actually before the Congress, GAO has not objected to suspension of collection action where a Member of Congress has asked GAO to investigate and report on the basis of the Government's claim, pending completion of the investigation and GAO's reply. B-159788, October 5, 1966.

Where GAO has agreed to suspend collection action, GAO personnel who may be involved in any audit action in connection with the indebtedness should be advised. B-165053-O.M., August 23, 1968; B-164399-O.M., August 20, 1968. Once a private relief bill is enacted, GAO will close its collection file. See B-166649 and B-166649-O.M., January 23, 1970.

(f) Commercial Collection Agencies

Prior to 1981, GAO had taken the position that the Federal Claims Collection Act did not authorize Federal agencies to use private collection agencies. The legal basis for this position was that the Act authorized agencies to refer uncollected debts only to other Federal agencies with claims collection responsibilities (GAO and the Justice Department) and not to private parties. From a policy perspective, GAO felt that claims collection should be handled by Government departments and agencies. B-117604(11), October 4, 1972; B-171524, January 4, 1971; B-117604(7)-O.M., June 30, 1970.

At one time, GAO opposed legislation to authorize the use of commercial collection agencies for two reasons. First, some private collection agencies had acquired unfavorable reputations resulting from the use of questionable practices which might be imputed to the United States. Second, commercial services might not have the technical knowledge or resources to provide a debtor with a proper explanation of the Federal laws and regulations giving rise to the debt. B-117604, October 18, 1973.

In 1981, GAO reexamined--and changed--its position. The result was a new 4 C.F.R. § 102.5 which authorizes contracting for collection services subject to certain limitations. Specifically, (a) the service must supplement, not replace, the agency's collection program; (b) the agency cannot contract away the authority to resolve disputes, compromise claims, terminate collection action, or initiate legal action; and (c) the contractor must agree to be subject to the Privacy Act and, if the contractor is a collection agency, the Fair Debt Collection Practices Act. The reasons for GAO's change in position are discussed in the commentary that accompanied the new regulation, 46 Fed. Reg. 22353 (April 17, 1981).

(3) Interest

As discussed in Part I of this Chapter and Chapter 12, this Manual, the United States is not liable to pay interest on claims against it, whether or not reduced to judgment, unless interest is expressly provided for in the relevant

statute or contract. The rule for claims by the Government, however, is different. The Government generally has the right, based on principles of justice and equity, to assess interest against all of its debtors and there is no requirement for statutory authority. E.g., Billings v. United States, 232 U.S. 261 (1914). While the difference in the rules sometimes seems unfair, it necessarily follows from the concept of sovereign immunity.

For a general discussion of the Government's right to charge interest on debts owed to it, see B-192479, September 27, 1978, a response to a general inquiry from a Member of the Senate. A more detailed discussion may be found in B-137762.21-O.M., January 3, 1977. For cases applying the principle to contract debt claims, see 41 Comp. Gen. 222 (1961) and B-131925, July 13, 1964.

The Government's right to charge interest on its claims applies equally to claims against its own employees. B-192479, supra. For example, in a letter report to the Chairman of the Civil Service Commission (now Office of Personnel Management), GAO's Financial and General Management Studies Division (now Accounting and Financial Management Division) reviewed the status of Government claims against employee retirement accounts and recommended that the Commission start charging interest on these claims. FGMSD-77-41, September 15, 1977.

The Federal Claims Collection Standards address interest in 4 C.F.R. § 102.11. Interest should be charged on delinquent debts and debts being paid in installments. When a debt is being paid in installments, the Government follows the normal commercial practice of applying the payments first to accrued interest and then to principal.

The rate of interest the Government should charge is prescribed by the Treasury Department's Fiscal Requirements Manual (TFRM). The percentage rate is calculated by Treasury as an average of the current value of funds to Treasury for a recent three-month period. Treasury announces the rates in TFRM bulletins and each rate is applicable to overdue payments during the succeeding calendar quarter. TFRM, Vol. I, Part 6, § 8020.20. Once an interest rate has been applied to a delinquent debt, it remains fixed until that debt is repaid; that is, the rate will not change each three months with respect to a particular debt. See B-107871, July 31, 1981. 27/

27/ GAO's statement to this effect was based on a letter dated October 20, 1980, from the Director, Special Financing Staff, Bureau of Government Financial Operations, Treasury Department, to the Environmental Protection Agency.

Interest recovered on a debt claim must be deposited in the Treasury as miscellaneous receipts unless the creditor agency has statutory authority for some other disposition. I TFRM § 6-8020.20e. See also Chapter 5, this Manual.

The Comptroller General discussed the application of 4 C.F.R. § 102.11 in detail in 59 Comp. Gen. 359 (1980), in which the Veterans Administration sought advice on implementing the regulation for debts arising out of VA benefit and entitlement programs. The decision makes several important points:

1. The Government's right to charge interest applies equally to contract and non-contract debts. (The Treasury Fiscal Requirements Manual is explicit in this regard.)

2. The debt may be established by administrative action as well as by a court.

3. Interest should not be assessed until the debtor has been notified of the debt. (The agency's first demand letter should include notice of the interest charge. 4 C.F.R. § 102.2, supra.)

4. The Federal Claims Collection Standards do not mandate procedural requirements for assessing and collecting interest. Agencies may develop their own procedures by regulation. For example, where an agency is collecting a debt by setoff and the debtor can establish that he never received the original debt notification, it would be inequitable to charge interest from the date of the original notification, so an agency may wish to provide for a second notification.

While the Government may charge interest, it may not impose a penalty without specific statutory authority. Therefore, the interest rate should not be so high as to constitute a penalty. See 59 Comp. Gen. 359, supra; B-192479, supra.

Absent specific statutory authority, the Government may not charge interest on a criminal penalty. Pierce v. United States, 255 U.S. 398, 405-406 (1921). The same principle applies to a civil penalty or forfeiture which is designed as a punishment or deterrent and not a revenue-raising device.

Rodgers v. United States, 332 U.S. 371 (1947); 4 C.F.R. § 102.11.

The Government's right to charge interest applies to debts owed to it by the District of Columbia Government. 60 Comp. Gen. 710 (1981) (amounts owed to Government Printing Office for printing and binding services performed under 31 U.S.C. § 685a). Essentially, this is because the District is not a Federal agency. Normally, absent statutory authority to the contrary, one agency would not be able to charge another agency interest. Id. See also B-161457, May 9, 1978 (no authority for Internal Revenue Service to assess interest against another Federal agency for late filing or underpayment of income or social security withholding taxes).

(4) Compromise

Perhaps the most important authority conferred by the Federal Claims Collection Act is the authority to compromise. Under section 3(b) of the Act, 31 U.S.C. § 952(b), agencies have authority to compromise debt claims where the principal amount (i.e., exclusive of interest) does not exceed $20,000. GAO has the same authority with respect to claims referred to it for further collection action. See, e.g., B-182423, November 25, 1974.

A compromise under the Act is final and conclusive unless procured by fraud, misrepresentation, or mutual mistake of fact. 31 U.S.C. § 952(c). Thus, in B-185295, January 21, 1977, a debtor who had made a compromise offer which was accepted, and then paid the compromise amount, could not later claim a refund arguing that he had paid only to avoid involuntary setoff and had not intended to make a binding compromise agreement.

If the principal amount of the debt exceeds $20,000, only the Attorney General has the authority to compromise. B-165667, December 11, 1968; B-165641, December 2, 1968 (non-decision letter); B-189670-O.M., August 30, 1977; B-186843-O.M., November 24, 1976; B-117604-O.M., February 1, 1967.

A debtor's liability arising from a particular transaction or contract is considered a single claim for purposes of the $20,000 limit. An agency may not subdivide a claim to avoid the monetary limit. 4 C.F.R. § 101.6.

An agency's compromise authority ceases once it refers the claim for further collection action to either GAO or the Justice Department. 4 C.F.R. § 103.1. Compromises at GAO are handled by the Claims Group. Under current procedures, if the debt exceeds $20,000 and the compromise amount is less than 50 percent of the debt, the General Counsel must approve referrals to the Justice Department recommending acceptance of the compromise. B-117604-O.M./B-135302-O.M., February 17, 1978. Approval by the General Counsel is not required to reject an offer. B-117604-O.M./B-135302-O.M., July 22, 1970.

Compromise, in essence, means accepting less than the full amount owed in full satisfaction of the claim. The term "imports the making of mutual concessions by the parties to a dispute in order to arrive at an amicable settlement without recourse to adversary proceedings." B-122319, August 21, 1956. Thus, the Federal Claims Collection Act does not authorize merely accepting a lesser amount for the sake of closing out the claim. Acceptance must be governed by standards, and those standards are found in the joint regulations.

If an agency has a firm written offer of compromise from a debtor and is uncertain as to whether to accept the offer, it may refer the matter to GAO or the Justice Department, which will either act on the offer or return it to the agency with a recommendation. 4 C.F.R. § 103.8.

Generally, the regulations permit compromise in three situations:

1. Inability to pay

An agency may compromise a debt claim if the debtor is unable to pay the full amount within a reasonable time, or if the debtor has refused to pay the debt in full and the Government will not be able to collect the full amount by enforced collection proceedings within a reasonable time. 4 C.F.R. § 103.2. The regulation lists a number of factors for the agency to consider in evaluating the situation, such as the debtor's age and health, present and potential income, and inheritance prospects.

If the agency's files do not contain reasonably up-to-date credit information, the agency may obtain a statement from the debtor, executed under penalty of perjury, showing the debtor's assets, liabilities, income, and expenses. Where information available to the Government on the debtor's financial status is not sufficient to reach a conclusion as to the debtor's ability to pay, GAO will normally not recommend acceptance of

a compromise offer. See, e.g., B-186843-O.M., November 24, 1976.

2. Doubtful litigation probabilities

An agency may compromise a claim if it has real doubt concerning the Government's ability to prove its case in court for the full amount either because of the legal issues involved or because of a bona fide dispute as to the facts. The amount accepted in compromise should reflect the probabilities of the Government's prevailing on the legal issue and its actually collecting a full or partial judgment, taking into consideration such factors as the availability of witnesses and other evidentiary support for the Government's claim. The cost of litigation is also a legitimate factor to include in the equation. See B-196058-O.M., October 29, 1979.

For example, GAO recommended acceptance of a corporation's offer to compromise an Atomic Energy Commission claim for $49,133.74 for loss of a rocket for $19,300 because of the factual uncertainties and legal principles involved in litigating the case. B-160890, May 14, 1970 (non-decision letter). In another case, GAO recommended acceptance of a debtor's offer of $125,000 to compromise a Government claim for $301,833.51, in part because it was possible that the debtor would question the forum in which the matter would be litigated, and that the case might then be heard in the United States district court, where the debtor could request a jury trial with its attendant uncertainties. B-170070, December 29, 1971 (non-decision letter).

In B-165667, December 11, 1968, GAO recommended to the Justice Department that it accept a $15,000 compromise offer in satisfaction of a $26,105 Government claim for damage to an aircraft under a cost reimbursement Army contract with the builder. Proof of actual damage was considered extremely difficult in the case because the aircraft was never repaired due to a reduction in scope of the contract. In a case where there was serious question as to the admissibilty of important documents as evidence and where it appeared that the agency could not furnish better evidence to support its claim, GAO did not object to the acceptance of a $5,000 compromise offer in settlement of a $54,655.70 claim. B-156283, July 20, 1970 (non-decision letter).

In a more recent case involving a claim already in litigation, GAO had set off a debt against an award under the Military Claims Act (Part I, this Chapter) and the debtor sued to recover the amount withheld. It turned out that the Government's claim had been based largely on an oral contract

which the debtor disputed. In view of the apparent weakness of the Government's position, GAO recommended to the Justice Department that it "seek settlement on the best possible terms." B-202732, July 30, 1981 (non-decision letter).

3. Diminishing returns

An agency may compromise a claim if the cost of collecting it does not justify the enforced collection of the full amount. 4 C.F.R. § 103.4. The agency should consider both the administrative and litigative costs of collection.

In addition, agencies may compromise statutory penalties or forfeitures established to aid enforcement and to compel compliance upon an administrative determination that acceptance of the compromise will adequately serve the Government's interest in terms of deterrence and securing compliance. 4 C.F.R. § 103.5.

The regulations prohibit the acceptance of either a percentage of a debtor's profits, or stock in a debtor corporation in compromise of a claim. 4 C.F.R. § 103.9.

If two or more debtors are jointly and severally liable on a debt owed to the United States, the Government may compromise the indebtedness of one debtor without releasing its claim against the others. 4 C.F.R. § 103.6; B-165736, December 19, 1968. For further discussion of joint and several liability, see 58 Comp. Gen. 778 (1979), Section B(2), supra.

Compromise and accountable officers

The liability and relief of accountable officers are discussed in detail in Chapter 10, this Manual. Two provisions of the Federal Claims Collection Act are relevant in connection with this liability.

First, agencies are not authorized to compromise a claim "that arises from an exception made by the General Accounting Office in the account of an accountable officer." 31 U.S.C. § 952(b). This includes a claim against the ultimate beneficiary of an improper payment. 4 C.F.R. § 103.1. Only the Comptroller General is authorized to compromise in this situation.

The term "exception" in the statute is construed in its general meaning as an objection raised by GAO to the passing for credit of an item or items in an accountable officer's account. The particular form is irrelevant. The exception

may be in the form of a statement of account, such as a Certificate of Settlement, as well as a formal Notice of Exception. B-164729-O.M., April 17, 1969; B-115392-O.M., February 27, 1969; B-117604-O.M., March 24, 1967.

Once GAO has raised an exception in an account, a purported compromise by the administrative agency will be legally ineffective. It does not bind the Government, nor does it affect the liability of the accountable officer. B-117604(1)-O.M., December 29, 1969; B-164729-O.M., April 17, 1969.

The statutory provision barring agency compromise in cases where GAO has raised an exception does not relieve the agency from continuing to pursue aggressive collection action on the debt. B-117604, January 3, 1968. Also, the provision bars only compromise and does not preclude the agency from exercising its authority to suspend or terminate collection action if otherwise appropriate. Id. (See Section B(5), infra.)

The second relevant provision is 31 U.S.C. § 952(c), which provides that a compromise with a "person primarily responsible" will operate to relieve the accountable officer. Thus, in improper payment cases, a compromise with the recipient or beneficiary will have the effect of relieving the accountable officer regardless of whether or not he would have been entitled to relief under 31 U.S.C. § 82a-2. The authority to compromise with the recipient under the Federal Claims Collection Act does not depend on whether the accountable officer is entitled to relief under the applicable relief statutes. However, the probability of recouping the full amount of an improper payment from the accountable officer is a factor to consider in determining whether a compromise offer from the recipient is adequate. B-154400-O.M., January 29, 1968.

The operation of 31 U.S.C. § 952(c) is illustrated in a Post Office case which arose prior to the Postal Reorganization Act of 1970. A local postmaster had been held liable for failure to assess and collect proper postage for second-class mailings of a newspaper. The (then) Post Office Department referred its claim against the newspaper to GAO for further collection action, and GAO accepted a compromise offer. By virtue of 31 U.S.C. § 952(c), acceptance of the compromise relieved the postmaster of any further accountability for the uncollected amount of the deficiency. B-170841, December 5, 1972.

The "relief aspect" of 31 U.S.C § 952(c) applies by its terms only to compromises made under the authority of the Federal Claims Collection Act. However, GAO has applied the same policy to compromises made by the Justice Department under its general litigation authority. Thus, in B-156846-O.M., October 25, 1967, GAO had raised an exception to an improper payment and denied relief to the accountable officer under 31 U.S.C. § 82a-2. Subsequently, the Government's claim against the recipient of the improper payment was referred to GAO as uncollectible, and then to the Justice Department. The Justice Department compromised the claim for 50 percent. GAO reviewed several earlier similar cases, some of which had held that the compromise operated to relieve the accountable officer, others that it did not, and decided that the policy expressed in the Federal Claims Collection Act should apply here as well. Therefore, the compromise with the recipient was held to relieve the accountable officer from any liability for the balance. This result is the more equitable in that the Government's compromise effectively bars the accountable officer from pursuing recovery from the recipient.

While compromise with the recipient of the improper payment thus effectively relieves the accountable officer, relief of the accountable officer does not affect the liability of the recipient. 31 U.S.C. § 81a-2 expressly provides that relieving the accountable officer does not relieve the recipient from liability, nor does it in any way decrease the Government's responsibility to pursue collection action against the recipient. See Chapter 10, this Manual.

(5) Suspension and Termination of Collection Action

Another important authority conferred by the Federal Claims Collection Act is the authority to suspend or terminate collection action. Suspension is merely a temporary deferral while termination closes out the case. As with compromise, the authority to suspend or terminate applies only to claims whose principal amount does not exceed $20,000, and it must be exercised in accordance with the joint regulations. 31 U.S.C. § 952(b); B-160506, April 10, 1970.

An agency may temporarily suspend collection action if, after diligent effort, it is unable to locate the debtor but believes that future possibilities justify periodic review and action on the claim. The agency should liquidate any security it may be holding and, if the debtor has executed a confess-judgment note, should refer it for the entry of judgment. An agency may also suspend collection action if the debtor owns no substantial equity in real property and is unable to make

payments on the claim or compromise it, but future prospects justify retention of the claim. This latter standard should be exercised only when either the applicable statute of limitations has been tolled, or when it has started running anew, or when future collection can be made by offset notwithstanding the statute of limitations. 4 C.F.R. § 104.2.

The regulations provide five criteria for termination, the first two as specified in the statute, and three additional logical standards added by the regulations. 4 C.F.R. § 104.3.

1. Inability to collect any substantial amount. The agency may terminate collection action if the debtor is financially unable, both presently and prospectively, to pay any substantial amount on the claim. 4 C.F.R. § 104.3(a). For example, termination was justified where the Government had obtained a default judgment but could not find any assets on which to levy, and there were other substantial unsatisfied judgments on record. B-161248-O.M., November 9, 1967.

2. Cost will exceed recovery. The agency may terminate when it is likely that the cost of further collection action will exceed the amount recoverable. This is the "diminishing returns" standard. 4 C.F.R. § 104.3(c).

3. Inability to locate debtor. The agency may terminate when the debtor cannot be located, there is no remaining security to be liquidated, the applicable statute of limitations has run, and prospects for setoff are too remote to justify retention. 4 C.F.R. § 104.3(b). E.g., B-180072-O.M., November 29, 1973.

4. Claim legally without merit. 4 C.F.R. § 104.3(d). This one is self-explanatory.

5. Claim cannot be substantiated by evidence. However good a claim may be in theory, if the agency has insufficient evidence to prove it (documentary evidence, witnesses, etc.) and the debtor refuses to pay or compromise, termination is appropriate. 4 C.F.R. § 104.3(e).

These regulations are not merely guidelines. They establish the limits of agency authority. If the standards for compromise or termination cannot be met, the agency has no alternative under the statute but to pursue collection of the full amount of the debt. B-152680, October 28, 1966; B-159788, November 28, 1966; B-160771, February 24, 1967; B-163495, February 23, 1968.

Application of the standards cannot be arbitrary. The agency must have adequate support for its decision to terminate. As the Comptroller General stated, in issuing the termination regulations, "it was not contemplated that any of these bases would be applied in the absence of detailed support of such application." B-117604(1), May 27, 1968.

If an agency is not sure whether collection on a particular claim should be suspended or terminated, it may refer the claim to GAO for advice. 4 C.F.R. § 104.4. If a significant enforcement policy is involved in a particular case, or if recovery of a judgment is a prerequisite to desired administrative sanctions, the agency may refer the claim for litigation even though it would otherwise qualify for termination. Id.

As with compromise, GAO has the same authority as do the agencies to suspend or terminate collection action on claims referred to it by other agencies. 31 U.S.C. § 952(b).

Categorical termination

One of the standards for termination is the so-called concept of "diminishing returns." When the cost of collection is likely to exceed the amount recoverable, collection action may be terminated. 4 C.F.R. § 104.3(c), supra. Based on the normal meaning of words, you cannot terminate something unless you have already started it. Thus, the termination authority seems to contemplate situations where the agency has already started collection action. However, there are situations where GAO has construed the Federal Claims Collection Act as permitting an agency to simply forego collection action before it was actually initiated.

Even before the Federal Claims Collection Act, GAO had advocated that agencies establish realistic points of diminishing returns for their collection activities. E.g., 45 Comp. Gen. 553 (1966). This advice continues today in 4 GAO 69.3.

Under the Federal Claims Collection Act and regulations, the rule has developed that an agency may establish a reasonable minimum amount for the pursuit of debt claims of a given type. The amount cannot be arbitrary but must be supported by cost studies. Having established a point of diminishing returns in this manner, the agency may then categorically forego collection action on claims below this amount. GAO will review these minimum amounts under its regular audit authority.

For example, based on cost figures supplied by the General Services Administration, GAO approved a $25 minimum for the filing of loss and damage claims against carriers, including small domestic shipments on commercial forms. 55 Comp. Gen. 1438 (1976). The decision emphasized that an agency is authorized but not required to observe the minimum, and would retain the option to file a claim in a particular case. Similarly, the Agriculture Department could establish a $35 minimum for the collection of small claims. B-3338, January 11, 1972.

In B-117604, March 6, 1972, based on cost studies conducted by the various services, the Comptroller General approved a proposal by the Defense Department to set a $25 minimum on pursuing out-of-service indebtedness claims. A few years later, Defense sought to establish a "floating minimum" or, in the alternative, raise the minimum to $150. While GAO approved the proposal in principle, differences in the findings and accounting concepts among the various services led GAO to conclude that the specific request was not adequately supported. Accordingly, until the cost studies by the various services showed a coordinated and reasonably consistent basis, GAO could not endorse the change. B-115800/ B-117604, August 17, 1976.

The authority recognized in this line of decisions applies to claims discovered after the fact. An agency may not "waive" recovery in advance, that is, where the potential overpayment is known or can be readily determined before the payment is made. 49 Comp. Gen. 359 (1969).

GAO took the logical next step in 58 Comp. Gen. 372 (1979). The Interior Department asked whether, under the Federal Claims Collection Act, it could forego collection action on underpayments of $1 or less of reclamation fees paid by coal mine operators under the Surface Mining Control and Reclamation Act of 1977. The Comptroller General applied the prior decisions, but noted further that "it may safely be presumed, without cost studies, that in cases of $1 or less collection action will always exceed the amount recoverable." Id., at 375. Therefore, construing the termination provision in the Federal Claims Collection Act in light of its purpose, the Comptroller General held that Interior could make a categorical determination to forego collection action on underpayments of $1 or less, based on the diminishing returns concept, without the need for cost studies.

Termination and Government employees

A question that has recurred frequently since the Federal Claims Collection Act was enacted is whether the termination authority applies to debtors currently employed by the Federal Government. On the one hand, the argument goes, Federal employees are people too, and should be governed by the same standards as non-Federal employees. On the other hand, however, a Government employee has a steady paycheck and should always be able to repay a debt, at least in reasonable installments. (As a practical matter, the lack of general setoff authority--see Section C(2), infra--makes it more difficult in many cases to collect from a recalcitrant Federal employee.)

The statute and its legislative history do not address this issue. There have been several decisions over the years, and while at first glance they may not appear entirely consistent, they evidence an evolving GAO position.

GAO first considered the issue in B-159708, September 23, 1966, a response to a Member of Congress on behalf of a civilian employee of the Navy. The Comptroller General pointed out that GAO would have to insist on collection of the full amount of the indebtedness unless there was a showing that the employee was financially unable to pay "any significant sum" on the debt--an event GAO viewed an "unlikely" since the debtor was employed by the Government. Thus, while the Comptroller General stopped short of expressing a definitive position, he seemed to be saying that the standards apply to Federal employees just as to any other debtor, but that a Federal employee would probably never be able to meet them.

In the next two cases to come up, GAO ruled flatly that termination was unauthorized. Decision B-160483, December 9, 1966, involved a Small Business Administration employee who had received overpayments of salary. The Comptroller General held that collection action could not be terminated because the debtor was currently employed. An additional factor was that an overpayment of salary can be liquidated by payroll deductions under 5 U.S.C. § 5514. Decision B-160633, January 19, 1967, involved an Air Force employee who had erroneously been paid overtime compensation. The decision held that there was no authority to discontinue collection action since the debtor "currently is employed and there is no showing of his inability to repay the amount in question." Again, the implication was that the standards apply as a matter of law but that someone receiving a Government paycheck is presumptively unable to meet them.

Decisions over the next few years suggest an embryonic rule struggling to take form. In 49 Comp. Gen. 359, 361 (1969), the Comptroller General still declined to express a definitive position but nevertheless signaled GAO's direction, stating that:

> "Moreover, in view of the many ways available to enforce collection of small debts owed by service members and Government employees, [the application of the termination regulations] to such personnel may be doubtful in any event."

Several other cases illustrate this "doubt." In B-160569, February 28, 1967, GAO reviewed the cases of several Air Force employees indebted to the Government as the result of salary overpayments. The Comptroller General discussed the criteria for termination and concluded:

> "Unless there can be shown some valid basis which would permit a compromise of the debt, or termination of collection thereon, under the cited standards, there is no alternative under the act to collection of the full amount of the debt."

Thus, once again, GAO seemed unwilling to directly hold that employee indebtedness can never be terminated, but clearly implied that it would be next to impossible for a current employee to meet the standards. A very similar case is B-163495, February 23, 1968. Then, in B-175499, April 21, 1972, GAO held that a particular overpayment could not be waived under 5 U.S.C. § 5584 but advised the agency to consider the various alternatives under the Federal Claims Collection Act, one of which is termination. In that particular case, however, the employee was in the process of resigning and was in a "leave without pay" status.

Since 1971, all cases involving overpayments to employees still receiving Government salaries have found termination to be unauthorized. In B-172122-O.M., May 21, 1971, the GAO General Counsel advised the Claims Group that "the present debt should not be terminated or suspended * * * so long as the employee occupies his present position and has a take home pay of $980 a month after tax withholding in addition to his retired military pay."

Three more recent decisions have held termination unauthorized in overpayment cases where payroll withholding under 5 U.S.C. § 5514 was an available remedy. B-180674, November 25, 1974; B-189701, September 23, 1977; and B-195471, October 26, 1979. (This of course was precisely what the Comptroller General had held in B-160483, December 9, 1966,

noted above.) See also B-195322, November 27, 1979. In B-187065, August 31, 1976, GAO approved termination in the case of a debt owed by the widow of a retired Army sergeant, a very different situation.

The cases discussed above all involved overpayments or erroneous payments made directly to the debtor. In one case, GAO considered whether termination was available on behalf of an accountable officer where GAO had previously denied relief. (See Chapter 10, this Manual.) Reviewing the various cases discussed above, GAO concluded that the general rule was that termination is unauthorized where the debtor is currently employed by the Government. In view of the history of that particular case, GAO advised that no further collection action need be taken, but cautioned that the case would not be viewed as a precedent and that GAO would apply the general rule (termination unauthorized) in the future. B-180957-O.M., September 25, 1979.

In sum, it seems accurate to say that, as a matter of law, the termination provisions in the Federal Claims Collection Act apply to Federal employees just like they apply to anyone else. However, the various criteria specified in the regulations must be examined individually. The "inability to pay" standard will not justify termination in the case of a Government employee. The rationale is that the employee cannot legitimately be deemed unable to pay, at least in reasonable installments, where he or she is receiving a steady Government paycheck.

Similarly, the "diminishing returns" standard will have little application, and certainly none where the debt is subject to a statutory setoff (e.g., 5 U.S.C. § 5514). Where a debt is not subject to a statutory setoff, the diminishing returns standard might arguably have some validity if the employee simply refuses to pay. However, as a matter of policy, it is extremely unlikely that GAO would sanction termination in this type of situation.

As to the remaining standards--a claim legally without merit, and a claim which cannot be substantiated by evidence--there is no reason why these should not apply fully to debts asserted against Federal employees.

Finally, there is one situation where GAO has permitted termination of indebtedness for Government employees--where the debtors are not specifically identified and the amounts are small enough to justify termination based on diminishing returns. The first case in point was B-181467, July 29, 1976. The Air Force discovered that it had been overpaying night

differential and Sunday premium pay to local employees at Clark Air Base in the Philippines. Since (1) the amount of the individual debts was minor, (2) the administrative costs of identifying the overpayments would have been excessive, and (3) the individual debts would have been eligible for waiver anyway, GAO concluded that the Air Force could terminate collection action. This decision was followed in B-188000, October 12, 1977, and again in B-184947, March 21, 1978. The exception recognized in these three cases is limited to unknown amounts owed by unknown individuals where termination is justifiable on a diminishing returns basis.

Termination/suspension/compromise vs. waiver

As discussed, the Federal Claims Collection Act authorizes compromise, suspension, or termination under the criteria established by the regulations. However, the Act has no provision authorizing either GAO or the administrative agency to "waive" a debt claim. E.g., B-159708, September 23, 1966.

"Waiver" of a debt is a forgiveness of the debt and relieves the debtor from having to repay it. More technically, it is "an intentional relinquishment or abandonment of a known right or privilege." 43 Comp. Gen. 311, 314 (1963). Waiver is authorized by statute in certain instances. Examples are 5 U.S.C. § 5584 and 10 U.S.C. § 2774 relating to certain claims against Federal civilian employees and military personnel. (These are beyond the scope of this Manual and are dealt with in the Personnel Law Manuals.)

However, absent statutory authority such as the examples cited--and again the Federal Claims Collection Act provides no such authority--no one is authorized to waive a claim owing to the United States.

For example, the Labor Department is not authorized to waive the recovery of overpayments made under the Disaster Relief Act of 1970. B-171934, April 2, 1971. Similarly, the Federal Emergency Management Agency lacks authority to issue regulations providing for the forgiveness of debts owed to the Government. B-201054, April 27, 1981. Along the same lines, the compromise, suspension, and termination authority of the Federal Claims Collection Act applies to overpayments by the Department of Labor under the Redwood Employee Protection Program although there would be no authority to "waive" the claims. B-195188, June 17, 1981.

The distinction is more than academic. Termination is a determination not to take any further collection action. It does not relieve the debtor from his liability and the debt remains on the books, for example, for possible future setoff.

(6) Referral to GAO and Justice Department

If an agency has taken the aggressive collection action prescribed in the regulations, is unable to compromise the claim, and if supension or termination is inappropriate, the agency must refer the claim to GAO for further collection action. 4 C.F.R. § 105.1. Referrals should include the debtor's current address (4 C.F.R. § 105.2), reasonably current credit data (4 C.F.R. § 105.3), and a brief summary of the actions previously taken to collect or compromise the claim (4 C.F.R. § 105.4). Further detail is found in 4 GAO, Chapters 9 through 15.

GAO's authority to pursue further collection action is limited to the same administrative devices that were available to the agency. Thus, GAO may send further demand letters, accept payment in installments, and consider compromise, suspension, or termination. GAO's authority to compromise is subject to tne same $20,000 limitation that applies to the agencies. GAO cannot sue a debtor. If GAO's administrative efforts prove equally fruitless and litigation becomes necessary, GAO must refer the claim to the Justice Department.

It is apparent that it will be frequently unproductive to have GAO as an intermediate step between the agency and the Justice Department, because GAO's authority is limited and because the process uses up more time under the statute of limitations. Thus, the regulations permit GAO to grant exceptions from the requirement to refer uncollectible claims to GAO, and to authorize agencies to refer claims directly to the Justice Department. 4 C.F.R. § 105.1.

Exceptions are considered and granted by GAO's Claims Group. GAO's policy is to grant exceptions either agency-wide, or for a particular category of claims rather than on an individual case basis, although individual case exceptions still occur. The tendency is toward increased exceptions, the theory being that GAO can perform its role under the Federal Claims Collection Act more effectively by audit and oversight than by direct involvement in individual claims. See "Unresolved Issues Impede Federal Debt Collection Efforts--A Status Report," CD-80-1 (January 15, 1980), page 9.

Cases should be referred to the Justice Department for litigation prior to the earliest barring date under an applicable statute of limitations, but may be referred even after such date if there is some reasonable theory in support of a later date, or if there is doubt as to the proper date. B-158275-O.M., December 9, 1971; B-158275-O.M., July 5, 1974.

Referral of a time-barred claim is also appropriate if there is a possibility of using the debt as a counterclaim in a pending suit against the Government. E.g., B-169175(2), May 23, 1972 (non-decision letter).

Claims of less than $600 should not be referred to GAO or the Justice Department unless referral is important to a significant enforcement policy, or it is clear that the debtor has the ability to pay and the Government can effectively enforce payment. 4 C.F.R. § 105.6.

(7) Disposition of Amounts Collected

If an agency collects a debt, it must deposit the money in the Treasury as miscellaneous receipts as required by 31 U.S.C. § 484, unless the agency has statutory authority to credit the receipts to its own appropriations or the collection qualifies as a "repayment." These concepts are discussed in detail in Chapter 5, this Manual.

If GAO collects a debt referred to it for collection by another agency, there is discretionary authority under 31 U.S.C. § 701(c) for GAO to deposit the money as miscellaneous receipts. Under GAO's current policy, collections involving appropriation or fund accounts, other than trust or deposit fund accounts, are deposited as miscellaneous receipts. This is true even if the referring agency would have had authority to retain the funds had it made the collection directly. Collections applicable to trust or deposit fund accounts are deposited directly into the Treasury for credit to the applicable fund. B-138706, May 13, 1963 (circular letter); B-138706-O.M., October 1, 1963. See also B-156011, April 30, 1965; B-138706, November 30, 1965; B-156343, January 17, 1966; 4 GAO 71. This policy modified a prior policy expressed in 40 Comp. Gen. 98 (1960), 40 Comp. Gen. 100 (1960), and B-141636, September 14, 1961, and effectively returned to a still earlier policy as reflected in 38 Comp. Gen. 95 (1958).

GAO's policy, of course, does not govern the disposition of funds collected by the Justice Department rather than GAO in cases where the agency has been authorized to refer claims directly to the Justice Department. B-152247, December 13, 1965. If, however, the Justice Department transmits the funds to GAO for disposition, GAO will treat the funds as if GAO had collected them.

For a related discussion, see "Disposition of Amounts Set Off," infra, this Chapter.

C. GOVERNMENT'S RIGHT OF SETOFF

(1) General

One of the more logical concepts in the law is setoff. Simply stated, if I owe you $100 and you owe me $50, I "set off" the $50 that you owe me against the $100 that I owe you, and my payment to you of $50 discharges both claims.

The right of setoff derives from the common law. It does not require specific statutory authority. Of course, it is not available in any situation where it is expressly prohibited by statute. The rule has frequently been stated in the following terms:

> "Every creditor has the right to apply the moneys of his debtor in his hands in the extinguishment of claims due him from the debtor." 1 Comp. Gen. 605, 606 (1922).

The right of setoff available to the private creditor is equally available to the Government. The Government's right of setoff applies to debts arising from unrelated as well as related transactions and to noncontractual as well as contractual debts. Setoff may be effected either by the administrative agency or by GAO. Where the administrative agency makes the setoff, the authority is the common law right. Where GAO makes the setoff, the authority derives not only from the common law, but also by necessary implication from 31 U.S.C. § 71, GAO's basic claims settlement authority. The Government's right of setoff has been consistently recognized by the Supreme Court 28/ and by the Comptroller General. 29/

28/ United States v. Munsey Trust Co., 332 U.S. 234 (1947); Pearlman v. Reliance Ins. Co., 371 U.S. 132, 140 (1962); Barry v. United States, 229 U.S. 47 (1913); McKnight v. United States, 98 U.S. 179 (1878), affirming 13 Ct. Cl. 292 (1877); Gratiot v. United States, 40 U.S. (15 Pet) 336 (1841); Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946), affirming 59 F. Supp. 122 (Ct. Cl. 1945).

29/ E.g., 1 Comp. Gen. 605 (1922); 3 Comp. Gen. 1006 (1924); 6 Comp. Gen. 810 (1927); 14 Comp. Gen. 849 (1935); B-128358, July 9, 1956; B-151895, August 9, 1963; B-146353, August 17, 1961; B-152507, November 29, 1963.

The courts have also expressly recognized GAO's setoff authority. 30/

The Federal Claims Collection Standards recognize setoff as one of the key debt collection devices. The regulations direct agencies to use setoff whenever it is feasible. 4 C.F.R. § 102.3(a). Agencies are expected to cooperate with one another in using setoff. One available device mentioned in the regulations is the Army Holdup List. 4 C.F.R. § 102.3(e); 4 GAO 75-77; B-184506, October 29, 1975.

There is no requirement that the Government's claim be reduced to judgment before setoff may be used. An administrative determination of indebtedness is sufficient. E.g., United States v. American Surety Co., 158 F.2d 12 (5th Cir. 1946); 56 Comp. Gen. 264 (1977); 3 Comp. Gen. 1006, 1007 (1924); B-195126, January 17, 1980; B-162376, September 20, 1967; B-84150, October 22, 1951. A debtor who disputes an administrative setoff may seek judicial review. For actions in the Court of Claims, jurisdiction is codified in 28 U.S.C. § 1503.

(2) Application to Specific Contexts

Since both payments and debts occur in so many different situations, setoff questions can arise in a variety of contexts. This Section will explore several of them. Although the editors have tried to be representative, the reader is cautioned not to view this Section as an exhaustive treatise.

(a) Cross-references

Setoff is discussed in several other places in this Manual and that discussion will not be duplicated here. Following is a list of pertinent cross-references:

--Setoff against grant funds: Chapter 13, Section H(2).

30/ E.g., United States v. Munsey Trust Co., 332 U.S. 234, 240 (1947); United States v. American Surety Co., 158 F.2d 12 (5th Cir. 1946); John P. Squire Co. v. United States, 30 F. Supp. 708 (Ct. Cl. 1940), cert. denied, 309 U.S. 689; Taggart v. United States, 17 Ct. Cl. 322 (1881); Bonnafon v. United States, 14 Ct. Cl. 484 (1878).

--Setoff against judgments: Chapter 12, Section E(1). 31/

--Setoff against contract proceeds under the Assignment of Claims Act: Chapter 11 (Part I), Section B(2).

--Setoff of interagency claims: Chapter 11 (Part I), Section C(16).

--Setoff of improperly paid State and local taxes: Chapter 3, Section C(14).

(b) Setoff Against Contract Payments

If a contractor is indebted to the Government, the Government may set off the indebtedness against contract payments. 4 Comp. Gen. 177 (1924); 28 Comp. Gen. 543 (1949).

The debt and payment may be attributable to the same transaction or contract. For example, the Navy could set off against the final contract payment the cost of work remaining to be performed under a warranty clause. B-187178, October 7, 1976. Similarly, the Air Force could set off, for payment to the Internal Revenue Service, underpayments of the contractor's share of Federal Insurance Contribution Act (Social Security) payments. B-196064, November 18, 1980. Setoff under a Bonneville Power Administration contract was appropriate in B-188473, August 3, 1977, to reimburse the Forest Service, pursuant to a clause in the contract, for firefighting costs the Forest Service incurred suppressing a fire caused by the contractor's operations.

The debt may also result from a separate and independent transaction. Thus, indebtedness under one contract may be set off against payments due under another contract. 2 Comp. Gen. 479 (1923); B-168619, January 14, 1970; B-176791, September 8, 1972.

31/ The procedures for offsetting indebtedness against a judgment, discussed in Chapter 12, are prescribed by 31 U.S.C. § 227. This statute is limited to judgments and has no effect on the Government's right to setoff prior to judgment. Project Map, Inc. v. United States, 486 F.2d 1375 (Ct. Cl. 1973); 1 Comp. Gen. 605 (1922); 14 Comp. Gen. 849 (1935); B-143573, May 7, 1962; B-188473, August 3, 1977.

The indebtedness to be offset need not be contractual. For example, in B-184506, October 29, 1975, GAO found setoff against contract payments a proper means to collect improperly refunded license fees.

If the amount of the Government's claim has not yet been finalized, the Government may set off a reasonable estimate. E.g., B-187178, October 7, 1976; B-176791, September 8, 1972. The setoff of an estimate is authorized notwithstanding the absence of a final resolution of a contract dispute (administrative or judicial) underlying the debt. B-188473, August 3, 1977; B-178368, September 24, 1973; B-163625, March 14, 1968.

Although the Government may base its setoff on an estimate, it may not base its estimate on a statistical sampling. A projection based on a random sampling is not sufficiently certain in amount to warrant a setoff. 56 Comp. Gen. 963 (1977).

Where a new corporation is in essence a mere continuation or reorganization of an old (debtor) corporation, debts of the old corporation may be set off against contract payments to the new corporation. The new corporation seeking to avoid liability has the burden of establishing that it is not a mere continuation. B-191129, September 8, 1978. However, the fact that two corporations were organized by the same officers and shareholders and that one is carrying on the business of the other with the same assets and personnel, while raising a presumption, does not automatically establish liability. Thus, setoff against a "buyer" corporation meeting these tests was held improper where the "buyer" had been in existence for several years prior to acquisition, the debtor remained in corporate existence, and the transfer was supported by a fair cash consideration. B-193966, April 12, 1979.

A corporation is not liable for debts incurred by one of its officers in his individual capacity after leaving the corporation. Thus, contract payments to a corporation could not be used to set off debts the former president of the corporation incurred under Government contracts he had entered into as an individual after leaving the corporation. 56 Comp. Gen. 499 (1977).

The Government's right of setoff applies to debts owed to the Small Business Administration by a "section 8(a)" subcontractor. B-189183, January 12, 1979; B-177648, August 10, 1973, affirmed upon reconsideration, B-177648, December 14, 1973.

In 46 Comp. Gen. 178 (1966), the Comptroller General held that moneys withheld from a contractor under the Davis-Bacon Act were available for setoff of Government claims against the contractor, at least before the contracting agency transferred the funds to GAO. The Comptroller General modified this decision in 55 Comp. Gen. 744 (1976), holding that the claims of underpaid workers have priority over an IRS tax levy to withheld Davis-Bacon funds.

However, funds withheld under the Davis-Bacon Act are not available to pay the claims of underpaid laborers arising from the performance of a different contract by the same contractor. B-189535, August 9, 1977; B-187142, December 28, 1976; B-187761-O.M., April 15, 1977. GAO has applied the same principle to the Contract Work Hours and Safety Standards Act. 48 Comp. Gen. 387 (1968); B-170784, February 17, 1971; B-187142, supra.

The Government's right of setoff to collect a contractor's tax indebtedness is superior to the claim of a payment bond (Miller Act) surety. 54 Comp. Gen. 823 (1975); B-187903, December 21, 1976; B-189125, June 7, 1977. The same result applies to a Labor Department claim for wage underpayment under the Contract Work Hours and Safety Standards Act. B-181695, April 7, 1975.

However, a performance bond surety which completes a defaulted contract is entitled to reimbursement of the costs it incurs in completing the contract from contract funds in the hands of the Government, free from any setoff of the contractor's debts. B-192237, January 15, 1979; B-189137, May 19, 1978; B-189679, September 7, 1977. Thus, the Government may enter into a takeover agreement with a performance and payment bond surety for completion of the defaulted work, with the surety to be reimbursed its actual completion costs without setoff of the contractor's debts. However, payments to the completing surety in excess of actual completion costs, such as payments to laborers or materialmen not paid by the defaulting contractor, remain subject to setoff to satisfy the contractor's tax indebtedness, and any purported agreement to the contrary is unauthorized. 40 Comp. Gen. 85 (1960); 31 Comp. Gen. 103 (1951).

A claim for excess costs under one contract may be set off against the balance due under another contract with the same contracting agency, and a tax claim is subordinate to the excess cost claim. B-189902, October 5, 1977. (Setoff and priorities involving the assignment of contract proceeds under the Assignment of Claims Act are discussed in Chapter 11 (Part I), Section B(2), this Manual.)

The Government is under no obligation to exercise the right of setoff against money due a contractor on unrelated contracts for the benefit of a surety, for example, for the purpose of holding a surety harmless on a defaulted contract. B-160641, April 28, 1967.

An award by a board of contract appeals is subject to setoff just like any other contract payment. The procedures prescribed by 31 U.S.C. § 227 for setoff against court judgments (Chapter 12, this Manual) do not apply. B-162526, October 9, 1967. (Although this decision predates the Contract Disputes Act of 1978, it has not been changed.)

A different type of contract setoff question arose in B-186852, October 21, 1976. The General Services Administration was selling excess zinc and inadvertently overstated the remaining undelivered quantity. Based on GSA's error, the purchaser overpaid the purchase price. The Comptroller General held that GSA could retain the overpayment to set off a prior unrelated indebtedness of the purchaser.

Repayment bond in lieu of setoff

Prior to the Federal Claims Collection Act, GAO had held that there was no authority to accept a repayment bond in lieu of setoff. The reasons were set forth in B-71886, January 28, 1948, as follows:

> "[T]here is no express provision of law authorizing this Office to accept a bond of indemnity as security for the payment of such an account. The practical effect of the action urged by you would be to deprive the United States of the use of the amount involved for an indefinite period of time, in order to confer an equal benefit upon the company, which company would be permitted to substitute for its obligation a bond upon which the United States well might be required to initiate legal proceedings. Manifestly, such action would be contrary to the interests of the United States. The hardship, if there be any, may not be assumed by the Government but must rest where it falls. Moreover, the offset of amounts due the company obviously is best fitted to protect the United States, especially in cases of disputed liability."

Under the Federal Claims Collection Act and regulations, an agency has authority to determine whether collection by setoff is "feasible" in a particular instance. Therefore,

the agency has discretionary authority to accept a repayment bond if it determines that setoff is not feasible. B-167635, November 18, 1975. The factors noted in the 1948 decision are, of course, relevant in making this determination, keeping in mind that an officer of the United States is expected to protect the interests of the United States. The device should therefore be used sparingly.

(c) Government Employees

Absent specific statutory authority to the contrary, the current salary of a Government employee is not subject to setoff to liquidate the employee's indebtedness to the United States, unless the employee consents to the setoff. 17 Comp. Gen. 12 (1937); 23 Comp. Gen. 555 (1944); 23 Comp. Gen. 911 (1944); 26 Comp. Gen. 907 (1947); 29 Comp. Gen. 99 (1949); 58 Comp. Gen. 501, 502 (1979). The rule applies equally to the current pay of members of the armed services. E.g., 38 Comp. Gen. 788 (1959); 42 Comp. Gen. 83 (1962).

There are a number of statutes authorizing setoff against current salary in specific situations. Several of them are as follows:

--5 U.S.C. § 5512: A literal reading of this provision might suggest that it applies to all employees. However, it applies only to "accountable officers"--persons who have been entrusted with and are required to account for public funds. 23 Comp. Gen. 555 (1944); 37 Comp. Gen. 344 (1957); 39 Comp. Gen. 203, 206 (1959). See also Chapter 10, this Manual.

--5 U.S.C. § 5513: Authorizes setoff against current salary of the recipient of a payment for which GAO has disallowed credit in the account of a disbursing officer or raised a charge against a certifying officer. The interpretation of this provision is discussed in 32 Comp. Gen. 101 (1952) and 32 Comp. Gen. 499 (1953). GAO may disallow an item for the express purpose of triggering the setoff authority of 5 U.S.C. § 5513. See B-155091, May 13, 1965.

--5 U.S.C. § 5514: Authorizes setoff in installments against the current salary of civilian employees and military personnel "because of an erroneous payment" to or on behalf of the individual.

--5 U.S.C. §§ 5705 and 5724(f): Authorizes setoff to recover unused travel and transportation advances.

--37 U.S.C. § 1007: Authorizes setoff against the pay of members of the Army or Air Force in several situations.

Thus, several statutory exceptions exist, but unless one of them applies, current salary is not subject to setoff.

The prohibition against setoff without either statutory authority or the employee's consent applies only to current salary. Other moneys payable to an employee are subject to setoff. Examples are:

--"Final pay" for both civilian employees and military personnel. 29 Comp. Gen. 99, 100 (1949); 33 Comp. Gen. 443 (1954); 38 Comp. Gen. 788 (1959). This includes final salary payments on behalf of a deceased employee. B-190291, January 3, 1978.

--Lump-sum payment for accrued leave. 29 Comp. Gen. 99, 100, supra; B-190291, supra.

--Payments, either periodic or lump-sum, under the Federal Employees Compensation Act. 41 Comp. Gen. 178 (1961).

Moneys held in an employee's retirement account are not available for setoff as long as they are required by law to remain in the fund. However, once they become payable to the employee, by virtue of either retirement or withdrawal upon separation, they are available for setoff. 58 Comp. Gen. 501, 502 (1979); 39 Comp. Gen. 203 (1959); B-195126, January 17, 1980. 32/ This principle applies equally to disability retirement benefits. B-194159, October 30, 1979.

Foreign Service retirement benefits are similarly subject to setoff. A-54780, February 11, 1935. However, the retired pay of military personnel is not subject to setoff absent either statutory authority or the individual's consent. B-191017, March 1, 1978.

32/ For earlier cases, see 3 Comp. Gen. 98 (1923); 16 Comp. Gen. 161 (1936); 16 Comp. Gen. 962 (1937); 21 Comp. Gen. 1000 (1942); 27 Comp. Gen. 703 (1948).

There have been many cases affirming the right of setoff against retirement funds involving the indebtedness of postal employees resulting from mail theft, embezzlement, and other offenses. A prima facie case of liability is established by a showing that (1) the loss occurred, (2) the employee has been caught committing a similar offense, (3) the employee had access to the item in question, and (4) there is no evidence implicating anyone else. Boerner v. United States, 30 F. Supp. 35 (E.D.N.Y. 1939), aff'd, 117 F. 2d 387 (2d Cir. 1941), cert. denied, 313 U.S. 587. If the employee is unable to overcome the prima facie case by more than a mere categorical denial of liability, he becomes indebted to the Government for the amount of the loss and setoff against his retirement account is proper. B-195126, January 17, 1980. 33/ The rationale of the postal employee cases has been applied to other Federal employees as well. B-139796, July 10, 1959.

The Federal Claims Collection Standards were amended in 1981 to provide for a pre-offset oral hearing, in limited circumstances, whenever an agency seeks to use setoff against compensation or benefits payable to a present or former Government employee, or to a member of the armed forces. 4 C.F.R. §§ 102.3(b) and (c), added by 46 Fed. Reg. 39113 (July 31, 1981).

For further discussion of the liquidation of employee indebtedness, see the Personnel Law Manuals.

(d) Transportation

The Federal Claims Collection Act and the Government's right of setoff apply fully to transportation claims against carriers. Setoff is not limited to overcharges but includes damage claims as well. The Government becomes entitled to setoff when it establishes a prima facie case of carrier liability which the carrier is unable to rebut. The Government establishes a prima facie case of liability by showing that the shipment was delivered to the carrier at origin in good condition (evidenced, for example, by a bill of

33/ For earlier cases, see 23 Comp. Gen. 723 (1944); 21 Comp. Gen. 1003 (1942); 19 Comp. Gen. 88 (1939); 18 Comp. Gen. 524 (1938); 7 Comp. Gen. 593 (1928); B-170316, April 12, 1971, affirmed upon reconsideration, B-170316, November 16, 1971; B-164193, June 5, 1968; B-155160; November 9, 1964; B-150407, April 4, 1963.

lading signed by the carrier without exception), that the shipment arrived at its destination in damaged condition, and by establishing the amount of damages. For decisions applying the Government's right of setoff to transportation claims, see 56 Comp. Gen. 264 (1977); B-181871, February 11, 1977; B-191889, October 2, 1978, affirmed upon reconsideration, B-191889, May 16, 1979; B-193101, March 12, 1979.

(e) Claims Against State or Municipality

If the Federal Government has a claim against a State or municipality, it may collect the claim by offset. Except for certain grants (Chapter 13, this Manual), the United States may set off its claim against any moneys payable to any agency of the State or municipality. E.g., B-143573, May 7, 1962; B-141018, February 11, 1960 (non-decision letter).

Government claims often arise from improperly collected State and local taxes. See Chapter 3, Section C(14), this Manual. If the State or municipality refuses to refund the tax, setoff is the proper remedy. For example, the Government's claim for the refund of real estate taxes on Government-owned property collected from a contractor who was reimbursed by the Government was properly set off against payments in lieu of taxes due the municipality in a subsequent year. 36 Comp. Gen. 713 (1957). Similarly, the overpayment by the Government of a State motor vehicle fuel tax on gasoline used in Government vehicles was properly set off against funds payable to the State under the Mineral Leasing Act of 1920. B-154113, June 24, 1964. See also B-162005, April 8, 1968, and other cases cited in Chapter 3.

(f) Trust Funds

As a general proposition, where the Government is holding funds as trustee, the funds are not subject to setoff to liquidate Government claims against the beneficiaries. This rule applies where the funds are not Government funds and the Government is merely holding them as a stakeholder. For example, Federal prisoners' trust funds are not subject to setoff to satisfy Government claims against the inmates. 48 Comp. Gen. 249 (1968). Similarly, funds received from the Government of Poland awarded to a claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949 (Chapter 11, Part I, this Manual) could not be used to set off the claimant's indebtedness to the United States. B-180825-O.M., July 23, 1974. A similar situation would be funds withheld from a contractor

and transferred to GAO under the Davis-Bacon Act. See 46 Comp. Gen. 178 (1966), discussed above.

However, where the funds constitute Government funds, they may be subject to setoff even though held in a trust capacity. 34 Comp. Gen 152 (1954) (moneys held in trust for Indians available to set off indebtedness of Indian to Government); B-121946, January 5, 1956 (claimant's debt to Government may be set off against award by Foreign Claims Settlement Commission under War Claims Act of 1948). Thus, in determining whether setoff is available, it is necessary to examine the nature of the funds as well as their status as trust funds.

(g) Nonappropriated Fund Activities

Setoff is not available to satisfy a debt owed to a nonappropriated fund activity since a debt to a nonappropriated fund activity is not a debt owed to the United States. 9 Comp. Gen. 353 (1930); 9 Comp. Gen. 411 (1930); 11 Comp. Gen. 161 (1931); B-170400, September 21, 1970, affirmed upon reconsideration, B-170400, February 2, 1971; B-128671-O.M., August 22, 1956.

The same rule applies to a debt owed to a Federal Credit Union since the funds belong to the employees and are not appropriated funds. 31 Comp. Gen. 363 (1952). See also B-113003, March 5, 1953 (non-trust funds of an Indian tribe generated by local activities).

Limited statutory setoff authority exists for some military personnel. Thus, 37 U.S.C. § 1007(c) authorizes setoff from current salary to liquidate the indebtedness of Army and Air Force enlisted personnel to nonappropriated fund activities. B-148581.13-O.M., November 2, 1976. Also, under 10 U.S.C. § 6032, the pay of Marines who are discharged, desert, or are sentenced to prison may be set off to satisfy indebtedness to Marine Corps Exchanges. The setoff authority is limited to the personnel and situations specified in the statutes. Therefore, for example, the indebtedness of a Marine to an officer's mess could not be collected by setoff. 43 Comp. Gen. 431 (1963).

Military personnel may consent to setoff to liquidate indebtedness to a nonappropriated fund activity by authorizing allotments from current salary. B-148581.13-O.M., November 2, 1976.

Nonappropriated fund activities are discussed further in Chapter 15, this Manual.

(h) Setoff and Bankruptcy

This subsection will summarize the effect of a debtor's bankruptcy on the Government's right of setoff. The debtor may be a corporation or other business entity or an individual, including a Government employee. The bankruptcy laws are complicated and this subsection is designed merely to point out some of the more important principles involved.

The bankruptcy laws have traditionally recognized the right of setoff. Subject to certain refinements specified in the statute, the Bankruptcy Act, recodified in 1978 and found in title 11 of the United States Code, preserves "any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case * * *." 11 U.S.C. § 553(a).

The basic test under this provision is "mutuality." To be mutual, the debts or credits must be in the same right and between the same parties standing in the same capacity. Further, the mutuality must exist "before the commencement of the case." Thus, if both claims are in existence at the time the petition in bankruptcy is filed, the Government may set off one against the other. 7 Comp. Gen. 186 (1927); 7 Comp. Gen. 576 (1928); 18 Comp. Gen. 301 (1938).

To illustrate, in two cases involving bankrupt carriers, setoff was proper where both the credit due the carrier for services rendered and the carrier's debt to the Government arose prior to the filing of the petition in bankruptcy. B-150463-O.M., March 18, 1963; B-149191-O.M., August 3, 1962. Similarly, the Navy could set off a member's indebtedness stemming from various overpayments against unpaid leave rations where both obligations pre-dated the member's filing of a voluntary petition in bankruptcy. The subsequent filing of the petition did not affect the Government's right of setoff. B-195066, September 22, 1980. See also 56 Comp. Gen. 279 (1977); B-123016, April 11, 1955; B-117500-O.M., November 4, 1953; B-129669-O.M., December 11, 1956.

Where one obligation arises prior to filing the petition and the other obligation arises after the filing, setoff is improper because the requisite mutuality is lacking. For example, overcharges for transportation performed before the carrier filed its petition in bankruptcy could not be set off against post-petition bills payable to the carrier by the General Services Administration. B-192974, March 29, 1979.

Reversing the sequence, overcharges for services rendered subsequent to the filing could not be collected by setoff against credits for pre-petition services. B-150294-O.M., March 27, 1963. See also B-129669-O.M., December 11, 1956.

If both obligations arise after the petition is filed and the bankrupt's debt to the Government is not included in the discharge in bankruptcy, the bankruptcy proceedings have no bearing and setoff is proper. 45 Comp. Gen. 342, 345 (1965).

The concept of mutuality is also relevant to setoffs against an employee's retirement account. An employee is not entitled to the sums in his retirement account until he leaves Federal service by retirement or resignation. Thus, where an employee files bankruptcy and continues his Federal employment, the money in his retirement account does not become part of the estate in bankruptcy and is not available for setoff since it does not constitute an obligation owed by the Government at the time the bankruptcy petition is filed. See 22 Comp. Gen. 330 (1942); B-185731, March 3, 1976 (non-decision letter).

GAO has applied the concept of mutuality by analogy to a State court liquidation proceeding. In B-167886/B-174985, June 1, 1978, the Comptroller General held setoff proper against a surety which was being liquidated in a State court proceeding, since the debts and credits being set off accrued before commencement of the liquidation proceeding. The Government did not waive its right of setoff by filing proofs of claims in the proceeding.

A completing surety has priority over a trustee in bankruptcy. 8 Comp. Gen. 58 (1928). Also, as noted previously, a completing performance bond surety is entitled to reimbursement of its actual completion costs free from setoff of the contractor's debts. Combining these two concepts, where a performance bond surety has undertaken to complete the remaining work left by a defaulted contractor which had filed a bankruptcy petition, contract funds in the hands of the Government are payable first to the completing surety to reimburse its completion costs, without setoff for the contractor's tax indebtedness. 58 Comp. Gen. 295 (1979).

A discharge in bankruptcy releases the bankrupt from legal liability on all debts included in the discharge. 22 Comp. Gen. 330 (1942); 22 Comp. Gen. 1119, (1943); 45 Comp. Gen. 342 (1965); B-192974, March 29, 1979; B-194360, February 15, 1980. A debt is included in the

discharge if it was listed on the bankrupt's schedule of debts, even though the creditor was not served with notice of the proceedings or had no actual knowledge of them. A debt is discharged even if not listed on the schedule if the creditor has notice or actual knowledge of the proceedings. Failure by the creditor to file a proof of claim will not prevent operation of the discharge as a bar to a claim which is provable and which otherwise would be released. 22 Comp. Gen. 1119, 1120 (1943).

Thus, a debt discharged in bankruptcy cannot be set off against currently payable obligations (such as salary or a new claim) that arose subsequent to the discharge. 45 Comp. Gen. 342 (1965); B-194360, February 15, 1980. Nor may the debt be set off against retirement funds when they become payable. 22 Comp. Gen. 330, supra; 22 Comp. Gen. 1119, supra; B-185731, supra.

Prior to the November 1978 revision of the Bankruptcy Act, GAO had taken the position that a discharge in bankruptcy did not extinguish the debt. It merely provided a legal defense against enforcement, and the decisions frequently noted that a moral obligation to pay continued. E.g., 45 Comp. Gen. 342 (1965); B-192974, March 29, 1979. The Comptroller General had pointed out that this moral obligation should be viewed as particularly strong where the bankrupt continued to receive a Government paycheck, stating in one decision that if the employee did not share this concept of morality:

> "[I]t would appear advisable in the interest of efficient and sound administration of Government affairs that officials of the department in which the person is currently employed be informed of the situation so as to enable them to decide whether it would be in the interest of the United States to permit that type of employee to continue in the service." 22 Comp. Gen. 330, 334 (1942).

The current Bankruptcy Act provides increased protection for debtors. For example, a discharge in bankruptcy "operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2). In addition, a governmental unit may not "deny employment to, terminate the employment of, or discriminate with respect to employment against" a bankrupt. 11 U.S.C. § 525. Senate Report No. 95-989, quoted in the Revision Note following

11 U.S.C. § 524, states, "In effect, the discharge extinguishes the debt * * *." In view of this, except to the extent the right of setoff has been expressly preserved, while it may be true that the debtor retains some sort of "moral obligation," the continuing effect of decisions such as 22 Comp. Gen. 330, supra, must be questioned.

Special instructions for debt collection where the debtor is involved in bankruptcy proceedings are contained in 4 GAO, Chapter 15.

(i) Miscellaneous Cases

The propriety of collection by setoff may come into question in situations other than the preceding categories. Following are miscellaneous cases in which GAO upheld the Government's right of setoff:

--Government claims against insurance companies may be set off against subrogation awards under the Federal Tort Claims Act. If the award is $2,500 or less, the settling agency makes the setoff administratively. If the award exceeds $2,500, GAO makes the setoff in accordance with 31 U.S.C. § 227. B-135984, May 21, 1976.

--Indebtedness resulting from default on a Veterans Administration loan could be set off against back pay payable to the debtor under private relief legislation. B-139924, November 21, 1960.

--Social security payments are subject to setoff. A-89228, April 29, 1938. Also subject to setoff are railroad unemployment insurance benefits. B-10614, August 26, 1940.

--The Railroad Retirement Board could set off amounts owed by railroads under the Railroad Unemployment Insurance Act against reimbursements due to those railroads from the Regional Rail Transportation Protective Account for employee protection payments. 59 Comp. Gen. 143 (1979). (The legislation involved in this case was changed in 1981.)

--Where a lessor failed to repaint the leased premises in violation of the lease, the lessee agency could set off the costs of repainting against lease payments. 48 Comp. Gen. 289 (1968). (This case can be viewed as a variety of contract setoff.)

--Where a lending institution files a claim with the Department of Housing and Urban Development under the mobile home loan insurance program authorized by Title I of the National Housing Act, HUD may set off against allowable payments the amount of unpaid premiums attributable to that claim prior to the date the claim was filed. 56 Comp. Gen. 279 (1977).

--Federal agency may use setoff to collect debt owed by District of Columbia government since D.C. government is not another Federal agency. However, setoff against funds withheld from salaries of agency employees for payment of D.C. income tax is improper on public policy grounds. 60 Comp. Gen. 710 (1981).

(3) Disposition of Amounts Set Off

When an agency (including GAO) makes a setoff, how does the agency account for the amount of the setoff? There are three possibilities: (a) transfer the amount set off to the Treasury as miscellaneous receipts; (b) transfer the amount set off to the credit of some other appropriation or fund; (c) take no action, with the result being that the amount of the setoff remains to the credit of the appropriation used to make the payment against which the debt was set off.

The rule is that a setoff must be accounted for in the same manner as if the debtor had made the payment directly. Whichever of the above three options would apply to a direct payment will apply as well to a setoff.

Thus, if a debt represents tax indebtedness, the amount set off should be paid over to the Internal Revenue Service. See, e.g., B-189125, June 7, 1977; B-187903, December 21, 1976. Similarly, amounts set off against a final contract payment to satisfy a Labor Department claim under the Contract Work Hours and Safety Standards Act should be transferred to GAO for disposition in accordance with that statute. B-181695, April 7, 1975.

If the setoff is not payable to some other agency as in the above examples, again the rule is that the agency must account for the setoff as if the debtor had made the payment directly. Generally, this means that the agency must transfer the amount of the setoff to the Treasury as miscellaneous receipts unless there is statutory authority for retention of the funds, or unless the setoff constitutes a repayment to the appropriation. The agency may not

retain the setoff if it would amount to an unauthorized augmentation of the agency's appropriations. (See Chapter 5, this Manual, for further discussion of the concepts of augmentation and miscellaneous receipts.)

The Comptroller of the Treasury expressed the general principle in 20 Comp. Dec. 349, 351 (1913) as follows:

> "The amount of the claim of the Government against the railroad company for the value of a mule negligently killed is just as much a receipt when deducted from the claim of the railroad company as it would be if collected in cash from some party who had negligently killed the mule and had no claim against the Government from which a set-off could be made. * * * The appropriation benefiting by the set-off should be charged with the amount of the set-off and miscellaneous receipts credited with a like amount."

For a more recent illustration, when an agency sets off a debt owed by an insurance company against a subrogation award under the Federal Tort Claims Act, it cannot simply settle the claim for the difference. It must first settle the tort claim, then pay the net amount, if any, to the insurance company and transfer the amount of the setoff to miscellaneous receipts. B-135984, May 21, 1976. See also 52 Comp. Gen. 45 (1972); 19 Comp. Gen. 88, 90 (1939); 2 Comp. Gen. 599, 600 (1923); 22 Comp. Dec. 703 (1916).

Similarly, receipts collected by setoff from a common carrier for the value of Government property lost or damaged in transit must be credited to miscellaneous receipts. 46 Comp. Gen. 31 (1966); 28 Comp. Gen. 666 (1949). A narrow exception exists in cases where a single appropriation is involved and the freight bill on the shipment of the property damaged or lost exceeds the amounts paid for repairs. 21 Comp. Dec. 632 (1915), as amplified in 8 Comp. Gen. 615 (1929).

Where a debt is collected by setoff against retirement funds, the Office of Personnel Management pays over the amount of the setoff by check from the retirement fund to the agency that made the request. The requesting agency then must dispose of the funds in accordance with the above principles. 35 Comp. Gen. 38 (1955). If the requesting agency is no longer in existence, the check is sent to GAO for disposition. Id., at 39.

D. STATUTES OF LIMITATIONS

The primary statute of limitations on the commencement of actions brought by the United States is 28 U.S.C. § 2415. Enacted in 1966 (Public Law 89-505), this was the first general statute of limitations on civil actions brought by the Government. It is relevant to the administrative debt collection process, obviously, because any referrals to the Justice Department must be made in sufficient time to permit the filing of a lawsuit before the statute runs. The time periods in 28 U.S.C. § 2415 apply with respect to the types of actions specified unless there is some other more specific statute of limitations applicable to a particular case. The statute applies only to actions for money damages.

Subsection (a) of section 2415 covers contract actions. The limitation period for filing a complaint on "any contract express or implied in law or fact" is six years after the right of action accrues, or one year after the final decision in any applicable administrative proceeding required by contract or law, whichever is later.

The subsection contains a proviso to the effect that a later partial payment or written acknowledgment of a debt starts the six-year period running anew. 34/

A 1971 memorandum, B-158275-O.M., December 9, 1971, discussed the date of accrual in several contexts. Thus, in contract default cases, the limitation period begins to run from the date of breach. In an action to recover for delivery of defective goods, the limitation period would commence on the date of delivery if the defects are obvious, and from the time of discovery if the defects are latent at the time of delivery. In actions to recover pension overpayments by the Veterans Administration, the limitation period runs from the date of discovery of the debtor's disqualification. In actions on VA guaranteed loans, the accrual date is the date of the borrower's default. The limitation on debt claims based on a veteran's indemnity obligation runs from the date the Government reimburses the lending institution.

34/ Query: Is this true even where the payment or acknowledgment occurs after the barring period has initially expired? As of late 1981, there were no judicial or Comptroller General decisions on point. However, GAO has informally taken the position, based on the apparent implication of the statutory language, that the proviso would apply.

28 U.S.C. § 2415 does not apply to an action by the United States to enforce a judgment. United States v. Kellum, 523 F.2d 1284 (5th Cir. 1975) (consent judgment); United States v. Johnson, 454 F. Supp. 762 (D. Idaho 1978) (default judgment).

Subsection (b) provides a three-year statute of limitations for tort actions brought by the United States (damage or injury from a wrongful or negligent act). However, certain specified tort actions have a six-year statute of limitations. These are: trespass on Federal land; damages resulting from fire on Federal land; conversion of Federal property; and actions to recover for the diversion of money paid out under a grant program. An action to recover based on the misapplication of social security benefits has been held to be within the grant diversion exception and therefore subject to the six-year limitation. United States v. Dimeo, 371 F. Supp. 95 (N.D. Ga. 1974).

Subsection (c) provides that 28 U.S.C. § 2415 shall not apply to actions to establish the title to, or right of possession of, real or personal property. Thus, no one can acquire title to Government property by adverse posssession.

Subsection (d) provides a six-year limitation period for actions to recover money erroneously paid to or on behalf of any civilian employee of the Government or any member or dependent of the uniformed services. The payment must have been incident to the employment or service. As with the contract limitation discussed above, subsection (d) also provides that a later partial payment or written acknowledgment of the debt will start the clock running anew.

Subsection (e) deals with recommencement of actions. Where an action has been dismissed without prejudice, the Government may recommence the action within one year regardless of whether the action would then otherwise be barred. The defendant in a recommenced action may assert any claims which would not have been barred in the original action.

Subsection (h) excludes from the coverage of 28 U.S.C. § 2415 actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

It is important to emphasize that 28 U.S.C. § 2415 does not cover all actions brought by the United States. As noted above, it is limited to suits to recover money damages and expressly excludes tax suits and suits to establish title to or possession of property. In addition, actions not within

one of the covered categories (contract, tort, or money erroneously paid out), such as certain actions founded on statute, would not be subject to the various limitation periods. See, e.g., B-179245-O.M., August 20, 1973 (action to recover statutory reenlistment bonus which was valid when paid).

The typical statute of limitations contains various tolling provisions--periods of time that are to be excluded in computing the limitation period. The tolling provisions for 28 U.S.C. § 2415 are found in 28 U.S.C. § 2416. There are four general situations which will toll the limitation periods prescribed in 28 U.S.C § 2415: (a) defendant outside the United States; (b) defendant exempt from legal process because of infancy, mental incompetence, or diplomatic immunity; (c) material facts not known and which could not reasonably be known by responsible Government official; and (d) United States in declared state of war. GAO also construes the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 525, as tolling the statute for periods of military service.

In addition to 28 U.S.C. § 2415, there are other statutes of limitations dealing with specific situations. Some of them are as follows:

--31 U.S.C. § 237a: United States waives claim under dual compensation laws if claim has not been reported to GAO for collection within six years from the last date of any period of dual compensation.

--49 U.S.C. § 1502, note (Article 29 of the Warsaw Convention): two-year statute of limitations on loss and damage claims resulting from international air transportation. (Statutes of limitations in transportation matters are covered in detail in the Transportaion Law Manual.)

--31 U.S.C. § 235: six-year statute of limitations for suits under False Claims Act. See Chapter 11 (Part I), Section E, this Manual.

Setoff and the statute of limitations

28 U.S.C. § 2415 expressly preserves the Government's right to assert offsets and counterclaims in actions brought against it. Under 28 U.S.C. § 2415(f), in a suit against the United States, the United States may assert any claim arising out of the same transaction or occurrence. The United States

may also assert, by way of offset, a claim not arising out of the same transaction or occurrence, even if time-barred, but the claim is allowable only in an amount not in excess of the opposing party's recovery.

A related issue is whether the running of a statute of limitations on bringing actions at law precludes administrative setoff. The Comptroller General's position is that it does not, unless the statute expressly provides that running of the time period will extinguish the liability as well as bar the remedy of a lawsuit.

Thus, setoff against a contractor for violations of the Walsh-Healey Act, 41 U.S.C. §§ 35 et seq., is proper even after expiration of the applicable two-year period for filing suit. 33 Comp. Gen. 66 (1953). However, administrative setoff after expiration of the statute of limitations in Article 29 of the Warsaw Convention, noted above, is improper because Article 29 expressly provides that running of the two-year period will extinguish the debt. 54 Comp. Gen. 633 (1975).

The Comptroller General considered the same issue in relation to 28 U.S.C. § 2415 and held that the expiration of a period of limitations under that statute merely bars judicial enforcement but does not preclude subsequent administrative setoff. 58 Comp. Gen. 501 (1979). The decision was based on the statutory language and legislative history. This is in accord with the views of at least one commentator. "The legislative history of new 28 U.S.C. § 2415(f) makes it clear that the permissibility of making administrative setoffs remains unchanged." Sidney B. Jacoby, "The 89th Congress and Government Litigation," 67 Colum. L. Rev. 1212, 1231 (1967). See also Atwater v. Roudebush, 452 F. Supp. 622 (N.D. Ill. 1976). However, the Justice Department has expressed a contrary view. 58 Comp. Gen. 501, supra, at 503-504. GAO supports legislation to make it clear that 28 U.S.C. § 2415 does not bar administrative setoff. 35/

35/ GAO testimony of April 23, 1981, supra, note (24), page 9.