



December 5, 2014

Memorandum

To: Members of the Board

From: Ross Simms, Assistant Director

Through: Wendy M. Payne, Executive Director

Subj: Principles of Federal Appropriations – **TAB B-1**¹

MEETING OBJECTIVE

The objective is to enhance knowledge of federal appropriations law.

BRIEFING MATERIALS

The attachment provides excerpts of *Principles of Federal Appropriations Law*, also known as the *Red Book*.

BACKGROUND

As part of the reporting model project, the Board is focusing on flows and members have expressed an interest in knowing more about federal budget concepts and requirements. The Board has discussed distinguishing government-wide and component level reporting and staff has organized panel discussions on budget matters from both perspectives.

Also, because appropriations are the most common form of budget authority, staff is providing Attachment I: Excerpts of the Red Book. The excerpts provide fundamental concepts regarding the nature of appropriations and their availability and discuss the

¹ The staff prepares Board meeting materials to facilitate discussion of issues at the Board meeting. This material is presented for discussion purposes only; it is not intended to reflect authoritative views of the FASAB or its staff. Official positions of the FASAB are determined only after extensive due process and deliberations

concept of obligation which is important to appropriation law. Appropriations are generally obligated before they are expended.

NEXT STEPS

During the February 2015 meeting, staff plans to continue to discuss draft conceptual guidance.

MEMBER FEEDBACK

If you have any questions or comments, please contact me by telephone at (202) 512-2512 or by email at simmsr@fasab.gov with a cc to paynew@fasab.gov .

Attachment I: Excerpts of the Red Book

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INTRODUCTION

Understanding the legal framework involved in financing component level reporting entities would be helpful in determining information that should be presented in financial statements. Component level reporting entities receive budget authority to enter into obligations and those obligations will result in the outlay of government funds.

Appropriations are the most frequently used form of budget authority and the attached excerpts of *Principles of Federal Appropriations Law* or the *Red Book* provide basic concepts regarding appropriations and other forms of budget authority. Also, Congress controls the use of budget authority through legislation and the excerpts discuss the Antideficiency Act and the recording of obligations. In particular, members may consider matters such as:

- The definition of appropriations on page 3
- The types of appropriations, beginning on page 11
- The availability of appropriations with respect to purpose, beginning on page 15
- The availability of appropriations with respect to time, beginning on page 29
- The availability of appropriations with respect to amount, beginning on page 37
- How Congress controls use of appropriations through the Antideficiency Act, beginning on page 39
- The nature of an obligation, beginning on page 55
- Criteria for recording obligations, beginning on page 59.

Overall, the excerpts discuss the framework for controlling component level spending of budget authority. The framework is not intended to provide insights on the resources accumulated; how those resources are being managed; or the impact of past transactions on existing or future resources.

The Legal Framework

A. Appropriations and Related Terminology

1. Introduction

The reader will find it useful to have a basic understanding of certain appropriations law terminology that will be routinely encountered throughout this publication. Some of our discussion will draw upon definitions that have been enacted into law for application in various budgetary contexts. Other definitions are drawn from custom and usage in the budget and appropriations process, in conjunction with administrative and judicial decisions.

In addition, 31 U.S.C. § 1112(c), previously noted in Chapter 1, requires the Comptroller General, in cooperation with the Treasury Department, Office of Management and Budget, and Congressional Budget Office, to maintain and publish standard terms and classifications for “fiscal, budget, and program information,” giving particular consideration to the needs of the congressional budget, appropriations, and revenue committees. Federal agencies are required by 31 U.S.C. § 1112(d) to use this standard terminology when providing information to Congress.

The terminology developed pursuant to this authority is published in a GAO booklet entitled *A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Washington, D.C.: Jan. 1993) [hereinafter *Glossary*]. Unless otherwise noted, the terminology used throughout this publication is based on the *Glossary*.¹ The following sections present some of the more important terminology in the budget and appropriations process. Many other terms will be defined in the chapters that deal specifically with them.

2. Concept and Types of Budget Authority

Congress finances federal programs and activities by providing “budget authority.” Budget authority is a general term referring to various forms of authority provided by law to enter into financial obligations that will result

¹ The Office of Management and Budget adopted these definitions in OMB Circular No. A-11, *Preparation, Submission and Execution of the Budget* (July 25, 2003).

in immediate or future outlays of government funds. As defined by the Congressional Budget Act, “budget authority” includes:

“(i) provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections;

“(ii) borrowing authority, which means authority granted to a Federal entity to borrow and obligate and expend the borrowed funds, including through the issuance of promissory notes or other monetary credits;

“(iii) contract authority, which means the making of funds available for obligation but not for expenditure; and

“(iv) offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority.

“The term includes the cost for direct loan and loan guarantee programs, as those terms are defined by [the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13201(a)].”²

a. Appropriations

Appropriations are the most common form of budget authority. As we have seen in Chapter 1 in our discussion of the congressional “power of the purse,” the Constitution prohibits the withdrawal of money from the Treasury unless authorized in the form of an appropriation enacted by Congress.³ Thus, funds paid out of the United States Treasury must be

² Section 3(2) of the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 622(2) and note, as amended by the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 13201(b) and 13211(a), 104 Stat. 1388, 1388-614 and 1388-620 (Nov. 5, 1990). Prior to the Congressional Budget Act, the term “obligational authority” was frequently used instead of budget authority.

³ The Constitution does not specify precisely what assets comprise the “Treasury” of the United States. An important statute in this regard is 31 U.S.C. § 3302(b), discussed in detail in Chapter 6, which requires that, unless otherwise provided, a government agency must deposit any funds received from sources other than its appropriations in the general fund of the Treasury, where they are then available to be appropriated as Congress may see fit.

accounted for by charging them to an appropriation provided by or derived from an act of Congress.

The term “appropriation” may be defined as:

“Authority given to federal agencies to incur obligations and to make payments from Treasury for specified purposes.”⁴

While other forms of budget authority may authorize the incurring of obligations, the authority to incur obligations by itself is not sufficient to authorize payments from the Treasury. *See, e.g., National Ass’n of Regional Councils v. Costle*, 564 F.2d 583, 586 (D.C. Cir. 1977); *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966). Thus, at some point if obligations are paid, they are paid by and from an appropriation. Section B.1 of this chapter discusses in more detail precisely what types of statutes constitute appropriations.

Appropriations do not represent cash actually set aside in the Treasury. They represent legal authority granted by Congress to incur obligations and to make disbursements for the purposes, during the time periods, and up to the amount limitations specified in the appropriation acts. *See United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284 (4th Cir. 2002).

Appropriations are identified on financial documents by means of “account symbols,” which are assigned by the Treasury Department, based on the number and types of appropriations an agency receives and other types of funds it may control. An appropriation account symbol is a group of numbers, or a combination of numbers and letters, which identifies the agency responsible for the account, the period of availability of the appropriation, and the specific fund classification. Detailed information on reading and identifying account symbols is contained in the *Treasury Financial Manual* (I TFM 2-1500). Specific accounts for each agency are listed in a publication entitled *Federal Account Symbols and Titles*, issued quarterly as a supplement to the TFM.

⁴ *Glossary* at 21; *Andrus v. Sierra Club*, 442 U.S. 347, 359 n.18 (1979). *See also* 31 U.S.C. §§ 701(2) and 1101(2).

b. Contract Authority

Contract authority is a form of budget authority that permits obligations to be incurred in advance of appropriations. *Glossary* at 22. It is to be distinguished from the inherent authority to enter into contracts possessed by every government agency, but which depends on the availability of funds.

Contract authority itself is not an appropriation; it provides the authority to enter into binding contracts but not the funds to make payments under them. Therefore, contract authority must be funded (or, in other words, the funds needed to liquidate obligations under the contracts must be provided) by a subsequent appropriation (called a “liquidating appropriation”) or by the use of receipts or offsetting collections authorized for that purpose. *See PCL Construction Service, Inc. v. United States*, 41 Fed. Cl. 242 (1998); *National Ass’n of Regional Councils v. Costle*, 564 F.2d 583, 586 (D.C. Cir. 1977); B-300167, Nov. 15, 2002; B-228732, Feb. 18, 1988.

Contract authority may be provided in appropriation acts (*e.g.*, B-174839, Mar. 20, 1984) or, more commonly, in other types of legislation (*e.g.*, B-228732, Feb. 18, 1988). Either way, the authority must be specific. 31 U.S.C. § 1301(d). As we noted in Chapter 1, one of the objectives of the Congressional Budget and Impoundment Control Act of 1974 was to provide increased control by the appropriations process over various forms of so-called “backdoor spending” such as contract authority. To this end, legislation providing new contract authority will be subject to a point of order in either the Senate or the House of Representatives unless it also provides that the new authority will be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation acts. 2 U.S.C. § 651(a).

Contract authority has a “period of availability” analogous to that for an appropriation. Unless otherwise specified, if it appears in an appropriation act in connection with a particular appropriation, its period of availability will be the same as that for the appropriation. If it appears in an appropriation act without reference to a particular appropriation, its period of availability, again unless otherwise specified, will be the fiscal year covered by the appropriation act. 32 Comp. Gen. 29, 31 (1952); B-76061, May 14, 1948. *See Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 331 n.4 (1999); *Costle*, 564 F.2d at 587–88. This period of availability refers to the time period during which the contracts must be entered into.

As noted above, appropriations constitute budget authority. An appropriation to liquidate contract authority, however, is not new budget authority, since contract authority itself constitutes new budget authority. This treatment is necessary to avoid counting the amounts twice. B-171630, Aug. 14, 1975.

Since the contracts entered into pursuant to contract authority constitute obligations binding on the United States, Congress has little practical choice but to make the necessary liquidating appropriations. B-228732, Feb. 18, 1988; B-226887, Sept. 17, 1987. As the Supreme Court has put it:

“The expectation is that appropriations will be automatically forthcoming to meet these contractual commitments. This mechanism considerably reduces whatever discretion Congress might have exercised in the course of making annual appropriations.”

Train v. City of New York, 420 U.S. 35, 39 n.2 (1975). A failure or refusal by Congress to make the necessary appropriation would not defeat the obligation, and the party entitled to payment would most likely be able to recover in a lawsuit. *E.g.*, B-211190, Apr. 5, 1983.

c. Borrowing Authority

“Borrowing authority” is authority that permits agencies to incur obligations and make payments to liquidate the obligations out of borrowed moneys.⁵ Borrowing authority may consist 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 directly from the public (authority to sell agency debt securities), (c) authority to borrow from (sell agency debt securities to) the Federal Financing Bank, or (d) some combination of the above.

Borrowing from the Treasury is the most common form and is also known as “public debt financing.” As a general proposition, GAO has traditionally expressed a preference for financing through direct appropriations on the grounds that the appropriations process provides enhanced congressional control. *E.g.*, B-301397, Sept. 4, 2003; B-141869, July 26, 1961. The Congressional Budget Act met this concern to an extent by requiring generally that new borrowing authority, as with new contract authority, be

⁵ *Glossary* at 22.

limited to the extent or amounts provided in appropriation acts. 2 U.S.C. § 651(a). GAO has recommended that borrowing authority be provided only to those accounts that can generate enough revenue in the form of collections from nonfederal sources to repay their debt. U.S. General Accounting Office, *Budget Issues: Budgeting for Federal Capital*, GAO/AIMD-97-5 (Washington, D.C.: Nov. 12, 1996); *Budget Issues: Agency Authority to Borrow Should Be Granted More Selectively*, GAO/AFMD-89-4 (Washington, D.C.: Sept. 15, 1989).⁶ On occasion, however, GAO has recommended borrowing authority when supplemental appropriations might otherwise be necessary. See U.S. General Accounting Office, *Aviation Insurance: Federal Insurance Program Needs Improvements to Ensure Success*, GAO/RCED-94-151 (Washington, D.C.: July 15, 1994).

d. Monetary Credits

A type of borrowing authority specified in the expanded definition of budget authority contained in the Omnibus Budget Reconciliation Act of 1990 is monetary credits. The monetary credit is a relatively uncommon concept in government transactions. At the present time, it exists mostly in a handful of statutes authorizing the government to use monetary credits to acquire property such as land or mineral rights. Examples are the Rattlesnake National Recreation Area and Wilderness Act of 1980, discussed in 62 Comp. Gen. 102 (1982), and the Cranberry Wilderness Act, discussed in B-211306, Apr. 9, 1984.⁷

Under the monetary credit procedure, the government does not issue a check in payment for the acquired property. Instead, it gives the seller “credits” in dollar amounts reflecting the purchase price. The holder may then use these credits to offset or reduce amounts it owes the government in other transactions that may, depending on the terms of the governing legislation, be related or unrelated to the original transaction. The statute may use the term “monetary credit” (as in the Cranberry legislation) or

⁶ If an agency cannot repay with external collections, it must either extend its debt with new borrowings, seek appropriations to repay the debt, or seek to have the debt forgiven by statute. Repayment from external collections is the only alternative that reimburses the Treasury in any meaningful sense. See GAO/AFMD-89-4 at 17, 20.

⁷ These and other examples are noted in the report: U.S. General Accounting Office, *Budget Treatment of Monetary Credits*, GAO/AFMD-85-21 (Washington, D.C.: Apr. 8, 1985). For more recent examples, see Mount St. Helens National Volcanic Monument Completion Act, Pub. L. No. 105-279, 112 Stat. 2690 (Oct. 23, 1998); Kentucky National Forest Land Transfer Act of 2000, Pub. L. No. 106-429, app. A-1, 114 Stat. 1900, 1900A-71 (Nov. 6, 2000); and Pueblo of Acoma Land and Mineral Consolidation, Pub. L. No. 107-138, 116 Stat. 6 (Feb. 6, 2002).

some other designation such as “bidding rights” (as in the Rattlesnake Act). Where this procedure is authorized, the acquiring agency does not need to have appropriations or other funds available to cover the purchase price because no cash disbursement is made. An analogous device authorized for use by the Commodity Credit Corporation is “commodity certificates.”⁸

The inclusion of monetary credits as budget authority has the effect of making them subject to the appropriation controls of the Congressional Budget Act, such as the requirements of 2 U.S.C. § 651.

e. Offsetting Receipts

The federal government receives money from numerous sources and in numerous contexts. For budgetary purposes, collections are classified in two major categories, governmental receipts and offsetting collections.⁹

Governmental receipts or budget receipts are collections resulting from the government’s exercise of its sovereign or regulatory powers. Examples are tax receipts, customs duties, and court fines. Collections in this category are deposited in receipt accounts and are compared against total outlays for purposes of calculating the budget surplus or deficit.

Offsetting collections are collections resulting from business-type or market-oriented activities, such as the sale of goods or services to the public, and intragovernmental transactions. Their budgetary treatment differs from governmental receipts in that they are offset against (deducted from or “netted against”) budget authority in determining total outlays. Offsetting collections are also divided into two major categories.¹⁰

First is *offsetting collections credited to appropriation or fund accounts*. These are collections which, under specific statutory authority, may be deposited in an appropriation or fund account under the control of the receiving agency and which are then available for obligation by the agency subject to the purpose and time limitations of the receiving account.

⁸ See U.S. General Accounting Office, *Farm Payments: Cost and Other Information on USDA’s Commodity Certificates*, GAO/RCED-87-117BR (Mar. 26, 1987).

⁹ See Glossary at 22, 27–29.

¹⁰ See U.S. General Accounting Office, *Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues*, GAO/AIMD-98-11 (Dec. 19, 1997).

Second is *offsetting receipts*. Offsetting receipts are offsetting collections that are deposited in a receipt account.¹¹ For budgetary purposes, these amounts are deducted from budget authority by function or subfunction and by agency.¹²

The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (Dec. 12, 1985), first addressed the budgetary treatment of offsetting receipts by adding the authority “to collect offsetting receipts” to the definition of budget authority. The expanded definition in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (Nov. 5, 1990), is more explicit. The authority to obligate and expend the proceeds of offsetting receipts and collections is treated as negative budget authority. In addition, the reduction of offsetting receipts or collections (*e.g.*, legislation authorizing an agency to forego certain collections) is treated as positive budget authority.¹³

f. Loan and Loan Guarantee Authority

A loan guarantee is any guarantee, insurance, or other pledge with respect to the payment of all or a part of the principal or interest on any debt obligation of a nonfederal borrower to a nonfederal lender.¹⁴ The government does not know whether or to what extent it may be required to honor the guarantee until there has been a default. Loan guarantees are contingent liabilities that may not be recorded as obligations until the contingency occurs. *See* 64 Comp. Gen. 282, 289 (1985); B-290600, July 10, 2002. *See also* Chapter 11.

Prior to legislation enacted in November 1990, loan guarantees were expressly excluded from the definition of budget authority. Budget authority was created only when an appropriation to liquidate loan guarantee authority was made.

¹¹ This usually means a general fund receipt account (miscellaneous receipts), but also includes amounts deposited in special or trust fund accounts. *See American Medical Ass’n v. Reno*, 857 F. Supp. 80 (D.D.C. 1994); B-199216, July 21, 1980.

¹² H.R. Conf. Rep. No. 99-433, at 102 (1985). This is the conference report on the Balanced Budget and Emergency Deficit Control Act of 1985.

¹³ This was the intent of the 1985 legislation, as reflected in the conference report, *supra*, although it had not been expressed in the legislation itself.

¹⁴ *Glossary* at 50–51.

Statutory reform of the budgetary treatment of federal credit programs came about in two stages. First, the Balanced Budget and Emergency Deficit Control Act of 1985 added a definition of “credit authority” to the Congressional Budget Act, specifically, “authority to incur direct loan obligations or to incur primary loan guarantee commitments.” 2 U.S.C. § 622(10).¹⁵ Any bill, resolution, or conference report providing new credit authority will be subject to a point of order unless the new authority is limited to the extent or amounts provided in advance in appropriation acts. 2 U.S.C. § 651(a).¹⁶

The second stage was the Federal Credit Reform Act of 1990,¹⁷ effective starting with fiscal year 1992. Under this legislation, the “cost” of loan and loan guarantee programs is budget authority. Cost means the estimated long-term cost to the government of a loan or loan guarantee (defaults, delinquencies, interest subsidies, *etc.*), calculated on a net present value basis, excluding administrative costs. Except for entitlement programs (the statute notes the guaranteed student loan program and the veterans’ home loan guaranty program as examples) and certain Commodity Credit Corporation programs, new loan guarantee commitments may be made only to the extent budget authority to cover their costs is provided in advance or other treatment is specified in appropriation acts. Appropriations of budget authority are to be made to “credit program accounts,” and the programs administered from revolving nonbudgetary “financing accounts.”

The Federal Credit Reform Act reflects the thrust of proposals by GAO, the Office of Management and Budget, the Congressional Budget Office, and the Senate Budget Committee. See U.S. General Accounting Office, *Credit Reform: U.S. Needs Better Method for Estimating Cost of Foreign Loans and Guarantees*, GAO/NSIAD/GGD-95-31 (Washington, D.C.: Dec. 19, 1994); *Credit Reform: Case-by-Case Assessment Advisable in Evaluating*

¹⁵ The statute does not further define the term “primary loan guarantee.”

¹⁶ This is the same control device we have previously noted for contract authority and borrowing authority. Although loan guarantee authority was not viewed as budget authority in 1985, the apparent rationale was that the control, if it is to be employed, must apply at the authorization stage because the opportunity for control no longer exists by the time liquidating budget authority becomes necessary. An example of a statute including this language is discussed in B-230951, Mar. 10, 1989.

¹⁷ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13201(a), 104 Stat. 1388, 1388-609 (Nov. 5, 1990).

Coverage and Compliance, GAO/AIMD-94-57 (Washington, D.C.: July 28, 1994). See also U.S. General Accounting Office, *Budget Issues: Budgetary Treatment of Federal Credit Programs*, GAO/AFMD-89-42 (Washington, D.C.: Apr. 10, 1989) (discussion of the “net present value” approach to calculating costs).

3. Some Related Concepts

a. Spending Authority

The Congressional Budget Act of 1974 introduced the concept of “spending authority.” The term is a collective designation for authority provided in laws other than appropriation acts to obligate the United States to make payments. It includes, to the extent budget authority is not provided in advance in appropriation acts, permanent appropriations (such as authority to spend offsetting collections), the nonappropriation forms of budget authority described above (*e.g.*, contract authority, borrowing authority, and authority to forego collection of offsetting receipts), entitlement authority, and any other authority to make payments. 2 U.S.C. § 651(c)(2). The different forms of spending authority are subject to varying controls in the budget and appropriations process. See Chapter 1, sections C and D. For example, as noted previously, proposed legislation providing new contract authority or new borrowing authority will be subject to a point of order unless it limits the new authority to such extent or amounts as provided in appropriation acts.

Further information on spending authority may be found in two 1987 GAO companion reports—one a summary presentation¹⁸ and the other a detailed inventory¹⁹—as well as in more recent updates.²⁰

¹⁸ U.S. General Accounting Office, *Budget Issues: The Use of Spending Authority and Permanent Appropriations Is Widespread*, GAO/AFMD-87-44 (Washington, D.C.: July 17, 1987).

¹⁹ U.S. General Accounting Office, *Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations, 1987*, GAO/AFMD-87-44A (Washington, D.C.: July 17, 1987).

²⁰ U.S. General Accounting Office, *Updated 1987 Inventory of Accounts with Spending Authority and Permanent Appropriations*, GAO/OGC-98-23 (Washington, D.C.: Jan. 19, 1998); *Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations, 1996*, GAO/AIMD-96-79 (Washington, D.C.: May 31, 1996).

b. Entitlement Authority

Entitlement authority is statutory authority, whether temporary or permanent,

“to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriation Acts, to any person or government if, under the provisions of the law containing that authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by that law.”²¹

Entitlement authority is treated as spending authority during congressional consideration of the budget. In order to make entitlements subject to the reconciliation process, the Congressional Budget Act provides that proposed legislation providing new entitlement authority to become effective prior to the start of the next fiscal year will be subject to a point of order. 2 U.S.C. § 651(b)(1). Entitlement legislation, which would require new budget authority in excess of the allocation made pursuant to the most recent budget resolution, must be referred to the appropriations committees. *Id.* § 651(b)(2).

4. Types of Appropriations

Appropriations are classified in different ways for different purposes. Some are discussed elsewhere in this publication.²² The following classifications, although phrased in terms of appropriations, apply equally to the broader concept of budget authority.

a. Classification Based on Duration²³

1. *One-year appropriation*: An appropriation that 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.

²¹ 2 U.S.C. § 622(9)(A); *Glossary* at 44.

²² Supplemental and deficiency appropriations are discussed in Chapter 6, section D; lump-sum and line-item appropriations in Chapter 6, section F; and continuing resolutions in Chapter 8.

²³ *Glossary* at 22–23.

2. *Multiple year appropriation*: An appropriation that is available for obligation for a definite period of time in excess of one fiscal year.
 3. *No-year appropriation*: An appropriation that is available for obligation for an indefinite period. A no-year appropriation is usually identified by appropriation language such as “to remain available until expended.”
- b. Classification Based on Presence or Absence of Monetary Limit²⁴
1. *Definite appropriation*: An appropriation of a specific amount of money.
 2. *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.
- c. Classification Based on Permanency²⁵
1. *Current appropriation*: An appropriation made by Congress in, or immediately prior to, the fiscal year or years during which it is available for obligation.
 2. *Permanent appropriation*: A “standing” appropriation which, once made, is always available for specified purposes and does not require repeated action by Congress to authorize its use.²⁶ Legislation authorizing an agency to retain and use offsetting receipts tends to be permanent; if so, it is a form of permanent appropriation.

²⁴ Glossary at 22.

²⁵ Glossary at 24.

²⁶ This is similar to a no-year appropriation except that a no-year appropriation will be closed if there are no disbursements from the appropriation for two consecutive fiscal years, and if the head of the agency or the President determines that the purposes for which the appropriation was made have been carried out. 31 U.S.C. § 1555. In actual usage, the term “permanent appropriation” tends to be used more in reference to appropriations contained in permanent legislation, such as legislation establishing a revolving fund, while “no-year appropriation” is used more to describe appropriations found in appropriation acts.

d. Classification Based on Availability for New Obligations²⁷

1. *Current or unexpired appropriation*: An appropriation that is available for incurring new obligations.
2. *Expired appropriation*: An appropriation that is no longer available to incur new obligations, although it may still be available for the recording and/or payment (liquidation) of obligations properly incurred before the period of availability expired.
3. *Canceled appropriation*: An appropriation whose account is closed, and is no longer available for obligation or expenditure for any purpose.

An appropriation may combine characteristics from more than one of the above groupings. For example, a “permanent indefinite” appropriation is open ended as to both period of availability and amount. Examples are 31 U.S.C. § 1304 (payment of certain judgments against the United States) and 31 U.S.C. § 1322(b)(2) (refunding amounts erroneously collected and deposited in the Treasury).

e. Reappropriation

The term “reappropriation” means congressional action to continue the availability, whether for the same or different purposes, of all or part of the unobligated portion of budget authority that has expired or would otherwise expire. Reappropriations are counted as budget authority in the first year for which the availability is extended.²⁸

B. Some Basic Concepts

1. What Constitutes an Appropriation

The starting point is 31 U.S.C. § 1301(d), which provides:

“A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the

²⁷ *Glossary* at 24. See also our discussion of the disposition of appropriation balances in Chapter 5, section D.

²⁸ *Glossary* at 23. See also 31 U.S.C. § 1301(b) (reappropriation for a different purpose is to be accounted for as a new appropriation).

Availability of Appropriations: Purpose

A. General Principles

1. Introduction: 31 U.S.C. § 1301(a)

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

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

Thus, there are three elements to the concept of availability: purpose, time, and amount. All three must be observed for the obligation or expenditure to be legal. Availability as to time and amount will be covered in Chapters 5 and 6. This chapter discusses availability as to purpose.

One of the fundamental statutes dealing with the use of appropriated funds is 31 U.S.C. § 1301(a):

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

Simple, concise, and direct, this statute was originally enacted in 1809 (ch. 28, § 1, 2 Stat. 535, (Mar. 3, 1809)) and is one of the cornerstones of congressional control over the federal purse. Because money cannot be paid from the Treasury except under an appropriation (U.S. Const. art. I, § 9, cl. 7), and because an appropriation must be derived from an act of Congress, it is for Congress to determine the purposes for which an appropriation may be used. Simply stated, 31 U.S.C. § 1301(a) says that public funds may be used only for the purpose or purposes for which they were appropriated. It prohibits charging authorized items to the wrong appropriation, and unauthorized items to any appropriation. Anything less

would render congressional control largely meaningless. An earlier Treasury Comptroller was of the opinion that the statute did not make any new law, but merely codified what was already required under the Appropriations Clause of the Constitution. 4 Lawrence, First Comp. Dec. 137, 142 (1883).

Administrative applications of the purpose statute can be traced back almost to the time the statute was enacted. See, for example, 36 Comp. Gen. 621, 622 (1957), which quotes part of a decision dated February 21, 1821. In an 1898 decision captioned “Misapplication of Appropriations,” the Comptroller of the Treasury talked about 31 U.S.C. § 1301(a) 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. § 1301(a) is that, absent a clear indication to the contrary, the common meaning of the words in the appropriation act and the program legislation it funds governs the purposes to which the appropriation may be applied. To illustrate, 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. Similarly, funds provided for the modification of existing dams for safety purposes could not be used to construct a new dam, even as part of an overall safety strategy. B-215782, Apr. 7, 1986.

If a proposed use of funds is inconsistent with the statutory language, the expenditure is improper, even if it would result in substantial savings or other benefits to the government. Thus, while the Federal Aviation Administration (FAA) could construct its own roads needed for access to FAA facilities, it could not contribute a share for the improvement of county-owned roads, even though the latter undertaking would have been much less expensive. B-143536, Aug. 15, 1960. *See also* 39 Comp. Gen. 388 (1959).

The limitation in 31 U.S.C. § 1301(a) applies to revolving funds. GAO has held that revolving funds are appropriations, and, accordingly, that the

legal principles governing appropriations also apply to revolving funds. *See* B-247348, June 22, 1992; B-240914, Aug. 14, 1991. *See also* 63 Comp. Gen. 110, 112 (1983), and decisions cited therein.

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

- A specific appropriation must be used to the exclusion of a more general appropriation that might otherwise have been viewed as available for the particular item. Chapter 2, section B.2.
- Transfer between appropriations is prohibited without specific statutory authority, even where reimbursement is contemplated. Chapter 2, section B.3.

It follows that deliberately charging the wrong appropriation for purposes of expediency or administrative convenience, with the expectation of rectifying the situation by a subsequent transfer from the right appropriation, violates 31 U.S.C. § 1301(a). 36 Comp. Gen. 386 (1956); 26 Comp. Gen. 902, 906 (1947); 19 Comp. Gen. 395 (1939); 14 Comp. Gen. 103 (1934); B-248284.2, Sept. 1, 1992; B-104135, Aug. 2, 1951; B-97772, May 18, 1951.¹ The fact that the expenditure would be authorized under some other appropriation is irrelevant. Charging the “wrong” appropriation, unless authorized by some statute such as 31 U.S.C. § 1534, violates the purpose statute. For several examples, see U.S. General Accounting Office, *Improper Accounting for Costs of Architect of the Capitol Projects*, PLRD-81-4 (Washington, D.C.: Apr. 13, 1981).

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

¹The situation dealt with in B-97772 and B-104135, advances of travel expenses to government employees serving as witnesses, is now authorized by 5 U.S.C. § 5751.

Although every violation of 31 U.S.C. § 1301(a) is not automatically a violation of the Antideficiency Act, and every violation of the Antideficiency Act is not automatically a violation of 31 U.S.C. § 1301(a), cases frequently involve elements of both. Thus, an expenditure in excess of an available appropriation violates both statutes. The reason the purpose statute is violated is that, unless the disbursing officer used personal funds, he or she must necessarily have used money appropriated for other purposes. 4 Comp. Dec. 314, 317 (1897). The relationship between purpose violations and the Antideficiency Act is explored further in Chapter 6.

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

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

2. Determining Authorized Purposes

a. 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, it may also be necessary to consult the legislation authorizing the appropriation, if any, and 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 one or more purposes in the sense that Congress does not provide money for an agency to do with as it pleases, although purposes

are stated with varying degrees of specificity. One end of the spectrum is illustrated by 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.

This is one extreme. There is no need to look beyond the language of the appropriation; it was available to pay \$148 to George H. Lott, and for absolutely nothing else. Language this specific leaves no room for administrative discretion. For example, the Comptroller General has held that language of this type 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, Aug. 26, 1964.

At the other extreme, smaller agencies may receive only one appropriation. The purpose of the appropriation will be to enable the agency to carry out all of its various authorized functions. For example, the Consumer Product Safety Commission receives but a single appropriation “for necessary expenses of the Consumer Product Safety Commission.”² To determine permissible expenditures under this type of appropriation, it would be necessary to examine all of the agency’s substantive legislation, in conjunction with the “necessary expense” doctrine discussed later in this chapter.

Between the two extremes are many variations. A common form of appropriation funds a single program. For example, the Interior Department receives a separate appropriation to carry out the Payments in Lieu of Taxes Act (PILT), 31 U.S.C. § 6901–6904.³ While the appropriation is specific in the sense that it is limited to PILT payments and associated

² *E.g.*, Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2003, Pub. L. No. 108-7, div. K, 117 Stat. 11, 474, 506 (Feb. 20, 2003).

³ *E.g.*, Department of the Interior and Related Agencies Appropriations Act, 2003, Pub. L. No. 108-7, div. F, title I, 117 Stat. 11, 216, 218 (Feb. 20, 2003) (“For expenses necessary to implement the Act of October 20, 1976 . . ., \$220,000,000, of which not to exceed \$400,000 shall be available for administrative expenses.”).

administrative expenses, it is nevertheless necessary to look beyond the appropriation language and examine the PILT statute to determine authorized expenditures.

Once the purposes have been determined by examining the various pieces of legislation, 31 U.S.C. § 1301(a) comes into play to restrict the use of the appropriation to these purposes only, together with one final generic category of payments—payments authorized under general legislation applicable to all or a defined group of agencies and not requiring specific appropriations. For example, legislation enacted in 1982 amended 12 U.S.C. § 1770 to authorize federal agencies to provide various services, including telephone service, to employee credit unions. Pub. L. No. 97-320, § 515, 96 Stat. 1469, 1530 (Oct. 15, 1982). Prior to this legislation, an agency would have violated 31 U.S.C. § 1301(a) by providing telephone service to a credit union, even on a reimbursable basis, because this was not an authorized purpose under any agency appropriation. 60 Comp. Gen. 653 (1981). The 1982 amendment made the providing of special services to credit unions an authorized agency function, and hence an authorized purpose, which it could fund from unrestricted general operating appropriations. 66 Comp. Gen. 356 (1987). Similarly, a recently enacted statute gives agencies the discretion to use appropriated funds to pay the expenses their employees incur for obtaining professional credentials. 5 U.S.C. § 5757(a). *See also* B-289219, Oct. 29, 2002. Prior to this legislation, agencies could not use appropriated funds to pay fees incurred by their employees in obtaining professional credentials. *See, e.g.*, 47 Comp. Gen. 116 (1967). Other examples are interest payments under the Prompt Payment Act (31 U.S.C. §§ 3901-3907) and administrative settlements less than \$2,500 under the Federal Tort Claims Act (28 U.S.C. §§ 2671 *et seq.*).

b. Specific Purpose Stated in
Appropriation Act

Where an appropriation specifies the purpose for which the funds are to be used, 31 U.S.C. § 1301(a) applies in its purest form to restrict the use of the funds to the specified purpose. For example, an appropriation for topographical surveys in the United States was not available for topographical surveys in Puerto Rico. 5 Comp. Dec. 493 (1899). Similarly, an appropriation to install an electrical generating plant in the customhouse building in Baltimore could not be used to install the plant in a nearby post office building, even though the plant would serve both buildings and thereby reduce operating expenses. 11 Comp. Dec. 724 (1905). An appropriation for the extension and remodeling of the State Department building was not available to construct a pneumatic tube delivery system between the State Department and the White House. 42 Comp. Gen. 226 (1962). In another example involving a line-item

appropriation for a grant project, because the funds were made available for a specific grantee in a specific amount to accomplish a specific purpose, the agency could not grant less than Congress has directed by using some of the appropriation to pay its administrative costs. 72 Comp. Gen. 317 (1993); 69 Comp. Gen. 660, 662 (1990). And, as noted previously, an appropriation for the “replacement” of state roads could not be used to make improvements on them. 41 Comp. Gen. 255 (1961).

It is well settled, but warrants repeating, that even an expenditure that may be reasonably related to a general appropriation may not be paid out of that appropriation where the expenditure falls specifically within the scope of another appropriation. 63 Comp. Gen. 422 (1984); B-300325, Dec. 13, 2002; B-290005, July 1, 2002. It is also well settled that when two appropriations are available for the same purpose, the agency must select which to use, and that once it has made an election, the agency must continue to use the same appropriation for that purpose unless the agency, at the beginning of the fiscal year, informs Congress of its intent to change for the next fiscal year. B-272191, Nov. 4, 1997. *See also*, 68 Comp. Gen. 337 (1989); 59 Comp. Gen. 518 (1980). An exception to this requirement is when Congress specifically authorizes the use of two appropriation accounts. B-272191, *supra* (statutory language makes clear that Congress intended that the “funds appropriated to the Secretary [of the Army] for operation and maintenance” in the fiscal year 1993 Defense Appropriations Act are “[i]n addition to ...the funds specifically appropriated for real property maintenance under the heading [RPM,D]” in that appropriation act).

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 U.S. 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. § 1301(a). The Roads and Trails appropriation could be used for only those landing fields 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), Feb. 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 because 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.

A 1955 case illustrates a type of expenditure that could properly be charged to the Roads and Trails account. Construction of a timber access road on a national forest uncovered a site of old Indian ruins. Since the road construction itself was properly chargeable to the Roads and Trails appropriation, the Forest Service could use the same appropriation to pay the cost of archaeological and exploratory work necessary to obtain and preserve historical data from the ruins before they were destroyed by the

construction. (Rerouting was apparently not possible.) B-125309, Dec. 6, 1955.⁴

In any case, an appropriation serves as a limitation, or more accurately, a series of limitations relating to time and amount in addition to purpose. In some situations, an appropriation is simultaneously a grant of authority. For example, 5 U.S.C. § 3109 authorizes agencies to procure the services of experts and consultants, but only “[w]hen authorized by an appropriation or other statute.” In contrast with the statute authorizing services for credit unions noted earlier, 5 U.S.C. § 3109 by itself does not authorize an agency to spend general operating appropriations to hire consultants. Unless an agency has received this authority somewhere in its permanent legislation, the hiring of consultants under section 3109 is an authorized purpose only if it is specified in the agency’s appropriation act.

3. New or Additional Duties

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

The rule is that existing agency appropriations that 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, in the earliest published decision cited for the rule, the Comptroller General held that the Securities and Exchange Commission could use its general operating appropriation for fiscal year 1936 to

⁴ 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, 16 U.S.C. §§ 470aa *et seq.*

perform additional duties imposed on it by the later enacted Public Utility Holding Company Act of 1935 (49 Stat. 803 (Aug. 26, 1935)). 15 Comp. Gen. 167 (1935).

Similarly, the Interior Department could use its 1979 “Departmental Management” appropriation to begin performing duties imposed by the Public Utilities Regulatory Policies Act of 1978,⁵ and to provide reimbursable support costs for the Endangered Species Committee and Review Board created by the Endangered Species Act Amendments of 1978.⁶ Both statutes were enacted after the Interior Department’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); 30 Comp. Gen. 258 (1951). Additional cases are 30 Comp. Gen. 205 (1950); B-290011, Mar. 25, 2002; B-211306, June 6, 1983; B-153694, Oct. 23, 1964.

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, 19 U.S.C. §§ 1901–1920 (1970), was transferred to a similar but new program by the Trade Act of 1974.⁷ 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 Commerce Department’s functions under the 1974 act. Applying the rationale of the later-imposed duty cases, the Comptroller General concluded that the purposes of the two programs were sufficiently related so that the Commerce Department could continue to use the transferred funds to make collateral protection payments and to honor guarantees made under the 1962 act.

A related question is the extent to which an agency may use current appropriations for preliminary administrative expenses in preparation for

⁵Pub. L. No. 95-617, 92 Stat. 3117 (Nov. 9, 1978), *codified at* 43 U.S.C. §§ 2001 *et seq.*

⁶Pub. L. No. 95-632, 92 Stat. 3751 (Nov. 10, 1978), *codified at* 16 U.S.C. §§ 1536 *et seq.*

⁷Pub. L. No. 93-618, § 602(e), 88 Stat. 1978, 2072 (Jan. 3, 1975).

implementing a new law, prior to the receipt of substantive appropriations for the new program. Again, the appropriation is available provided it is sufficiently broad to embrace expenditures of the type contemplated. Thus, the National Science Foundation could use its fiscal year 1967 appropriations for preliminary expenses of implementing the National Sea Grant College and Program Act of 1966,⁸ 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). The preliminary tasks in that case included such things as development of policies and plans, issuance of internal instructions, and the establishment of organizational units to administer the new program.

Similarly, the Bureau of Land Management could use current appropriations to determine fair market value and to initiate negotiations with owners in connection with the acquisition of mineral interests under the Cranberry Wilderness Act,⁹ even though actual acquisitions could not be made until funding was provided in appropriation acts. B-211306, June 6, 1983. *See also* B-153694, Oct. 23, 1964; B-153694, Sept. 2, 1964.

Where Congress has not made a specific appropriation available to fund additional or new duties and an existing appropriation is used based upon a determination that the new duties bear a sufficient relationship to the purpose for which the existing appropriation was made, the agency may not reimburse the existing appropriation that was used once the new appropriation is available. 30 Comp. Gen. 258 (1951); B-290011, *supra*. The shifting of money from one appropriation to another in the absence of statutory authority is prohibited by 31 U.S.C. § 1532.¹⁰ Compare B-300673, July 3, 2003, where GAO concluded that the Chief Administrative Officer (CAO) for the House of Representatives was allowed to use the CAO fiscal year 2003 Salaries and Expenses appropriation to reimburse the House of Representatives Child Care Center revolving fund for certain payments incurred by the Center at the beginning of fiscal year 2003 during a period covered by a continuing resolution, before enactment of the fiscal year 2003 appropriation. In this case, CAO's fiscal year 2003 appropriation expressly

⁸ Pub. L. No. 89-688, 80 Stat. 998 (Oct. 15, 1966).

⁹ Pub. L. No. 97-466, 96 Stat. 2538 (Jan. 13, 1983).

¹⁰ Section 1532 provides in pertinent part, "[a]n amount available under law may be withdrawn from one appropriation account and credited to another ... only when authorized by law."

directed that it cover the Center director's salary and employees' training costs for fiscal year 2003 and thereafter. Under the plain meaning of the appropriation language, the CAO appropriation was the proper one to charge for all expenses incurred in fiscal year 2003.

4. Termination of Program

a. Termination Desired

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.) If implementation of the program is mandatory, the answer is no. In 1973, for example, the administration attempted to terminate certain programs funded by the Office of Economic Opportunity (OEO), relying in part on the fact that it had not requested any funds for OEO for 1974. The programs in question were funded under a multiple year authorization that directed that the programs be carried out during the fiscal years covered by the authorization. The U.S. District Court for the District of Columbia held that funds appropriated to carry out the programs could not be used to terminate them. *Local 2677, American Federation of Government Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973). The court cited 31 U.S.C. § 1301(a) as one basis for its holding. *Id.* at 76 n.17. *See also* 63 Comp. Gen. 75, 78 (1983).

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

The concepts are further illustrated in a series of cases involving the Clinch River Nuclear Breeder Reactor. In 1977, the administration proposed using funds appropriated for the design, development, construction, and operation of the reactor to terminate the project. Construction of a breeder reactor had been authorized, but not explicitly mandated, by statute. As contemplated by the program legislation, the Energy Research and Development Administration, the predecessor of the Department of Energy, had submitted program criteria for congressional approval. GAO reviewed the statutory scheme, found that the approved program criteria were “as much a part of [the authorizing statute] as if they were explicitly stated in the statutory language itself,” and concluded that use of program funds for termination was unauthorized. B-115398, June 23, 1977.¹¹ Two subsequent opinions reached the same conclusion, supported further by a provision in a 1978 supplemental appropriation act that specifically earmarked funds for the reactor. B-164105, Mar. 10, 1978; B-164105, Dec. 5, 1977.

By 1983 the situation had changed. Congressional support for the reactor had eroded considerably, no funds were designated for it for fiscal year 1984, and it became apparent that further funding for the project was unlikely. In light of these circumstances, GAO revisited the termination question and concluded that the Department of Energy now had a legal basis to use 1983 funds to terminate the project in accordance with the project justification data that provided for termination in the event of insufficient funds to permit effective continuation. 63 Comp. Gen. 75 (1983).

b. Reauthorization Pending

Another variation occurs when an entity’s enabling legislation is set to expire and Congress shows signs of extending or reauthorizing the entity, but has not yet provided funds or authority to continue. For example, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) was statutorily authorized to give continuing attention to intergovernmental problems. In 1995, ACIR was statutorily terminated effective September 30, 1996. About 2 months before ACIR was to terminate, Congress enacted legislation giving ACIR a new responsibility to provide research and a report under a contract with the National Gambling Impact Study Commission. Although Congress continued ACIR’s existence beyond fiscal year 1996 for the limited purpose of providing research for the Gambling

¹¹GAO reached this conclusion prior to the Supreme Court’s decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

Commission, Congress appropriated no funds for fiscal year 1997. ACIR had separate statutory authority, 42 U.S.C. § 4279, to receive and expend unrestricted contributions made to ACIR from state governments. In B-274855, Jan. 23, 1997, GAO held that this statute constituted an appropriation (a permanent, indefinite appropriation¹²) separate from ACIR's annually enacted fiscal year appropriation, and that from October 1, 1996, until such time as ACIR was awarded the research contract, ACIR could use its unconditional state government contributions.

Another situation may occur when an entity's authorizing legislation is set to terminate and Congress provides an appropriation but does not reauthorize the entity until months later. In 71 Comp. Gen. 378 (1992), the U.S. Commission on Civil Rights was set to terminate by operation of law on September 30, 1991. The Commission was not reauthorized until November 26, 1991. However, during the interim and prior to the expiration date, Congress provided the Commission with appropriations for fiscal year 1992. Once a termination or sunset provision for an entity becomes effective, the agency ceases to exist and no new obligations may be incurred after the termination date.¹³ However, when Congress desires to extend, amend, suspend, or repeal a statute, it can accomplish its purpose by including the requisite language in an appropriations or other act of Congress. After viewing the legislative actions, in their entirety, on the Commission's reauthorization and appropriation bills, GAO determined that Congress clearly intended for the Commission to continue to operate after September 30, 1991. GAO held that the specific appropriation provided to the Commission served to suspend its termination until the Commission was reauthorized.

B. The "Necessary Expense" Doctrine

1. The Theory

The preceding discussion establishes the primacy of 31 U.S.C. § 1301(a) in any discussion of purpose availability. The next point to emphasize is that

¹² See Chapter 2 for a discussion of permanent, indefinite appropriations.

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

Availability of Appropriations: Time

A. General Principles— Duration of Appropriations

1. Introduction

As we have emphasized in several places in this publication, the concept of the “legal availability” of appropriations is defined in terms of three elements—purpose, time, and amount. Chapter 4 focused on purpose; this chapter addresses the second element, time.

The two basic authorities conferred by an appropriation law are the authority to incur obligations and the authority to make expenditures. An obligation results from some action that creates a liability or definite commitment on the part of the government to make an expenditure. (The concept of “obligation” and the criteria for charging obligations against appropriations are discussed in detail in Chapter 7.) The expenditure is the disbursement of funds to pay the obligation. While an obligation and expenditure may occur simultaneously, ordinarily the obligation precedes the expenditure in 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 this chapter.

Our starting point is the firmly established proposition that—

“Congress has the right to limit its appropriations to particular times as well as to particular objects, and when it has clearly done so, its will expressed in the law should be implicitly followed.”

13 Op. Att’y Gen. 288, 292 (1870). 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.

When an appropriation is by its terms made available for a fixed period of time or 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 expiration date for obligations previously incurred, unless the payment is otherwise expressly prohibited by statute. 37 Comp. Gen. 861, 863 (1958); 23 Comp. Gen. 862 (1944); 18 Comp. Gen. 969 (1939); 16 Comp. Gen. 205 (1936). Thus, a time-limited appropriation is available to incur an obligation only during the period for which it is made. However, it remains available beyond that period, within limits, to make adjustments to the amount of such obligations and to make payments to liquidate such obligations. In this connection, 31 U.S.C. § 1502(a) provides:

“The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.”

In addition, there are situations in which appropriations may be “held over” by statute and by judicial decree for obligation beyond their expiration date. The concepts summarized in this paragraph will be explored in depth elsewhere in this chapter.

2. Types of Appropriations

Classified on the basis of duration, appropriations are of three types: annual, multiple year, and no-year appropriations.

a. Annual Appropriations

Annual appropriations (also called fiscal year or 1-year appropriations) are made for a specified fiscal year and are available for obligation only during the fiscal year for which made. The federal government's fiscal year begins on October 1 and ends on September 30 of the following year. 31 U.S.C. § 1102. For example, fiscal year 2005 begins on October 1, 2004, and ends on September 30, 2005.

All appropriations are presumed to be annual appropriations unless the appropriation act expressly provides otherwise. There are several reasons for this. First, as required by 1 U.S.C. § 105, the title and enacting clause of all regular and supplemental appropriation acts specify the making of appropriations “for the fiscal year ending September 30, (here insert the calendar year).” Thus, everything in an appropriation act is presumed to be

applicable only to the fiscal year covered unless specified to the contrary. Second, 31 U.S.C. § 1301(c) provides that, with specified exceptions:

“An appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation—

....

“(2) expressly provides that it is available after the fiscal year covered by the law in which it appears.”

Third, appropriation acts commonly include a general provision similar to the following:

“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

Under the plain terms of this provision, the origin of which has previously been discussed in Chapter 2, section C.2.d, the availability of an appropriation to incur a new obligation may not be extended beyond the fiscal year for which it is made absent express indication in the appropriation act itself. 71 Comp. Gen. 39 (1991); 58 Comp. Gen. 321 (1979); B-118638, Nov. 4, 1974.

A limitation item included in an appropriation (for example, a lump-sum appropriation with a proviso that not to exceed 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

¹ See, e.g., the following fiscal year 2002 appropriation acts: Pub. L. No. 107-76, § 706, 115 Stat. 704, 732 (Nov. 28, 2001) (Agriculture); Pub. L. No. 107-77, § 602, 115 Stat. 748, 798 (Nov. 28, 2001) (Commerce, Justice, State); Pub. L. No. 107-117, § 8003, 115 Stat. 2230, 2247 (Jan. 10, 2002) (Defense); Pub. L. No. 107-96, § 104, 115 Stat. 923, 946 (Nov. 21, 2001) (District of Columbia); Pub. L. No. 107-115, § 511, 115 Stat. 2118, 2141 (Jan. 10, 2002) (Foreign Operations); Pub. L. No. 107-63, § 303, 115 Stat. 414, 465 (Nov. 5, 2001) (Interior); Pub. L. No. 107-116, § 502, 115 Stat. 2177, 2217 (Jan. 10, 2002) (Labor, Health and Human Services, Education); Pub. L. No. 107-68, § 302, 115 Stat. 560, 591 (Nov. 12, 2001) (Legislative); Pub. L. No. 107-87, § 306, 115 Stat. 833, 855 (Dec. 18, 2001) (Transportation); Pub. L. No. 107-67, § 501, 115 Stat. 514, 543 (Nov. 12, 2001) (Treasury).

exempted from it in the appropriation act. 37 Comp. Gen. 246, 248 (1957); B-274576, Jan. 13, 1997.

Annual appropriations are available only to meet *bona fide* needs of the fiscal year for which they were appropriated. The so-called “*bona fide* needs rule” is covered in detail in this chapter in section B.

If an agency fails to obligate its annual funds by the end of the fiscal year for which they were appropriated, they cease to be available for incurring and recording new obligations and are said to have “expired.” This rule—that time-limited budget authority ceases to be available for incurring new obligations after the last day of the specified time period—has been termed an “elementary principle” of federal fiscal law. *City of Houston, Texas v. Department of Housing & Urban Development*, 24 F.3d 1421, 1426 (D.C. Cir. 1994); *West Virginia Ass’n of Community Health Centers, Inc. v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984). See also 18 Comp. Gen. 969, 971 (1939). Annual appropriations remain available for an additional five fiscal years beyond expiration, however, to adjust and make payments to liquidate liabilities arising from obligations made within the fiscal year for which the funds were appropriated. 31 U.S.C. § 1553(a), as amended by Pub. L. No. 101-510, § 1405(a), 104 Stat. 1676 (Nov. 5, 1990). The principles summarized in this paragraph are discussed in this chapter in section D.

The above 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 immediate 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 being that, in view of the capital gains tax, the seller would have insisted on a higher purchase price if payment was to be made in a lump sum. The Comptroller General concluded that the proposal was not legally objectionable, provided that (a) a *bona fide* need for the property existed in the fiscal year in which the option was to be exercised and (b) the full purchase price was obligated against appropriations for the fiscal year in which the option was exercised. As long as these conditions were met—obligation within the period of availability for a legitimate need existing within that period—the timing of actual disbursements over a 4-year period was 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 now defunct 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, 1980.² Appropriations available for obligation for less than a full fiscal year are, however, uncommon.

Finally, Congress may pass a law to rescind the unobligated balance of a fixed (annual or multiple year) appropriation at any time prior to the accounts closing.³ The law may be passed at the initiation of the President pursuant to the impoundment procedures (see discussion in Chapter 1, section D.3) or by Congress as part of its regular legislative process.

b. Multiple Year
Appropriations

Multiple year appropriations are available for obligation for a definite period in excess of one fiscal year. 37 Comp. Gen. 861, 863 (1958). For example, if a fiscal year 2005 appropriation act includes an appropriation account that specifies that it shall remain available until September 30, 2006, it is a 2-year appropriation. As a more specific illustration, the appropriation accounts for military construction are typically 5-year appropriations.⁴

Apart from 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.

c. No-Year Appropriations

A no-year appropriation is available for obligation without fiscal year limitation. For an appropriation to be considered a no-year appropriation, the appropriating language must expressly so provide. 31 U.S.C. § 1301(c). The standard language used to make a no-year appropriation is “to remain available until expended.” 40 Comp. Gen. 694, 696 (1961); 3 Comp. Dec. 623, 628 (1897); B-279886, Apr. 28, 1998; B-271607, June 3, 1996.

² Department of the Interior and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-126, 93 Stat. 954, 978 (Nov. 27, 1979). Due to a 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, 94 Stat. 1001 (Aug. 4, 1980).

³ *E.g.*, Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11, 117 Stat. 559, 571, 591–593 (Apr. 16, 2003); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 106, 107 (Feb. 20, 2003).

⁴ *See, e.g.*, the Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, 115 Stat. 474 (Nov. 5, 2001).

However, other language will suffice as long as its meaning is unmistakable, such as “without fiscal year limitation.” 57 Comp. Gen. 865, 869 (1978).

Unless canceled in accordance with 31 U.S.C. § 1555 or rescinded by another law, there are no time limits as to when no-year funds may be obligated and expended and the funds remain available for their original purposes until expended. 43 Comp. Gen. 657 (1964); 40 Comp. Gen. 694 (1961). This includes earmarks applicable to the use of no-year funds since they are coextensive with, and inseparable from, the period of availability of the no-year appropriation to which they relate. B-274576, Jan. 13, 1997.

A small group of decisions involves the effect of subsequent congressional action on the availability of a prior years no-year appropriation. 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, 696 (1961). *See also Atlantic Fish Spotters Ass’n v. Evans*, 321 F.3d 220 (1st Cir. 2003); B-200519, Nov. 28, 1980.

In another case, a no-year appropriation for the National Capital Park and Planning Commission included a monetary ceiling on noncontract services during the fiscal year. Based on the apparent intent of the ceiling, GAO concluded that the specific restriction had the effect of suspending the “available until expended” provision of prior unrestricted no-year appropriations as far as personal services were concerned, for any fiscal year in which the restriction was included. Thus, unobligated balances of prior unrestricted no-year appropriations could not be used to augment the ceiling. 30 Comp. Gen. 500 (1951). A similar issue was considered in 62 Comp. Gen. 692 (1983). The Nuclear Regulatory Commission received a no-year appropriation that included a prohibition on compensating intervenors. The decision held that the unobligated balance of a prior unrestricted no-year appropriation could be used to pay an Equal Access to Justice Act award to an intervenor made in a restricted year, where part of the proceeding giving rise to the award was funded by an unrestricted appropriation. Unlike the situation in 30 Comp. Gen. 500, the restriction in

the 1983 case was expressly limited to “proceedings funded in this Act,” and thus could have no effect on the availability of prior appropriations.

Similar issues were considered in the context of multiple year appropriations in 31 Comp. Gen. 368 (1952) and 31 Comp. Gen. 543 (1952), overruling 31 Comp. Gen. 275 (1952). In both of these cases, based on a determination of congressional intent, it was held that the current restriction had no effect on the availability of unobligated balances of prior unrestricted appropriations.

No-year appropriations have advantages and disadvantages. The advantages to the spending agency are obvious. From the legislative perspective, a key disadvantage is a loss of congressional control over actual program levels from year to year. GAO has expressed the position that no-year appropriations should not be made in the absence of compelling programmatic or budgetary reasons. See U.S. General Accounting Office, *No-Year Appropriations in the Department of Agriculture*, PAD-78-74 (Washington, D.C.: Sept. 19, 1978).

3. Obligation or Expenditure Prior to Start of Fiscal Year

In considering what may and may not be done before the start of a fiscal year, it is necessary to keep in mind the Antideficiency Act, which prohibits obligations or expenditures in advance of appropriations, 31 U.S.C. § 1341(a), and apportionments, 31 U.S.C. § 1517(a).⁵ By virtue of this law, certainly no obligations may be incurred before the appropriation act is enacted and amounts apportioned to the agency, unless specifically authorized by law.⁶

There are some decisions that stand for the proposition that if the appropriation act is passed by both houses of Congress and signed by the President prior to the start of the fiscal year for which the appropriation is being made, 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. 20 Comp. Gen. 868 (1941); 16 Comp. Gen. 1007 (1937); 4 Comp. Gen. 887 (1925); 2 Comp. Gen. 739 (1923); 11 Comp. Dec. 186 (1904); 4 Lawrence, First Comp. Dec. 132 (1883); B-20670, Oct. 18.

⁵ See Chapter 6, section C for a discussion of the apportionment process.

⁶ See Chapter 5, section B.

1941; A-19524, Aug. 26, 1927. GAO did not view the contract as an obligation in violation of the Antideficiency Act since, even though the time period covered by the appropriation to be charged had not yet started, the appropriation had already been enacted into law. These decisions addressed these contracts from an Antideficiency Act perspective, and did not address the *bona fide* needs rule.

In other decisions, the Comptroller General has expressed the opinion that, in the absence of any other statutory authority, the awarding of a “conditional contract” prior to the enactment of the appropriation act to be charged with the obligation does not raise Antideficiency Act or *bona fide* needs issues when the government’s liability is contingent upon the future availability of appropriations. The contract must expressly provide:

1. that no legal liability on the part of the government arises until the appropriation is made available within the agency to fund the obligation and
2. that notice is to be given by the agency to the contractor before the contractor may proceed.

See B-171798(1), Aug. 18, 1971, at 11–12.⁷ Such express provisions are necessary to make explicit what is meant by the term “contingent upon the future availability of appropriations” in order to avoid Antideficiency Act problems,⁸ and to permit the agency to maintain effective internal controls over the obligating of appropriations.

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 that clearly by its terms requires immediate action. *E.g.*, 1 Comp. Dec. 329 (1895).

⁷ See also 39 Comp. Gen. 776 (1960); 39 Comp. Gen. 340 (1959); 21 Comp. Gen. 864 (1942); B-239435, Aug. 24, 1990. See also the discussion in Chapter 6, section C.2.b.

⁸ See Chapter 6, section C.2.b, “Multiyear or continuing contracts,” particularly the discussion of *Leiter v. United States*, 271 U.S. 204 (1925). See also *Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 332–333 (1999) (discussing *Leiter* and the Antideficiency Act).

Availability of Appropriations: Amount

A. Introduction

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 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 also must 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. Since you do not have enough money to cover your full legal obligation under the mortgage, you sign the mortgage papers on the assumption that you will continue to have an income adequate to cover the mortgage. If your income diminishes substantially or, heaven forbid, disappears, and you are unable to make the payments, you lose the house. A government agency cannot operate this way. The main reason why is the Antideficiency Act, discussed in section C of this chapter.

Under the Constitution, Congress 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 has the “final word” as to how much money can be spent by a given agency or on a given program. Congress may give the executive branch considerable discretion concerning how to implement the laws and hence how to obligate and expend funds appropriated, but it is ultimately up to Congress to determine how much the executive branch can spend. In applying these concepts 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.” Its importance is underscored by the fact that it is the only one of the fiscal statutes to include both civil and criminal penalties for violation.

To ensure that the Antideficiency Act’s prohibition against overobligating or overspending an appropriation remains meaningful, agencies must be restricted to the appropriations Congress provides. The rule prohibiting the unauthorized “augmentation” of appropriations, covered in section E of this chapter, is thus a crucial complement to the Antideficiency Act.

While Congress retains, as it must, ultimate control over how much an agency can spend, it does not attempt to control the disposition of every dollar. We began our general discussion of administrative discretion in Chapter 3 by quoting Justice Holmes' statement that "some play must be allowed to the joints if the machine is to work."¹ This is fully applicable to the expenditure of appropriated funds. An agency's discretion under a lump-sum appropriation is discussed in section F of this chapter.

B. Types of Appropriation Language

Congress has been making appropriations since the beginning of the Republic. 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.² In recent decades, however, as the federal budget has grown in both size and complexity, a lump-sum approach has become a virtual necessity.³ 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.

Over the course of this time, certain forms of appropriation language have become standard. This section will point out the more commonly used language with respect to amount.

1. Lump-Sum Appropriations

A *lump-sum appropriation* is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a *line-item appropriation* is available only for the specific object described.

¹ *Tyson & Brother United Theater Ticket Offices v. Banton*, 273 U.S. 418 (1927) (Holmes, J., dissenting).

² For fiscal year 1905, for example, Congress appropriated to the Department of Justice a specific line item of \$3,000 for stationery. Legislative, Executive and Judicial Appropriations Act, 1905, ch. 716, 33 Stat. 85, 134 (Mar. 18, 1904). For fiscal year 2005, Congress appropriated to the Department of Justice a lump-sum appropriation of \$124,100,000 for administrative expenses. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005, Pub. L. No. 108-447, div. B, title I, 118 Stat. 2809, 2853 (Dec. 8, 2004).

³ As a result of appropriation account consolidation over the years, 200 accounts now cover 90 percent of all federal expenditures. Allen Schick, *The Federal Budget: Politics, Policy, and Process*, 229 (2000).

C. The Antideficiency Act

1. Introduction and Overview

The Antideficiency Act is one of the major laws in the statutory scheme by which Congress exercises its constitutional control of the public purse. It has been termed “the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds.”³⁴

As with the series of funding statutes as a whole, the Antideficiency Act did not hatch fully developed but evolved over a period of time in response to various abuses. As we noted in Chapter 1, as late as the post-Civil War period, it was not uncommon for agencies to incur obligations in excess, or in advance, of appropriations. Perhaps most egregious of all, some agencies would spend their entire appropriations during the first few months of the fiscal year, continue to incur obligations, and then return to Congress for appropriations to fund these “coercive deficiencies.”³⁵ These were obligations to others who had fulfilled their part of the bargain with the United States and who now had at least a moral—and in some cases also a legal—right to be paid. Congress felt it had no choice but to fulfill these commitments, but the frequency of deficiency appropriations played havoc with the United States budget.

The congressional response to abuses of this nature was the Antideficiency Act. Its history is summarized in the following paragraphs:³⁶

“Control in the execution of the Government’s budgetary and financial programs is based on the provisions of section 3679 of the Revised Statutes, as amended . . . , commonly referred to as the Antideficiency Act. As the name . . .

³⁴ Hopkins & Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51, 56 (1978).

³⁵ Hopkins & Nutt, at 57–58; Louis Fisher, *Presidential Spending Power*, 232 (1975).

³⁶ Senate Committee on Government Operations, *Financial Management in the Federal Government*, S. Doc. No. 87-11, at 45–46 (1961). In the Senate document, the Antideficiency Act is cited as “section 3679 of the Revised Statutes,” a designation that is now obsolete.

implies, one of the principal purposes of the legislation was to provide effective control over the use of appropriations so as to prevent the incurring of obligations at a rate which will lead to deficiency (or supplemental) appropriations and to fix responsibility on those officials of Government who incur deficiencies or obligate appropriations without proper authorization or at an excessive rate.

“The original section 3679 . . . was derived from legislation enacted in 1870 [16 Stat. 251] and was designed solely to prevent expenditures in excess of amounts appropriated. In 1905 [33 Stat. 1257] and 1906 [34 Stat. 48], section 3679 . . . was amended to provide specific prohibitions regarding the obligation of appropriations and required that certain types of appropriations be so apportioned over a fiscal year as to ‘prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made.’ Under the amended section, the authority to make, waive, or modify apportionments was vested in the head of the department or agency concerned. By Executive Order 6166 of June 10, 1933, this authority was transferred to the Director of the [Office of Management and Budget]. . . .

“During and following World War II, with the expansion of Government functions and the increase in size and complexities of budgetary and operational problems, situations arose highlighting the need for more effective control and conservation of funds. In order to effectively cope with these conditions it was necessary to seek legislation clarifying certain technical aspects of section 3679 of the Revised Statutes, and strengthening the apportionment procedures, particularly as regards to agency control systems. Section 1211 of the General Appropriation Act, 1951 [64 Stat. 765], amended section 3679 . . . to provide a basis for more effective control and economical use of appropriations. Following a recommendation of the second Hoover Commission that agency allotment systems should be simplified, Congress passed legislation in 1956 [70 Stat. 783] further amending section 3679 to provide that each agency 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. In 1957 [71 Stat. 440] section 3679 was further amended, adding a prohibition against the requesting of apportionments or reapportionments which indicate the necessity for a deficiency or supplemental estimate except on the determination of the agency head that such action is within the exceptions expressly set out in the law. The revised Antideficiency Act serves as the primary foundation for the Government's administrative control of funds systems."

In its current form, the law prohibits:

- Making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).
- 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, unless the contract or obligation is authorized by law. 31 U.S.C. § 1341(a)(1)(B).
- Accepting voluntary services for the United States, or employing personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.

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- Making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).³⁷

Subsequent sections of this chapter will explore these concepts in detail. However, the fiscal principles inherent in the Antideficiency Act are really quite simple. Government officials may not make payments or 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 Antideficiency Act, in conjunction with the other funding statutes discussed throughout this publication, 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

³⁷ See S. Doc. No. 87-11, at 48; B-131361, Apr. 12, 1957. Further discussion of the Antideficiency Act from varying perspectives will be found in the following sources: James A. Harley, *Multiyear Contracts: Pitfalls and Quandaries*, 27 Public Contract L.J. 555 (1998); Col. James W. McBride, *Avoiding Antideficiency Act Violations on Fixed Price Incentive Contracts (The Hunt for Red Ink)*, June Army Lawyer (1994); Fenster & Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Public Contract L.J. 155 (1979); Rollee H. Efros, *Statutory Restrictions on Funding of Government Contracts*, 10 Public Contract L.J. 254 (1978); Hopkins & Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51 (1978); William J. Spriggs, *The Anti-Deficiency Act Comes to Life in U.S. Government Contracting*, 10 National Contract Management Journal 33 (1976-77); Col. John R. Frazier, *Use of Annual Funds with Conditional, Option, or Indefinite Delivery Contracts*, 8 A.F. JAG L. Rev. 50 (1966).

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. Viewed in the aggregate, the Antideficiency Act and related funding statutes “[restrict] in every possible way the expenditures and expenses and liabilities of the government, so far as executive offices are concerned, to the specific appropriations for each fiscal year.” *Wilder’s Case*, 16 Ct. Cl. 528, 543 (1880).

2. Obligation/Expenditure in Excess or Advance of Appropriations

The key provision of the Antideficiency Act is 31 U.S.C. § 1341(a)(1).³⁸

“(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

“(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

“(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”

Not only is section 1341(a)(1) the key provision of the Act, it was originally the only provision, the others being added to ensure enforcement of the basic prohibitions of section 1341.

The law is not limited to the executive branch, but applies to any “officer or employee of the United States Government” and thus extends to all branches. Examples of legislative branch applications are B-303964, Feb. 3,

³⁸ Prior to the 1982 recodification of title 31 of the United States Code, the Antideficiency Act consisted of nine lettered subsections of what was then 31 U.S.C. § 665. The recodification scattered the law among several new sections. To better show the relationship of the material, our organization in this chapter retains the sequence of the former subsections.

2005 (Capitol Police use of the Legislative Branch Emergency Response Fund); B-303961, Dec. 6, 2004 (Architect of the Capitol); B-107279, Jan. 9, 1952 (Office of Legislative Counsel, House of Representatives); B-78217, July 21, 1948 (appropriations to Senate for expenses of Office of Vice President); 27 Op. Att'y Gen. 584 (1909) (Government Printing Office). Within the judicial branch, it applies to the Administrative Office of the United States Courts. *E.g.*, 50 Comp. Gen. 589 (1971). However, whether a federal judge is an officer or employee for purposes of 31 U.S.C. § 1341(a)(1) appears to remain an open question, at least in some contexts. *See Armster v. United States District Court*, 792 F.2d 1423, 1427 n.7 (9th Cir. 1986) (the Seventh Amendment of the Constitution prohibits suspension of civil jury trials for lack of funds, whether or not a judge is considered an employee or officer under the Antideficiency Act). The Antideficiency Act also applies to officers of the District of Columbia Courts. B-284566, Apr. 3, 2000.

Some government corporations are also classified as agencies of the United States Government, and to the extent they operate with funds which are regarded as appropriated funds, they too are subject to 31 U.S.C. § 1341(a)(1). *E.g.*, B-223857, Feb. 27, 1987 (Commodity Credit Corporation); B-135075-O.M., Feb. 14, 1975 (Inter-American Foundation). It follows that section 1341(a)(1) does not apply to a government corporation that is not an agency of the United States Government. *E.g.*, B-175155-O.M., July 26, 1976 (Amtrak). These principles are, of course, subject to variation if and to the extent provided in the relevant organic legislation.

There are two distinct prohibitions in section 1341(a)(1). Unless otherwise authorized by law, no officer or employee of the United States may (1) make any expenditure or incur an obligation *in excess* of available appropriations, or (2) make an expenditure or incur an obligation *in advance* of appropriations.

The distinction between obligating in excess of an appropriation and obligating in advance of an appropriation is clear in the majority of cases, but can occasionally become blurred. For example, an agency which tries to meet a current shortfall by “borrowing” from (*i.e.*, obligating against) the unenacted appropriation for the next fiscal year is clearly obligating in advance of an appropriation. *E.g.*, B-236667, Jan. 26, 1990. However, it is also obligating in excess of the currently available appropriation. Since both are equally illegal, determining precisely which subsection of 31 U.S.C. § 1341(a) has been violated is of secondary importance. In any

event, the point to be stressed here is that the law is violated not just when there are insufficient funds in an account when a payment becomes due. 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 31 U.S.C. § 1341(a). *E.g.*, B-300480, Apr. 9, 2003.

In B-290600, July 10, 2002, both the Office of Management and Budget (OMB) and the Airline Transportation Stabilization Board (ATSB) violated the Antideficiency Act when OMB apportioned, and ATSB obligated an appropriation, in advance of, and thus in excess of, its availability. The Air Transportation Safety and System Stabilization Act authorized the President to issue up to \$10 billion in loan guarantees, and to provide the subsidy amounts necessary for such guarantees,³⁹ to assist air carriers who incurred losses resulting from the September 11, 2001, terrorist attacks on the United States. Pub. L. No. 107-42, title I, § 101(a)(1), 115 Stat. 230 (Sept. 22, 2001). Congress established the ATSB to review and decide on applications for these loan guarantees. The budget authority for the guarantees was available only “to the extent that a request, that includes designation of such amount as an emergency requirement . . . is transmitted by the President to Congress.” *Id.* at § 101(b). The President had not submitted such a request at the time OMB apportioned the funds to ATSB and the ATSB obligated the funds; therefore, both OMB and ATSB made funds available in advance of their availability, violating the Antideficiency Act. See section C of this chapter for a discussion of the apportionment process.

Note that 31 U.S.C. § 1341(a) refers to overobligating and overspending the amount available in an “appropriation or fund.” The phrase “appropriation or fund” refers to appropriation and fund accounts. An appropriation account is the basic unit of an appropriation generally reflecting each unnumbered paragraph in an appropriation act. Fund accounts include general fund accounts, intragovernmental fund accounts, special fund accounts, and trust fund accounts.⁴⁰ *See, e.g.*, 72 Comp. Gen. 59 (1992) (Corps of Engineers was prohibited by the Antideficiency Act from overobligating its Civil Works Revolving Fund’s available budget authority).

³⁹ Pursuant to the Federal Credit Reform Act, agencies are required to have budget authority in advance to cover the long-term costs (*i.e.*, subsidy costs) of direct loans and loan guarantees. 2 U.S.C. § 661c(b).

⁴⁰ *See* GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005), at 3–5.

Thus, for example, the Antideficiency Act applies to Indian trust funds managed by the Bureau of Indian Affairs. However, the investment of these funds in certificates of deposit with federally insured banks under authority of 25 U.S.C. § 162a does not, in GAO's opinion, constitute an obligation or expenditure for purposes of 31 U.S.C. § 1341. Accordingly, overinvested trust funds do not violate the Antideficiency Act unless the overinvested funds, or any attributable interest income, are obligated or expended by the Bureau. B-207047-O.M., June 17, 1983. Cf. B-303413, Nov. 8, 2004 (the Federal Communications Commission's (FCC) regulatory action to provide spectrum rights through a license modification instead of an auction did not violate section 1341; spectrum licenses that impose costs and expenses on the licensee do not constitute an obligation and expenditure of the FCC). GAO also views the Antideficiency Act as applicable to presidential and vice-presidential "unvouchered expenditure" accounts. B-239854, June 21, 1990 (internal memorandum).

a. Exhaustion of an
Appropriation

When we talk about an appropriation being "exhausted," we are really alluding to any of several different but related situations:

- Depletion of appropriation account (*i.e.*, fully obligated and/or expended).
- Similar depletion of a maximum amount specifically earmarked in a lump-sum appropriation.⁴¹
- Depletion of an amount subject to a monetary ceiling imposed by some other statute (usually, but not always, the relevant program legislation).

(1) Making further payments

In simple terms, once an appropriation is exhausted, the making of any further payments, apart from using expired balances to liquidate or make adjustments to valid obligations recorded against that appropriation, violates 31 U.S.C. § 1341. When the appropriation is fully expended, no further payments may be made in any case. If an agency finds itself in this position, unless it has transfer authority or other clear statutory basis for

⁴¹ See section B of this chapter for a discussion of earmarking.

making further payments, it has little choice but to seek a deficiency⁴² or supplemental appropriation from Congress, and to adjust or curtail operations as may be necessary. *E.g.*, B-285725, Sept. 29, 2000; 61 Comp. Gen. 661 (1982); 38 Comp. Gen. 501 (1959). For example, when the Corporation for National and Community Service obligated funds in excess of the amount available to it in the National Service Trust, the Corporation suspended participant enrollment in the AmeriCorps program and requested a deficiency appropriation from Congress.⁴³

In many ways, the prohibitions in the Adequacy of Appropriations Act, 41 U.S.C. § 11, parallel those of 31 U.S.C. § 1341(a). The Adequacy of Appropriations Act states in part that—

“No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.”

41 U.S.C. § 11(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. Assessment of Antideficiency Act violations is not frozen at the point when the obligation is incurred. Even if the initial obligation was well within available funds, the Antideficiency Act can still be violated if upward adjustments cause the obligation to exceed available funds. *E.g.*, 55 Comp. Gen. 812, 826 (1976).

⁴² See 31 U.S.C. §§ 1552(a), 1553(a), 1554(a), and Chapter 5, section D, for a discussion of expired and closed appropriation accounts.

⁴³ GAO, *Corporation for National and Community Service: Better Internal Control and Revised Practices Would Improve the Management of AmeriCorps and the National Service Trust*, GAO-04-225 (Washington, D.C.: Jan. 16, 2004).

What one authority termed the “granddaddy of all violations”⁴⁴ occurred when the Navy overobligated and overspent nearly \$110 million from its “Military Personnel, Navy” appropriation during the years 1969–1972. GAO summarized the violation in a letter report, B-177631, June 7, 1973. While there may have been some concealment, GAO concluded that the violation was not the result of some evil scheme; rather, the “basic cause of the violation was the separation of the authority to create obligations from the responsibility to control them.” The authority to create obligations had been decentralized while control was centralized in the Bureau of Naval Personnel.

Granddaddy was soon to lose his place of honor on the totem pole. Around November of 1975, the Department of the Army discovered that, for a variety of reasons, it had overobligated four procurement appropriations in the aggregate amount of more than \$160 million and consequently had to halt payments to some 900 contractors. The Army requested the Comptroller General’s advice on a number of potential courses of action it was considering. The resulting decision was 55 Comp. Gen. 768 (1976). The Army recognized its duty to mitigate the Antideficiency Act violation.⁴⁵ It was clear that without a deficiency appropriation, all the contractors could not be paid. One option—to use current appropriations to pay the deficiencies—had to be rejected because there is no authority to apply current funds to pay off debts incurred in a previous year. *Id.* at 773. An option GAO endorsed was to reduce the amount of the deficiencies by terminating some of the contracts for convenience, although the termination costs would still have to come from a deficiency appropriation unless there was enough left in the appropriation accounts to cover them. *Id.*

(2) Limitations on contractor recovery

If the Antideficiency Act prohibits any further payments when the appropriation is exhausted, where does this leave the contractor? Is the contractor expected to know how and at what rate the agency is spending its money? There is a small body of judicial case law which discusses the effect of the exhaustion of appropriations on government obligations. The

⁴⁴ Louis Fisher, *Presidential Spending Power*, 236 (1975).

⁴⁵ “We believe it is obvious that, once an Antideficiency Act violation has been discovered, the agency concerned must take all reasonable steps to mitigate the effects of the violation insofar as it remains executory.” 55 Comp. Gen. at 772.

fate of the contractor seems to depend on the type of appropriation involved and the presence or absence of notice, actual or constructive, to the contractor on the limitations of the appropriation.

Where a contractor is but one party out of several to be paid from a general appropriation, the contractor is under no obligation to know the status or condition of the appropriation account on the government's books. If the appropriation becomes exhausted, the Antideficiency Act may prevent the agency from making any further payments, but valid obligations will remain enforceable in the courts. For example, 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 the contractor's rights in a breach of contract suit, the court said:

“A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money entrusted 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.

The rationale for this rule is that “a contractor cannot justly be expected to keep track of appropriations where he is but one of several being paid from the fund.” *Ross Construction Corp. v. United States*, 392 F.2d 984, 987 (Ct. Cl. 1968). Other illustrative cases are *Dougherty ex rel. Slavens v. United States*, 18 Ct. Cl. 496 (1883), and *Joplin v. United States*, 89 Ct. Cl. 345 (1939). The Antideficiency Act may “apply to the official, but [does] not affect the rights in this court of the citizen honestly contracting with the Government.” *Dougherty*, 18 Ct. Cl. at 503. Thus, it is settled that contractors paid from a general appropriation are not barred from recovering for breach of contract even though the appropriation is exhausted.

However, under a specific line-item appropriation, the answer is different. The contractor in this situation is deemed to have notice of the limits on the spending power of the government official with whom he contracts. A contract under these circumstances is valid only up to the amount of the available appropriation. Exhaustion of the appropriation will generally bar any further recovery beyond that limit. *E.g.*, *Sutton v. United States*, 256 U.S. 575 (1921); *Hooe v. United States*, 218 U.S. 322 (1910); *Shipman v. United States*, 18 Ct. Cl. 138 (1883); *Dougherty*, 18 Ct. Cl. at 503.

The distinction between the *Ferris* and *Sutton* lines of cases follows logically from the old maxim that ignorance of the law is no excuse. If Congress appropriates a specific dollar amount for a particular contract, that amount is specified in the appropriation act and the contractor is deemed to know it. It is certainly not difficult to locate. If, on the other hand, a contract is but one activity under a larger appropriation, it is not reasonable to expect the contractor to know how much of that appropriation remains available for it at any given time. A requirement to obtain this information would place an unreasonable burden on the contractor, not to mention a nuisance for the government as well.

In two cases in the 1960s, the Court of Claims permitted recovery on contractor claims in excess of a specific monetary ceiling. *See Anthony P. Miller, Inc. v. United States*, 348 F.2d 475 (Ct. Cl. 1965) (claim by Capehart Housing Act contractor); *Ross Construction Corp. v. United States*, 392 F.2d 984 (Ct. Cl. 1968) (claim by contractor for “off-site” construction ancillary to Capehart Act housing). The court distinguished between matters not the fault or responsibility of the contractor (for example, defective plans or specifications or changed conditions under the “changed conditions” clause), in which case above-ceiling claims are allowable, and excess costs resulting from what it termed “simple extras,” in which case they are not. Without attempting to detail the fairly complex Capehart legislation here, we note merely that *Ross* is more closely analogous to the *Ferris* situation (392 F.2d at 986), while *Anthony P. Miller* is more closely analogous to the *Sutton* situation (392 F.2d at 987). The extent to which the approach reflected in these cases will be applied to the more traditional form of exhaustion of appropriations remains to be developed, although the *Ross* court intimated that it saw no real distinction for these purposes between a specific appropriation and a specific monetary ceiling imposed by other legislation (*id.*).

b. Contracts or Other
Obligations in Excess or
Advance of Appropriations

It is easy enough to say that the Antideficiency Act prohibits you from obligating a million dollars when you have only half a million left in the account, or that it prohibits you from entering into a contract in September purporting to obligate funds for the next fiscal year that have not yet been appropriated. Many of the situations that actually arise from day to day, however, are not quite that simple. A useful starting point is the relationship of the Antideficiency Act to the recording of obligations under 31 U.S.C. § 1501.

(1) Proper recording of obligations

Proper recording practices are essential to sound funds control. An amount of recorded obligations in excess of the available appropriation is *prima facie* evidence of a violation of the Antideficiency Act, but is not conclusive. B-134474-O.M., Dec. 18, 1957.⁴⁶

An example of this is B-300480, Apr. 9, 2003, in which the Corporation for National and Community Services failed to recognize and record obligations for national service educational benefits of AmeriCorps participants when it incurred that obligation. In that case, the Corporation made grant awards to state corporations, who, in turn, made subgrants to nonprofit entities, who enrolled participants. In its grant awards to the state corporations, the Corporation approved the enrollment of a specified number of new program participants. Because the Corporation in the grant agreement had committed to a specified number of new participants, the Corporation incurred an obligation for the participants' educational benefits at that time; without further action by the Corporation, the Corporation was legally required to pay education benefits of all participants, up to the number the Corporation had specified in the grant agreement, if the grantee and subgrantee, who needed no further approval from the Corporation, enrolled that number of new participants, and if they satisfied the criteria for benefits. The Corporation's failure to recognize and record its obligation did not ameliorate its violation of the Act. *See also* B-300480.2, June 6, 2003.

Also, 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

⁴⁶ GAO has cautioned, however, that an Antideficiency Act violation should not be determined solely on the basis of year-end reports prior to reconciliation and adjustment. B-114841.2-O.M., Jan. 23, 1986.

contract with price escalation provisions. A violation would occur if sufficient budget authority is not available when an agency must adjust a recorded obligation. *See, e.g.*, B-240264, Feb. 7, 1994 (an agency would incur an Antideficiency Act violation if it must adjust an obligation for an incrementally funded contract to fully reflect the extent of the *bona fide* need contracted for and sufficient appropriations are not available to support the adjustment).

This is illustrated in B-289209, May 31, 2002. After holding that the Coast Guard had wrongly used no-year funds from the Oil Spill Liability Trust Fund for administrative expenses, GAO concluded that the agency should adjust its accounting records by deobligating the incorrectly charged expenses and charging them instead to the proper appropriation. GAO advised the Coast Guard that these adjustments could result in a violation of the Antideficiency Act to the extent that there was insufficient budget authority, and that the agency should report any deficiency in accordance with the Antideficiency Act.

The incurring of an obligation in excess or advance of appropriations violates the Act, and this is not affected by the agency's failure to record the obligation. *E.g.*, 71 Comp. Gen. 502, 509 (1992); 65 Comp. Gen. 4, 9 (1985); 62 Comp. Gen. 692, 700 (1983); 55 Comp. Gen. 812, 824 (1976); B-245856.7, Aug. 11, 1992.

(2) Obligation in excess of appropriations

Incurring an obligation in excess of the available appropriation violates 31 U.S.C. § 1341(a)(1).⁴⁷ As the Comptroller of the Treasury advised an agency head many years ago, "your authority in the matter was strictly limited by the amount of the appropriation; otherwise there would be no limit to your power to incur expenses for the service of a particular fiscal year." 9 Comp. Dec. 423, 425 (1903). If you want higher authority, the Supreme Court has stated that, absent statutory authorization, "it is clear that the head of the department cannot involve the government in an obligation to pay any thing in excess of the appropriation." *Bradley v. United States*, 98 U.S. 104, 114 (1878).

⁴⁷ Determining the amount of available budget authority against which obligations may be incurred is covered later in this chapter in section C.2.e under the heading "Amount of Available Appropriation or Fund."

To take a fairly simple illustration, the statute was violated by an agency's acceptance of an offer to install automatic telephone equipment for \$40,000 when the unobligated balance in the relevant appropriation was only \$20,000. 35 Comp. Gen. 356 (1955).

In a 1969 case, the Air Force wanted to purchase computer equipment but did not have sufficient funds available. It attempted an arrangement whereby it made an initial down payment, with the balance of the purchase price to be paid in installments over a period of years, the contract to continue unless the government took affirmative action to terminate. This was nothing more than a sale on credit, and since the contract constituted an obligation in excess of available funds, it violated the Antideficiency Act. 48 Comp. Gen. 494 (1969).

(3) Variable quantity contracts

A leading case discussing the Antideficiency Act ramifications of "variable quantity" contracts (requirements contracts, indefinite quantity contracts, and similar arrangements) is 42 Comp. Gen. 272 (1962).⁴⁸ That decision considered a 3-year contract the Air Force had awarded to a firm to provide any service or maintenance work necessary for government aircraft landing on Wake Island. GAO questioned the legality of entering into a contract of more than 1 year since the Air Force had only a 1-year appropriation available. The Air Force argued that it was a "requirements" contract, that no obligation would arise unless or until some maintenance work was ordered, and that the only obligation was a negative one—not to buy service from anyone else but the contractor should the services be needed. 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" as the services would almost certainly be needed if the base were to remain operational. Accordingly, the contract was not a true requirements contract but amounted to a firm obligation for the needs of future years, and was therefore an unauthorized multiyear contract. As such, it violated the Antideficiency Act. The solution was to contract on an annual basis with renewal options from year to year, and, if that did not

⁴⁸ We cover the obligational treatment of contracts of this type in Chapter 7, section B.1.e, which should be read in conjunction with this section.

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:

- You walk into a store, make a purchase, and pay at the counter with cash, check, or debit card.
- 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.
- 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.
- 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.
- 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. The first example is a simple cash transaction. The legal liability to pay and the actual disbursement of money occur simultaneously. The rest of the examples 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 a variety of 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.” For the government, there is.

The concept of “obligation” is central to appropriations law. As will be demonstrated in the discussion below, this is because of the principle, one of the most fundamental, 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 publication to refer to availability as to purpose, time, and 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.” However, because of the immense variety of transactions in which the government is involved, GAO has defined “obligation” only in the most general terms and has instead analyzed on a case-by-case basis the nature of the particular transaction at issue to determine whether an obligation has been incurred. B-192282, Apr. 18, 1979; B-116795, June 18, 1954.

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-300480.2, June 6, 2003; B-272191, Nov. 4, 1997; B-265901, Oct. 14, 1997; 21 Comp. Gen. 1162, 1163 (1941) (circular letter); B-222048, Feb. 10, 1987; B-82368, July 20, 1954; B-24827, Apr. 3, 1942. From the earliest days, the Comptroller General has cautioned that the obligating of appropriations must be “definite and certain.” A-5894, Dec. 3, 1924.

Another definition of an “obligation” that one finds in the decisions takes a slightly broader perspective:

“A legal duty on the part of the United States which constitutes a legal liability or which could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States . . .”

42 Comp. Gen. 733, 734 (1963).

Thus, in very general and simplified terms, an “obligation” is some action that creates a legal liability or definite commitment on the part of the government, or creates a legal duty that could mature into a legal liability

by virtue of an action that is beyond the control of the government. Payment may be made immediately or in the future. GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005), at 70. See also *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 295, 301, order modified, 39 Fed. Cl. 665 (1997); OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, §§ 20.3, 20.5 (June 21, 2005).

An advance of funds to a working fund¹ does not in itself serve to obligate the funds. See B-180578-O.M., Sept. 26, 1978. The same result holds for funds transferred to a special “holding account” established for administrative convenience. B-118638, Nov. 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 “Judiciary Trust Fund” established by the Administrative Office).

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, with all the consequences that flow from that determination. It is also essential to the broader concern of congressional control over the public purse.

Before proceeding with the specifics, two general points should be noted. First, an obligation arises when the definite commitment is made, even though the actual payment may not take place until a future fiscal year. B-300480.2, June 6, 2003; 56 Comp. Gen. 351 (1977); 23 Comp. Gen. 862 (1944). Second, for appropriations law purposes, the term “obligation” includes both matured and unmatured commitments. A matured commitment is a legal liability that is currently payable. An unmatured commitment is a liability which is not yet payable but for which a definite commitment nevertheless exists. For example, a contractual liability to pay for goods which have been delivered and accepted has “matured.” The liability for monthly rental payments under a lease is largely unmatured although the legal liability covers the entire rental period. Both types of liability are “obligations.” The fact that an unmatured liability may be

¹ A working fund account is established to receive advance payment from other agencies or accounts. 14 Comp. Gen. 25 (1934). For an example, see 10 U.S.C. § 2208, which authorizes working capital funds in the Department of Defense.

subject to a right of cancellation does not negate the obligation. A-97205, Feb. 3, 1944, at 9–10.²

A recent decision illustrates this point. In B-300480, Apr. 9, 2003, GAO determined that the Corporation for National and Community Service (Corporation), the parent body of the AmeriCorps national service program, incurred a legal liability for the award of AmeriCorps national service educational benefits at the time it entered into a grant agreement to provide educational benefits to AmeriCorps participants. Participants in the AmeriCorps program who successfully completed a required term of service earned a national service educational award that could be used to pay for post-secondary education. The Corporation awarded grants to state service commissions, which awarded subgrants to the nonprofit groups—the entities that actually enrolled the AmeriCorps participants. When the Corporation awarded a grant to a state service commission, it entered into a binding agreement authorizing the state service commissions to provide grant awards to a specified number of new participants in the AmeriCorps program. The Corporation argued that it did not incur an obligation for an education award until the time of enrollment because the Corporation could modify the terms and conditions of a grant, including suspension of enrollment, prior to the enrollment of all positions initially approved in a grant. GAO disagreed and explained that:

“The fact that the government may have the power to amend unilaterally a contract or agreement does not change the nature or scope of the obligation incurred at time of award. Were it otherwise, every government contract that permits the government to terminate the contract for the convenience of the government (48 C.F.R. § 49.502), or to modify the terms of the contract at will (48 C.F.R. §§ 52.243-1, 243-2, 243-3), would not be an obligation of the government at time of award. Long-standing practice and logic both of the Congress (31 U.S.C. § 1501, 41 U.S.C. § 5) and the accounting officers of the government (B-234957, July 10, 1989, B-112131, Feb. 1, 1956) have rejected such a view.”

² An “unmatured liability” as described in this paragraph is different from a “contingent liability” as discussed in section C of this chapter.

B-300480, Apr. 9, 2003. GAO concluded that because the Corporation had taken an action that could mature into a legal liability for the education benefits by virtue of actions taken by the grantee and participants, not the Corporation, the Corporation incurred an obligation at the time of grant award. *Id.* Subsequently, GAO issued a second decision, B-300480.2, June 6, 2003, which elaborated upon and affirmed the April decision.

B. Criteria for Recording Obligations (31 U.S.C. § 1501)

The overrecording and the underrecording of obligations are equally improper. Both practices make it impossible to determine the precise status of the appropriation and can lead to other adverse consequences. Overrecording (recording as obligations items that are not) is usually done to inflate obligated balances and reduce unobligated balances of appropriations expiring at the end of a fiscal year. Underrecording (failing to record legitimate obligations) may result in violating the Antideficiency Act. 31 U.S.C. § 1341.³ A 1953 decision put it this way:

“In order to determine the status of appropriations, both from the viewpoint of management and the Congress, it is essential that obligations be recorded in the accounting records on a factual and consistent basis throughout the Government. Only by the following of sound practices in this regard can data on existing obligations serve to indicate program accomplishments and be related to the amount of additional appropriations required.”

32 Comp. Gen. 436, 437 (1953). *See also* GAO, *Policy and Procedures Manual for Guidance of Federal Agencies*, title 7, § 3.5.A. (Washington, D.C.: May 18, 1993) (hereafter GAO-PPM).

The standards for the proper recording of obligations are found in 31 U.S.C. § 1501(a), originally enacted as section 1311 of the Supplemental Appropriation Act, 1955, Pub. L. No. 83-663, 68 Stat. 800, 830 (Aug. 26, 1954). 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

³ For further discussion of the Antideficiency Act, see Chapter 6, section C.

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 department[s], 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. . . .”⁴

Thus, the primary purpose of 31 U.S.C. § 1501 is to ensure that agencies record only those transactions which meet specified standards for legitimate obligations. 71 Comp. Gen. 109 (1991); 54 Comp. Gen. 962, 964 (1975); 51 Comp. Gen. 631, 633 (1972); B-192036, Sept. 11, 1978.⁵

Subsection (a) of 31 U.S.C. § 1501 prescribes specific criteria for recording obligations. The subsection begins by stating that “[a]n amount shall be

⁴ Senate Committee on Government Operations, *Financial Management in the Federal Government*, S. Doc. No. 87-11, at 85 (1961).

⁵ Although 31 U.S.C. § 1501 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, Sept. 26, 1978. This is because the proper recording of obligations is the only way to assure compliance with 31 U.S.C. § 1341, a portion of the Antideficiency Act, which does expressly apply to the government of the District of Columbia. District of Columbia Self-Government and Governmental Reorganization Act (so-called “Home Rule” Act), Pub. L. No. 93-198, § 603(e), 87 Stat. 774, 815 (Dec. 24, 1973).

recorded as an obligation of the United States Government only when supported by documentary evidence” and then goes on to specify nine criteria for recording obligations. Note that the statute requires “documentary evidence” to support the recording in each instance. In one sense, these nine criteria taken together may be said to comprise the “definition” of an obligation.⁶

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 at that point record the transaction as an obligation. While 31 U.S.C. § 1501 does not explicitly state that obligations must be recorded as they arise or are incurred, it follows logically from an agency’s responsibility to comply with the Antideficiency Act. GAO has made the point in decisions and reports in various contexts. *E.g.*, B-302358, Dec. 27, 2004; 72 Comp. Gen. 59 (1992); 65 Comp. Gen. 4, 6 (1985); B-242974.6, Nov. 26, 1991; B-226801, Mar. 2, 1988; B-192036, Sept. 11, 1978; A-97205, Feb. 3, 1944, at 10; GAO, FGMSD-75-20 (Washington, D.C.: Feb. 13, 1975) (untitled letter report); GAO, *Substantial Understatement of Obligations for Separation Allowances for Foreign National Employees*, B-179343, (Washington, D.C.: Oct. 21, 1974), at 6.

It is important to emphasize the relationship between the existence of an obligation and the act of recording. Recording evidences the obligation but does not create it. If a given transaction is not sufficient to constitute a valid obligation, recording it will not make it one. *E.g.*, B-197274, Feb. 16, 1982 (“reservation and notification” letter held not to constitute an obligation, act of recording notwithstanding, where letter did not impose legal liability on government and subsequent formation of contract was within agency’s control). Conversely, failing to record a valid obligation in no way diminishes its validity or affects the fiscal year to which it is properly chargeable. *E.g.*, B-226782, Oct. 20, 1987 (letter of intent, executed in fiscal year 1985 and found to constitute a contract, obligated fiscal year 1985 funds, notwithstanding agency’s failure to treat it as an obligation). *See also* 63 Comp. Gen. 525 (1984); 38 Comp. Gen. 81, 82–83 (1958).

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, an obligation

⁶ S. Doc. No. 87-11, at 86.

amount must still be recorded on a preliminary basis. How to determine this amount is discussed in section B.1.f of this chapter. See also OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, § 20.5 (June 21, 2005) for guidance on how to record obligation amounts in certain situations. As more precise data on the liability becomes available, the obligation must be periodically adjusted, that is, the agency must deobligate funds or increase the obligational level as the case may be. 7 GAO-PPM § 3.5.D; B-300480, Apr. 9, 2003.

Adjustments to recorded obligations, like the initial recordings themselves, must be supported by documentary evidence. The use of statistical methods to make adjustments “lacks legal foundation if the underlying transactions cannot be identified and do not support the calculated totals.” B-236940, Oct. 17, 1989; GAO, *Financial Management: Defense Accounting Adjustments for Stock Fund Obligations Are Illegal*, GAO/AFMD-87-1 (Washington, D.C.: Mar. 11, 1987), at 6.

A related concept is the allocation of obligations for administrative expenses (utility costs, computer services, *etc.*) between or among programs funded under separate appropriations. There is no rule or formula for this allocation apart from the general prescription that the agency must use a supportable methodology. Merely relying on the approved budget is not sufficient. See GAO, *Financial Management: Improvements Needed in OSMRE's Method of Allocating Obligations*, GAO/AFMD-89-89 (Washington, D.C.: July 28, 1989). An agency may initially charge common-use items to a single appropriation as long as it makes the appropriate adjustments from other benefiting appropriations before or as of the end of the fiscal year. 31 U.S.C. § 1534; 70 Comp. Gen. 601 (1991). The allocation must be in proportion to the benefit. 70 Comp. Gen. 592 (1991).

Further procedural guidance may be found in OMB Circular No. A-11, at § 20.5; the Treasury Financial Manual; and title 7 of GAO's *Policy and Procedures Manual for Guidance of Federal Agencies*. For the most part, the statutory criteria in 31 U.S.C. § 1501(a) reflect standards that had been developed in prior decisions of the Comptroller General over the years. See, *e.g.*, 18 Comp. Gen. 363 (1938); 16 Comp. Gen. 37 (1936). The remainder of this section will explore the nine specific recording criteria.