FISCAL LAW OVERVIEW

I. INTRODUCTION 1

A. U.S. CONSTITUTION 1

B. THE MAJOR FISCAL LIMITATIONS 1

C. PHILOSOPHY OF FISCAL LAW 1

II. KEY TERMINOLOGY 1

III. AVAILABILITY AS TO PURPOSE. 4

A. THE "PURPOSE STATUTE" 4

B. THREE-PART TEST FOR A PROPER PURPOSE. 4

C. DETERMINING THE PURPOSE OF A SPECIFIC APPROPRIATION. 4

D. NECESSARY EXPENSES. 10

E. TYPICAL QUESTIONABLE EXPENSES. 11

F. IS THE EXPENDITURE PROHIBITED? 26

G. IS THE EXPENDITURE OTHERWISE PROVIDED FOR IN A SEPARATE APPROPRIATION? 26

H. AUGMENTATION OF APPROPRIATIONS & MISCELLANEOUS RECEIPTS. 29

I. EMERGENCY AND EXTRAORDINARY EXPENSE FUNDS 34

J. MILITARY CONSTRUCTION 38

Matt Reres
(Ethics & Fiscal)

IV. AVAILABILITY AS TO TIME. 49

A. THE TIME RULE. 49

B. THE "BONA FIDE NEEDS" RULE.. 49

V. AVAILABILITY AS TO AMOUNT 52

A. ADMINISTRATIVE SUBDIVISION OF FUNDS. 52

B. REGULATIONS TO CONTROL THE RATE OF OBLITATIONS 52

VI. THE ANTIDEFICIENCY ACT. 53

A. PROHIBITIONS. 53

B. ANTIDEFICIENCY ISSUES WITH P-T-A. 53

C. LIMITATION ON VOLUNTARY SERVICES. 55

D. INVESTIGATING AND REPORTING ADA VIOLATIONS. 57

VII. CONCLUSION. 58

FISCAL LAW OVERVIEW

I. INTRODUCTION.

A. The U.S. Constitution gives Congress the authority to raise revenue, borrow funds, and appropriate the proceeds for federal agencies. See U.S. Constitution, Art. I, §§ 8 and 9. In implementing these express constitutional powers, Congress limits strictly the obligation and expenditure of public funds by the Executive Branch. Congress regulates virtually all Executive Branch programs and activities through the appropriations process.

1. Congress has enacted fiscal controls, which, if violated, subject the offender to serious adverse personnel actions and criminal penalties.

2. Congress and the Department of Defense (DOD) have agreed informally to additional restrictions. The DOD refrains from taking certain actions without first giving prior notice to, and receiving consent from, Congress. These restraints are embodied in regulation.

B. What are the major fiscal limitations?

1. An agency may obligate and expend appropriations only for a proper **purpose**;

2. An agency may obligate only within the **time** limits applicable to the appropriation (e.g., O&M funds are available for obligation for one fiscal year); and

3. An agency may not obligate more than the **amount** appropriated by the Congress.

C. Philosophy of Fiscal Law. "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." United States v. MacCollom, 426 U.S. 317 (1976).

II. KEY TERMINOLOGY.

A. Fiscal Year. The Federal Government's fiscal year begins on 1 October and ends on 30 September.

B. Period of Availability. Most appropriations are available for obligation for a limited period of time. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for obligation thereafter. DOD Financial Management Regulation 7000.14, Vol. 1, p. xviii [hereinafter DoD FMR].

C. Obligation. An obligation is any act that legally binds the government to make payment. Obligations represent the amounts of orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. DOD FMR, Vol. 1, p. xvi.

D. Budget Authority.

1. Congress finances federal programs and activities by granting budget authority. Budget authority is also called obligational authority.

2. Budget authority means "the authority provided by Federal law to incur financial obligations . . ." 2 U.S.C. § 622(2).

3. "Contract Authority," is a limited form of "budget authority." Contract authority permits agencies to obligate funds in advance of appropriations but not to pay or disburse those funds absent some additional appropriations authority. See, e.g., 41 U.S.C. § 11 (Feed and Forage Act).

E. Comptroller General and Government Accountability Office (GAO).

1. The Comptroller General of the United States heads the GAO, an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds. Established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) the GAO audits government agencies.

2. The Comptroller General asserts the authority of GAO to issue advance decisions regarding the propriety of appropriated fund obligations or expenditures, except in those instances described in paragraph 3 below (see 31 U.S.C. § 3529), BUT DoD policy is to resolve legal issues internally, and agencies are prohibited from requesting advance decisions from the Comptroller General without prior approval of the agency's General Counsel and the DoD General Counsel. Finance officers can direct their questions, through channels, to the appropriate General Counsel's office for an advance decision and DOD will ultimately determine when relief for loss or improper payments is appropriate. See DOD FMR, Vol. 5, Ch. 1, para 0108 (April 2005); 31 U.S.C. 3527(b)(1).

3. Agency Advance Decisions. See DOD FMR, vol. 5, ch. 1, para. 0108 and vol. 5, app. E (April 2005); B-2756605 (March 17, 1997). Per the General Accounting Office Act of 1996 (Pub. L. 104-316, § 204, 110 Stat. 3826 (1996) (codified at 31 U.S.C. § 3529)) and, as delegated by the Director, Office of Management and Budget (OMB), the following issue advance decisions for designated categories:

   a. DOD: uniformed service member pay, allowances, travel, transportation, and survivor benefits.

   b. Office of Personnel Management (OPM): civilian pay and leave.

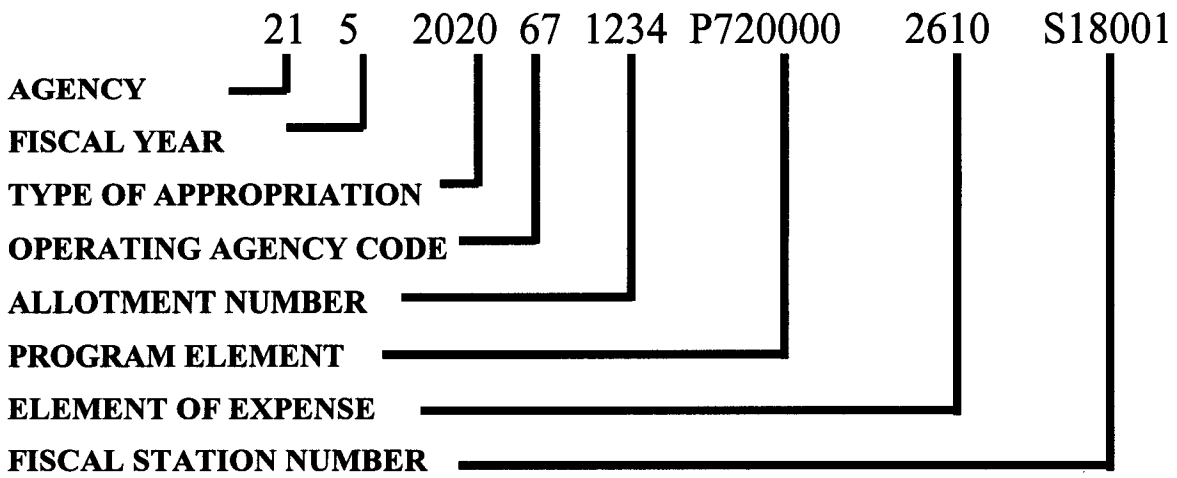
4. GAO Treatises. The GAO has published a five-volume treatise entitled Principles of Federal Appropriations Law (commonly referred to as the "Red Book") available at http://www.gao.gov/.

F. Accounting Classifications. See DFAS-IN Reg. 37-100-XX, The Army Mgmt. Structure.

1. These are codes used to manage appropriations. They implement the administrative fund control system and help to ensure correct use.

2. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN Reg. 37-100-XX, The Army Mgmt. Structure, provides a detailed breakdown of Army accounting classifications and is available at http://dfas4dod.dfas.mil/centers/dfasin/library/regs.htm.

G. Understanding an Accounting Classification. The following is a sample fund cite:



The first two digits represent the military department. The "**21**" in the example shown denotes the Department of the Army.

III. AVAILABILITY AS TO PURPOSE.

A. The "Purpose Statute" provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. 31 U.S.C. § 1301(a).

B. Three-Part Test for a Proper Purpose. The Comptroller General has determined the following three conditions must be met in order to expend appropriated funds:

1. The expenditure of an appropriation must be for a particular statutory purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation.

2. The expenditure must not be prohibited by law.

3. The expenditure must not be otherwise provided for; it must not fall within the scope of some other appropriation.

See e.g., B-240365.2 (March 14, 1996); Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954).

C. Determining the Purpose of a Specific Appropriation.

1. Appropriations Acts.

a. An appropriation is a statutory authorization "to incur obligations and make payments out of the Treasury for specified purposes." See A Glossary of Terms Used in the Federal Budget Process, p.13, GAO-05-734SP (Sept. 2005).

b. In recent years Congress has, on an annual basis, passed thirteen (13) appropriations acts. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. See generally, Principles of Fed. Appropriations Law, 3d ed., vol. I, ch. 1, 1-26 – 1-27, GAO-04-261SP (Jan. 2004).

c. In each of the two annual appropriations acts devoted to DOD, Congress grants multiple appropriations. See e.g., Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148 (2005) (providing 58 separate appropriations to DOD and 2 other appropriations to non-DOD entities); Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005, Pub. L. No. 108-324 (2004) (providing an additional 21 appropriations to DOD for military construction, as well as numerous other appropriations for the DOD and other agencies for natural disaster related costs).

d. Earmarks. An earmark occurs when Congress designates a portion of an appropriation for a particular purpose by way of legislative language within the appropriation. See GAO, A Glossary of Terms Used in the Federal Budget Process, p.46, GAO-05-734SP (Sept. 2005).

e. Researching Appropriation Acts. In addition to LEXIS™- and Westlaw™ -based research, one can utilize the Thomas website (http://thomas.loc.gov/) within the Library of Congress to conduct research on legislation enacted since 1973. This website also has a consolidated listing of appropriations legislation enacted since 1999 and a list of pending appropriations bills for the current or upcoming fiscal year.

2. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency that a subsequent appropriation act will fund. Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-40, GAO-04-261SP (Jan. 2004). This organic legislation provides the agency with authority to conduct the program, function, or mission and to utilize appropriated funds to do so.

a. Example: 10 U.S.C. § 111 establishes the Department of Defense as an executive department. Various statutes scattered mainly throughout Title 10 of the United States Code establish programs or functions that the department is to carry out. See e.g., 10 U.S.C. § 1090 (giving the Secretary of Defense the mission to "identify, treat, and rehabilitate members of the armed forces who are dependent on drugs or alcohol").

b. Organic legislation may be found in appropriation acts, authorization acts, or "stand-alone" legislation. It may also be codified or uncodified.

c. Organic legislation rarely provides any money for the agency, program, or activity it establishes.

3. Authorization Act.

a. An authorization act is a statute, passed annually by Congress that authorizes the appropriation of funds for programs and activities. See GAO, A Glossary of Terms Used in the Federal Budget Process, p.15, GAO-05-734SP (Sept. 2005)

b. An authorization of appropriations is, under congressional rules, a prerequisite for such an appropriation. Thus, for example, a point of order may be raised in either house objecting to an appropriation in an appropriation act that is not previously authorized by law. This rule is seldom enforced in practice and generally there is no other requirement to have an authorization in order for an appropriation to occur. There are, however, certain statutorily created situations in which Congress must authorize an appropriation. For example 10 U.S.C. § 114(a) states that "No funds may be appropriated for any fiscal year" for certain purposes, including procurement, military construction, and/or research, development, test and evaluation "unless funds therefore have been specifically authorized by law" (emphasis added).

c. An authorization act does not provide budget authority. That authority **most commonly** stems from the appropriations act.

(1) Congress may choose to place limits in the authorization act on the amount of appropriations it may subsequently provide, however.

(2) In the alternative, Congress may also authorize the appropriation of "such sums as may be necessary" for a particular program or function.

d. Resolving Conflicts between an Appropriation Act and an Authorization Act. See generally, Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-42 to 2-70, GAO-04-261SP (Jan. 2004).

(1) The general rule regarding statutory construction is "that statutes should be construed harmoniously so as to give maximum effect to both whenever possible." Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

(2) If there is an irreconcilable conflict between two statutes or if the latter of the two statutes is clearly intended to substitute for the prior statute, the more recent statute governs. The "intention of the legislature to repeal must be clear and manifest" in either case, however. Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

(3) Differences in Amount. In general, Congress enacts authorization acts before it enacts appropriation acts. Application of the above rules will therefore usually result in the agency being able to use the amount specified in the appropriation act, regardless of whether it is more or less than what is in the authorization act.

(4) Differences in Purpose. Congress can expressly expand or limit authorized purposes in an appropriations act but must otherwise appropriate funds in accordance with the authorization act in terms of purpose. Likewise, Congress cannot expand the purposes of an appropriation through authorizing acts. *See generally*, Principles of Fed. Appropriations Law, Vol I, 2/51-52, GAO-04-261SP (3d Ed. 2004).

4. Miscellaneous Statutory Provisions.

a. Congress often enacts statutes that expressly prohibit or authorize the use of appropriated funds.

(1) **Express Prohibition**: 10 U.S.C. § 2491a prohibits DOD from using its appropriated funds to operate or maintain a golf course except in foreign countries or isolated installations within the United States.

(2) **Express Authorization**: 10 U.S.C. § 520b permits DOD to use its appropriated funds "for the issue of authorized articles to applicants for enlistment."

b. **Express Prohibitions and Authorizations** may also be either temporary or permanent. For example, if the restriction arises out of a provision in an appropriation act that does not expressly state the duration of the restriction, an agency may presume the restriction is effective only for the fiscal year covered by the act. This presumption may be overcome if the restriction uses language indicating futurity, or if the legislation clearly indicates its permanent character. See Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, B-222097, 65 Comp. Gen. 588 (1986) (indicating that a restriction applicable to "this Act or any other Act" does not indicate futurity).

5. Legislative History.

a. Legislative history is any Congressionally-generated document related to a bill from the time the bill is introduced to the time it is passed. In addition to the text of the bill itself, it includes conference and committee reports, floor debates, and hearings.

b. Legislative history can be very useful for resolving ambiguities or confirming the intent of Congress.

c. If the underlying statute clearly conveys Congress' intent, however, agencies will not be further restricted by what is included in legislative history. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001); ANGUS Chem. Co., B-227033, Aug. 4, 1987, 87-2 CPD ¶ 127 (stating that "there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into law that which is not there"); SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30 (indicating that if Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions); LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203 (indicating the Navy was not bound by a provision within the conference report accompanying the 1975 Defense Appropriations Act stipulating that adaptation of the Air Force's F-14 to enable it to be capable of carrier operations was the prerequisite for the Navy's use of $20 million in funds provided for a Navy fighter).

d. Legislative history may also not be utilized to justify an otherwise improper expenditure. Alberto Mora, Gen. Counsel, U.S. Info. Agency, B-248284.2, Sept. 1, 1992 (unpub.) (agency violated the purpose statute when it utilized construction funds to host an overseas exhibit that should have been funded with salaries and expenses funds where the agency had only received informal written approval from the Chairmen of the House and Senate Subcommittees to reprogram the construction funds into salaries and expenses funds).

6. Other Documents Impacting the Usage of an Appropriation.

a. Budget Request Documentation. Agencies are required to justify their budget requests. OMB Cir. A-11, Preparation, Submission, and Execution of the Budget (Jun. 2005), § 51.

(1) Within DOD, Volumes 2A and 2B of the DOD FMR provide guidance on the documentation that must be generated to support defense budget requests. These documents are typically referred to as Justification Books, with a book generated for each appropriation.

(a) The document is prepared by the actual end user of the funds and is filtered through agency command channels until it is ultimately reviewed by the Office of Management and Budget and submitted by the President as part of the federal government's overall budget request.

(b) These justification documents contain a description of the proposed purpose for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purpose requested, unless otherwise prohibited.

b. Agency Regulations. See generally, Principles of Fed. Appropriations Law, vol. I, 3d. Ed., ch. 3, GAO-04-261SP (Jan. 2004)

(1) Background. When Congress enacts organic legislation establishing a new agency or giving an existing agency a new function or program, it rarely prescribes exact details about how the agency will carry out that new mission. Instead, Congress leaves it up to the agency to implement the statutorily-delegated authority in agency-level regulations.

(2) Where Congress charges an agency with the responsibility for administering a statute, by regulation or otherwise, the agency's interpretation of the statute is entitled to considerable weight. When the agency's interpretation is in the form of a regulation which has the force and effect of law, then it receives the greatest deference. An agency's statutory interpretation that takes the form of an interpretive regulation, manual or handbook is given somewhat less deference. See e.g. Intertribal Bison Cooperative, B-288658, Nov. 30, 2001 (finding little if any deference due to Department of Agriculture's interpretation of a statute because the agency interpretation not derived from rulemaking or adjudication and generally lacked weight given its opposition to plan meaning of the statute and legislative history).

(3) Agency-level regulations may also place restrictions on the use of appropriated funds.

c. Additional Research Resources:

(1) DOD Financial Management Regulation, DOD 7000.14-R available at: http://www.dod.mil/comptroller/fmr/.

(2) DFAS-IN Manual 37-100-XXXX, The Army Management Structure (July XXXX). The manual is reissued every FY. This annual publication as well as other DFAS-IN regulations can be found at: https://dfas4dod.dfas.mil/centers/dfasin/library/regs.htm.

(3) Army Regulations: http://www.usapa.army.mil/.

(4) GAO: http://www.gao.gov/legal.htm.

D. Necessary Expenses.

1. The Purpose Statute does not require Congress to specify every item of expenditure in an appropriations act. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. See HUD Gun Buyback Initiative, B-285066, May 19, 2000 (unpub.). See also Department of Labor—Interagency Agreement between Employment and Training Admin. and Bureau of Int'l Affairs, B-245541, 71 Comp. Gen. 402 (1992); Department of the Army—Purchase of Commercial Calendars, B-211477, 62 Comp. Gen. 566 (1983).

2. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. Secretary of State, B-150074, 42 Comp. Gen. 226, 228 (1962); Major General Anton Stephan, A-17673, 6 Comp. Gen. 619 (1927).

3. In some instances, Congress has specifically authorized expenditures as "necessary expenses" of an existing appropriation. See e.g., 10 U.S.C. § 1124 (authorizing the Secretary of Defense to "incur necessary expense for the honorary recognition of a member of the armed forces" who increases their agency's efficiency or improves its operations); 5 U.S.C. §§ 4503-4504 (authorizing the same for civilian employees).

4. Necessary Expense Defined.

   a. "[A]n expenditure is permissible if it is **reasonably necessary** in carrying out an authorized function or will **contribute materially** to the effective accomplishment of that function . . . ." Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) (emphasis added).

   b. A necessary expense does not have to be the only way, or even the best way, to accomplish the object of an appropriation. Secretary of the Interior, B-123514, 34 Comp. Gen. 599 (1955). However, a necessary expense must be more than merely desirable. Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).

5. Determinations are fact/agency/purpose/appropriation specific. See Federal Executive Board—Appropriations—Employee Tax Returns—Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129; Use of Appropriated Funds for an Employee Electronic Tax Return Program, B-239510, 71 Comp. Gen. 28 (1991).

E. Typical Questionable Expenses.

1. Agencies may have specific guidance about "questionable" expenditures. See, e.g., AFI 65-601, Budget Guidance and Procedures, vol. 1., ch. 4, §§ K-O (24 Dec. 2002).

2. Food: Buying food for individual employees (who are not away from their official duty station on travel status) generally does not materially contribute to an agency's mission performance. As a result, food is generally considered a personal expense, and appropriated funds are legally unavailable for such expenses. See Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (determining coffee and donuts to be an unauthorized entertainment expense). It may be permissible to use appropriated funds for food, at some types of events, for some types of personnel, under the following very limited circumstances. See DOD CG Memo (9/1/05)

   a. Basic Allowance for Subsistence. Under 37 U.S.C. § 402, DOD may pay service members a basic allowance for subsistence.

   b. GAO-sanctioned exception where food is included as part of a facility rental cost. GAO has indicated that it is acceptable for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and comparably priced to the fees of other facilities that do not include food as part of their rental fee. See Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, Dec. 1, 1999 (unpub.).

   c. Regulatory-based "Light Refreshments" exception has been eliminated. Through 27 January 2003, federal agencies commonly paid for "light refreshments" at government-sponsored conferences under a regulatory exception found in the travel regulations where a majority of the attendees were from a different permanent duty station than the sponsoring activity. That exception was recently overturned, at least with respect to paying for the refreshments given to any personnel not on travel status. See Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, Jan. 27, 2003 (unpub.).

   d. Award Ceremonies:

      (1) The award recipients are either federal employees or military members

      (2) The Award recipients are publicly recognized, and

      (3) The authorized agency official has determined that food materially advances the recognition of the recipient.

(4) Sources: 5 U.S.C. §§ 4501, 4503-4504 (civilian incentive awards) and 10 U.S.C. § 1124 (military cash awards only); Defense Reutilization and Mktg. Serv. Award Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986).

e. Cultural Awareness Ceremonies:

(1) The food is part of a formal program intended to make the audience aware of the cultural or ethnic history being celebrated,

(2) The food is a sample of the food of the culture and is being offered as part of the larger program to serve an educational function, and

(3) The portions and selection of dishes do not constitute a meal, for which appropriated funds are not available under this exception.

(4) Sources: B-301184, January 15, 2004.

f. Training:

(1) When food constitute a nonseverable portion of the registration or attendance fee for the training program.

(2) Food costs are considered non-severable if they are billed as part of the overall costs of the conference, and the conference costs cannot be reduced by foregoing the food or by breaking out the food costs as a separate optional item.

(3) The cost of food provided at the training program conducted by the Government is presumed to be severable because the Government is responsible for arranging the program.

(4) If food costs are a severable part of the registration fee, appropriated funds are available for such costs only where necessary for the employee to obtain the full benefit of the training. For example, where essential training is conducted during a luncheon session, food may be provided at Government expense. Simply labeling a session as a "training event" is not sufficient; instead, the event must be a substantive program designed to improve trainee and agency performance.

(5) Sources: 5 U.S.C. 4101, 4109 (applicable to civilian employees); 10 U.S.C. 2013, **10 U.S.C. § 4301** and **10 U.S.C. § 9301** (applicable to service members); 39 Comp. Gen. 119 (1959); 66 Comp. Gen. 350 (1987).

g. Routine Agency Meetings:

(1) Held to discuss internal day-to-day operations of government

(2) The meeting is held at an outside facility

(3) The cost of the food is a non-severable, non-negotiable portion of the cost of the conference space, and

(4) The cost of the space is demonstrably priced competitively with facilities at which food is not provided.

(5) Note: To be applied rarely because, in most cases, the cost of conference space with food will not be competitively priced with similar cost of conference space without food.

(6) Sources: B-281063 (Dec. 1, 1999)

h. Conferences:

(1) A conference typically involves topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants. Other indicators include registration, a published agenda, and scheduled speakers or discussion panels.

(2) Paying for Employees to Attend a Conference

(a) Sponsored by Non-Federal Entities:

(i) Non-Severable Fee:

(a) An agency may pay or provide reimbursement for food purchased as a non-severable, non-negotiable portion of a registration or attendance fee.

(b) Sources: 5 U.S.C. § 4110, B-233807, Aug 27, 1990: B-19471, May 1, 1980; B-288266, Jan 27, 2003: 64 Comp. Gen. 406 (1985).

(ii) Severable Fee: Available only to the extent that

(a) The expenditure is necessary to obtain the full benefit of the meeting or conference,

(b) Meals and refreshments are incidental to the meeting or conference, and

(c) The employee cannot take the meals elsewhere without missing formal discussions, lectures, or speeches that are essential parts of the conference.

(d) Sources: 5 U.S.C. § 4110, B-233807, Aug 27, 1990: B-19471, May 1, 1980; B-288266, Jan 27, 2003: 64 Comp. Gen. 406 (1985).

(b) Sponsored by Another Government Agency:

(i) If the criteria above for "conferences sponsored by a non-federal entity with a severable fee are met and

(ii) The meeting or conference involves matters of topical interest to multiple agencies and/or nongovernmental participants.

(iii) Sources: 5 U.S.C. § 4110; B-198471, May 1, 1980; B-1288266, January 27, 2003).

(3) DOD Sponsored Conferences:

(a) The conference is a formal conference with registration, a published and substantive agenda, and scheduled speakers and a routine meeting that involves the day-to-day operations of the government.

(b) The conference involves matters of topical interest to actual participants from multiple agencies and/or nongovernmental participants

(c) Meals and refreshments are incidental to the overall purposes of the formal conference

(d) Attendance at the meal or when refreshments are provided is important to the host agency to ensure the attendees' full participation in essential discussions and speeches concerning the purpose of the conference, and

(e) The meal and refreshments are part of the formal conference that includes substantial sessions apart from those at which food is served.

(f) Sources: 5 U.S.C. § 4110; NIH, B-300826, March 3, 2005

(4) Where Contractors Collect Fees to Defray Conference Costs:

(a) Only permissible where sponsoring agency has specific statutory authority to charge the fee for the conference and retain the proceeds.

(b) Conference costs include food.

(c) Source: NIH, B-300826, March 3, 2005; B-306663 (January, 2006).

(5) Outstanding Questions: (To be discussed at GAO's April 2006 Forum)

(a) Co-Sponsoring a Conference with a private entity.

(b) No-Cost Contracts with a Contractor that collects fees from participants.

3. Bottled Water. Bottled water generally does not materially contribute to an agency's mission accomplishment. It is therefore generally a personal expense.

   a. GAO-Sanctioned Exception Where Water is Unpotable. Agencies may use appropriated funds to buy bottled water where a building's water supply is unwholesome or unpotable. See United States Agency for Int'l Dev.—Purchase of Bottled Drinking Water, B-247871, 1992 U.S. Comp. Gen. LEXIS 1170 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed "maximum contaminant level" and justified purchase of bottled water until problems with system could be resolved).

   b. Relevant Regulations. See also DOD FMR, vol. 10, ch. 12, para. 120203 (permitting the purchase of water where the public water is unsafe or unavailable); AR 30-22, para. 5-19 (discussing bottled water in the context of a deployment / contingency).

4. Workplace Food Storage and Preparation Equipment (i.e. microwave ovens; refrigerators; coffee pots).

   a. In the past, the Comptroller General opined that buying food storage and/or preparation equipment generally did not materially contribute to an agency's mission performance. As a result, these items were generally considered to be a personal expense.

   b. Under a "necessary expense" analysis, the GAO sanctioned the use of appropriated funds to buy food storage and preparation equipment only when the purchase was:

      (1) "reasonably related to the efficient performance of agency activities," and

      (2) "not just for the personal convenience of individual employees."

See e.g., Central Intelligence Agency-Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230 (determining that commercial facilities were not proximately available when the nearest one was a 15-minute commute away from the federal workplace); Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (determining commercial facilities were unavailable when employees worked 24 hours a day, seven days a week and restaurants were not open during much of this time).

c. In June, 2004 the GAO revisited this issue and determined that regardless of the availability of commercial eating facilities, food storage and/or preparation equipment did reasonably relate to the efficient performance of agency activities, and thus appropriated funds could be spent for these items. See Use of Appropriated Funds to Purchase Kitchen Appliances, B-302993 (June 25, 2004) (observing that these items reasonably related to workplace safety in that, as a result of fire safety measures, employees were not allowed to have coffee makers in their workspace areas and further noting that providing such equipment results in benefits for the agency, "including increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment."). (Note: agency level regulations and policies should be consulted prior to relying on this decision.)

5. Clothing. Buying clothing for individual employees generally does not materially contribute to an agency's mission performance. Clothing is, therefore, generally considered a personal expense unless a statute provides to the contrary. See IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized).

a. Statutorily-Created Exceptions. See 5 U.S.C. § 7903 (authorizing purchase of special clothing, for government benefit, which protects against hazards); 10 U.S.C. § 1593 (authorizing DOD to pay an allowance or provide a uniform to a civilian employee who is required by law or regulation to wear a prescribed uniform while performing official duties); and 29 U.S.C. § 668 (requiring federal agencies to provide certain protective equipment and clothing pursuant to OSHA). See also Purchase of Insulated Coveralls, Vicksburg, Mississippi, B-288828, Oct. 3, 2002 (unpub.); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Eng's, B-289683, Oct. 7, 2002 (unpub.) (both provide an excellent overview of each of these authorities).

b. Opinions and Regulations on-point. See also White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (authorizing tuxedo rental or purchase); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (authorizing safety shoes); DOD FMR vol. 10, ch. 12, para. 120220; AR 670-10, Furnishing Uniforms or Paying Uniform Allowances to Civilian Employees, (1 July 1980).

6. Entertainment. Entertaining people generally does not materially contribute to an agency's mission performance. As a result, entertainment expenses are generally considered to be a personal expense. See HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989); Navy Fireworks Display, B-205292, Jun. 2, 1982, 82-2 CPD ¶ 1 (fireworks unauthorized entertainment).

   a. Statutory-based Exceptions. Congress does occasionally provide permanent or one-time authority to entertain. See Claim of Karl Pusch, B-182357, Dec. 9, 1975 (unpub.) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club—twice); Golden Spike Nat'l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (discussing authority to conduct "interpretive demonstrations" at the 1988 Annual Golden Spike Railroader's Festival).

   b. Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of cultural awareness programs including equal employment opportunity training programs. Internal Revenue Serv.—Live Entm't and Lunch Expense of Nat'l Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (determining a live African dance troupe performance conducted as part of an Equal Employment Opportunity (EEO) program was a legitimate part of employee training).

   c. Agencies that are authorized emergency and extraordinary expense or similar funds may also use such funds to entertain distinguished visitors to the agency. See discussion beginning on page 34 *infra* for an overview. See also To The Honorable Michael Rhode, Jr., B-250884, March 18, 1993 (unpub.) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).

7. Decorations. Under a "necessary expense" analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. See Department of State & Gen. Serv. Admin.—Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (modest expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee proper); But see The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (determining Christmas cards were not a proper expenditure because they were for personal convenience). See also AFI 65-601, vol. 1, para. 4.26.2.

NOTE: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, Hanukkah, etc.)

8. Business Cards. Under a "necessary expense" analysis, the GAO has recently sanctioned the use of appropriated funds to purchase business cards for agency employees. See Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, B-280759, Nov. 5, 1998 (purchase of business cards with appropriated funds **for government employees who regularly deal with public or outside organizations** is a proper "necessary expense").

a. This case "overturned" a long history of Comptroller General's decisions holding that business cards were a personal expense because they did not materially contribute to an agency's mission accomplishment. See, e.g., Forest Serv.—Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).

b. More Restrictive Agency Level Regulations. The military departments have implemented policies that permit only recruiters and criminal investigators to purchase commercially prepared business cards. All others are permitted to use appropriated funds to purchase card stock and printer ink and then use in-house computing resources to print their own business cards. See AR 25-30, The Army Publishing and Printing Program, para. 11-11 (21 June 1999); DOD Directive 5330.3/AFSUP1, Defense Automated Printing Service (18 Feb. 1999); but see Department of Defense memorandum, dated 15 July 1999 and Department of the Army memorandum, dated 2 August 1999 (indicating agencies may procure commercially prepared business cards from the Lighthouse for the Blind if the cost of procuring the cards is equivalent to or less than the cost of producing the cards on a personal computer).

9. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that an employee incurs to obtain a license or certificate enabling them to carry out their duties are considered a personal expense rather than a "necessary expense" of the government. See A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable).

a. GAO Sanctioned Exception. When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency—Request for Advance Decision, B-257895, Oct. 28, 1994 (unpub.) (driver's licenses for scientists and engineers to perform security testing at remote sites); Air Force—Appropriations—Reimbursement for Costs of Licenses or Certificates, B-252467, June 3, 1994, (unpub.) (license necessary to comply with state-established environmental standards).

b. Legislative Exception.

(1) Section 1112 of the 2002 National Defense Authorization Act, Pub. L. No. 107-107, 115 Stat. 1654 (2001), added 5 U.S.C. § 5757, permitting agencies to reimburse the following expenses that their civilian competitive service employees incur:

(a) professional accreditation;

(b) state-imposed professional licenses;

(c) professional certification; and

(d) the costs of any examinations required to obtain such credentials.

(2) On 20 June 2003 the Assistant Secretary of the Army (Manpower and Reserve Affairs) issued a memorandum to MACOM Commanders authorizing payment for professional credentials, as permitted in 5 U.S.C. § 5757. This authority may be redelegated at the discretion of the MACOM Commanders. This memorandum is available at: http://www.asmccertification.com/documents/Army-Reimbursement-Policy-20030620.pdf. See also: http://www.hq.usace.army.mil/cehr/d/traindevelop/USACE-credentials-policy-aug03.pdf (Corps of Engineers implementing guidance); Scope of Professional Credentials Statute, B-302548, Aug. 20, 2004 (GAO analysis of the scope of 5 U.S.C. § 5757).

10. Awards (Including Unit or Regimental Coins and Similar Devices). Agencies generally may not use their appropriated funds to purchase "mementos" or personal gifts. See EPA Purchase of Buttons and Magnets, B-247686, 72 Comp. Gen. 73 (1992) (requiring a direct link between the distribution of the gift or memento and the purpose of the appropriation in order to purchase the item with appropriated funds). Congress has enacted various statutory schemes permitting agencies to give awards, however. These include:

a. Awards for Service Members. Congress has provided specific statutory authority for SECDEF to "award medals, trophies, badges, and similar devices" for "excellence in accomplishments or competitions." 10 U.S.C. § 1125.

(1) The Army has implemented this statute in AR 600-8-22, Military Awards (25 Feb. 1995). The bulk of this regulation deals with the typical medals and ribbons issued to service members (i.e. the Army Achievement Medal, the Meritorious Service Medal, the Purple Heart, etc).

(2) Chapter 11 of the regulation allows the presentation of other nontraditional awards for "excellence in accomplishments and competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, that is, tank gunnery, weapons competition, military aerial competition."

(3) These awards must "be made on a one time basis where the achievement is unique and clearly contributes to increased effectiveness." See AR 600-8-22, para. 11-2.

(4) Theoretically, these awards could be made in the form of a coin, a trophy, a plaque, or a variety of other "similar devices." The MACOM commander or head of the principal HQDA agency must approve the purchase of the particular item to be awarded, however. See AR 600-8-22, para. 1-7d. See also Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (approving the use of appropriated funds to purchase belt buckles as awards for the annual "Peacekeeper Challenge").

(5) Specific Issues Concerning Unit or Regimental Coins. For a detailed discussion of the issues related to commanders' coins, see Major Kathryn R. Sommerkamp, *Commanders' Coins: Worth Their Weight in Gold?*, ARMY LAW., Nov. 1997, at 6.

b. Awards for Civilian Employees. Congress has provided agencies with various authorities to pay awards to their employees. See U.S.C. tit. 5, ch. 45. The most often utilized authority used as a basis to issue an award to a civilian employee is that found at 5 U.S.C. § 4503.

(1) Regulatory Implementation. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be in accordance with DoD 1400.25-M, subchapter 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993).

(2) Non-Cash Awards. The statute technically states that the "head of an agency **may pay a cash award** to, and incur necessary expense for the honorary recognition of" one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. The agency regulations each expressly permit non-cash awards, however. Curiously, the GAO has sanctioned the giving of non-cash awards to civilian employees. See Awarding of Desk Medallion by Naval Sea Sys. Command, B-184306, Aug. 27, 1980 (unpub.) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements).

c. Agencies that are authorized emergency and extraordinary expense or similar funds may also use such funds to purchase mementoes for their distinguished visitors. See discussion beginning on page 34 *infra* for an overview.

d. DA Memo 600-70 (16 Jan. 2004) (Applies to HQDA & FOAs, Only; Only BG or SES Level HQDA Principals May Purchase Coins with Appropriated Funds. (May be delegated to one GS-15 / 0-6 or above); No Coins to Contractors; Only Sec Army, Army COS, and Army SM May Personalize Coins with Name).

11. Use of Office Equipment. Use of Office Equip. in Support of Reserves and Nat'l Guard, B-277678, Jan. 4, 1999 (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See Office of Personnel Management memorandum, subject: Use of Official Time and Agency Resources by Federal Employees Who Are Members of the National Guard or Armed Forces Reserves (3 June 1999) (providing general guidance to assist federal agencies in determining the circumstances in which employee time and agency equipment may be used to carry out limited National Guard or Reserve functions) available at http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/OPM Reserves.htm. See also CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, RESERVE OFFICERS ASS'N L. REV., May 2001 (providing a good overview of this authority).

12. Cellular phones. AR 25-1, 1 June 2004, para. 6-4; Interim Change (IC) 2004-1 to Air Force Instruction (AFI) 33-111, Telephone Systems Management.

13. Chaplain Programs. New 10 U.S.C. § 1789. Permanent authorization for chaplain-led programs (retreats, conferences) to maintain strong families.

F. Is the Expenditure Prohibited?

1. After determining that an expenditure is a "necessary expense," the next step in the three-part Purpose analysis is to determine whether Congress or other authority has prohibited the expenditure. See e.g. B-291241, October 8, 2002).

2. This step in the analysis again requires review of the Appropriations and Authorization Acts, statutes, and regulations. For example, 10 U.S.C. 2246 states that "funds appropriation to the DOD may not be used to equip, operation, or maintain a golf course," except in limited circumstances.

3. For a discussion of the permanency of prohibitions/restrictions, see "Miscellaneous Statutory Provisions" discussed above at pp. 7-8.

G. Is the Expenditure Otherwise Provided For in a Separate Appropriation?

1. If there is another, more specific appropriation available, it must be used in preference to the more general appropriation. The Honorable Lane Evans, B-289209, 2002 U.S. Comp. Gen. LEXIS 145 (May 31, 2002); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (may not use O&M funds when foreign assistance funds available).

a. That a specific appropriation is exhausted is immaterial. Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).

b. General appropriations may not be used as a back-up for a more specific appropriation. Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940).

c. Limitation applies even if specific appropriation is included in the more general appropriation. Secretary of the Interior, B-14967, 20 Comp. Gen. 739 (1941).

2. If there are two appropriations equally available:

a. The agency may choose either appropriation. Payment of SES Performance Awards of the R.R. Ret. Board's Office of Inspector Gen., B-231445, 68 Comp. Gen. 337 (1989). Agency discretion is not questioned generally. Secretary of Agric., A-96689, 18 Comp. Gen. 285, 292 (1938).

b. **BUT**, once the election is made, the agency must continue to use the selected appropriation to the exclusion of any other, during the current fiscal year. See Funding for Army Repair Projects, B-272191, Nov. 4, 1997. The election is binding even after the chosen appropriation is exhausted. Honorable Clarence Cannon, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).

c. If Congress specifically authorizes the use of two accounts for the same purpose, the agency is not required to make an election between the two and is free to use both appropriations for the same purpose. See Funding for Army Repair Projects, *supra*; See also 10 U.S.C. § 166a (Combatant Commander Initiative Funds are in addition to amounts otherwise available for an activity).

3. Investment/Expense Threshold.

a. Expenses are costs of resources consumed in operating and maintaining DOD, and are normally financed with O&M appropriations. See DOD FMR, vol. 2A, ch. 1, para. 010201.

b. Investments are "costs to acquire capital assets" or which have costs that will benefit both current and future periods and generally have a long life span. DOD FMR, vol. 2A, ch. 1, para. 010201.D.2. Investments are normally financed with procurement appropriations.

c. Exception Permitting Purchase of Investments with O&M Funds. In each year's Defense Appropriation Act, Congress has permitted DOD to utilize its O&M appropriations to purchase investment items having a unit cost that is less than a certain threshold. See e.g., Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, § 8036 (2005) (establishing the threshold at $250,000).

(1) Expenses. Operation & Maintenance, Army (OMA) appropriations generally are available to acquire systems and equipment items that are **locally purchased** and **cost less than $250,000**. See DOD Reg. 7000.14-R, vol. 2A, ch 1, para. 010201.

(2) Investments. Other Procurement, Army (OPA) appropriations are used to acquire equipment items that are **centrally managed** or **cost $250,000 or more**. See DOD Reg. 7000.14-R, vol. 2A, ch 1, para. 010201.

(3) Systems. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the investment/expense threshold ($250,000). This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.

(a) Agencies must consider the "system" concept when evaluating the procurement of items. The determination of what constitutes a "system" must be based on the **primary function** of the items to be acquired, as stated in the approved requirements document.

(b) A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.

(c) Agencies may purchase multiple end items of equipment (e.g., computers), and treat each end item as a separate "system" for funding purposes, only if the primary function of the end item is to operate independently.

(d) Do not fragment the acquisition of an interrelated system of equipment merely to avoid exceeding the O&M threshold.

See also DFAS-IN Manual 37-100-03, Appendix A, Expense/Investment Criteria (implementing the expanded threshold for Army purchases).

H. Augmentation of Appropriations & Miscellaneous Receipts.

1. General Rule - Augmentation of Appropriations Is Not Permitted.

a. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. Generally, this results in expenditures by the agency in excess of the amount originally appropriated by Congress.

b. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:

(1) Article I, Section 9, Clause 7, of United States Constitution.

No money shall be drawn from the treasury except in consequence of appropriations made by law.

(2) 31 U.S.C. § 1301(a) (Purpose Statute).

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

(3) 31 U.S.C. § 3302(b) (Miscellaneous Receipts Statute).

Except as . . . [otherwise provided] . . . an official or agent of the government receiving money for the government from any source shall deposit the money in the Treasury as soon as practical without any deduction for any charge or claim.

c. Types of Augmentation.

(1) Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, 31 U.S.C. § 1301(a). See, e.g., U.S. Equal Employment Opportunity Comm'n – Reimbursement of Registration Fees for Fed. Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (1991).

(2) Augmenting an appropriation by retaining government funds received from another source. This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992); But see Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (noting that 31 U.S.C. § 3302 only applies to monies received, not to other property or services).

(a) Expending the retained funds generally violates the constitutional requirement for an appropriation. See Use of Appropriated Funds by Air Force to Provide Support for Child Care Ctrs. for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988).

2. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted that expressly authorize agencies to retain funds received from a non-Congressional source include:

a. Economy Act. 31 U.S.C. § 1535 authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. See also 41 U.S.C. § 23 (project orders).

b. Foreign Assistance Act. 22 U.S.C. § 2392 authorizes the President to transfer State Department funds to other agencies, including DOD, to carry out the purpose of the Foreign Assistance Act.

c. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. See 10 U.S.C. § 2208; National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (1992); Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960).

d. Defense Gifts. 10 U.S.C. § 2608. The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress.

e. Health Care Recoveries. 10 U.S.C. § 1095(g). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.

f. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts "shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned." 42 U.S.C. § 2651. The U.S. Army Claims Service has taken the position that such recoveries should be credited to the installation's operation and maintenance account. See Affirmative Claims Note, *Lost Wages under the Federal Medical Care Recovery Act*, ARMY LAW., Dec, 1996, at 38.

g. Military Leases of Real or Personal Property. 10 U.S.C. § 2667(d)(1). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the military department and used for facility maintenance, repair, or environmental restoration.

h. Damage to Real Property. 10 U.S.C. § 2782. Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.

i. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. 10 U.S.C. § 2575. Proceeds are credited to the operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities.

j. Host nation contributions to relocate armed forces within a host country. 10 U.S.C. § 2350k.

3. GAO-sanctioned Exceptions to the Miscellaneous Receipts Statute. In addition to the statutory authorities mentioned above, the Comptroller General recognizes other exceptions to the Miscellaneous Receipts Statute, including:

a. Replacement Contracts. An agency may retain recovered excess reprocurement costs to fund replacement contracts. Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678 (1983).

b. Refunds.

(1) Refunds for erroneous payments, overpayments, or advance payments may be credited to agency appropriations. Department of Justice—Deposit of Amounts Received from Third Parties, B-205508, 61 Comp. Gen. 537 (1982) (agency may retain funds received from carriers/insurers for damage to employee's property for which agency has paid employee's claim).

(2) Amounts that exceed the actual refund must be deposited as miscellaneous receipts. Federal Emergency Mgmt. Agency—Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260 (1990) (agency may retain reimbursement for false claims, interest, and administrative expenses in revolving fund; treble damages and penalties must be deposited as miscellaneous receipts).

(3) Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts. Defense Logistics Agency—Disposition of Funds Paid in Settlement of Contract Action, B-226553, 67 Comp. Gen. 129 (1987) (negligent installation of power supply system caused damage to computer software and equipment; insurance company payment to settle government's claim for damages must be deposited as miscellaneous receipts).

(4) Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired. Accounting for Rebates from Travel Mgmt. Ctr. Contractors, B-217913.3, 73 Comp. Gen. 210 (1994); To The Sec'y of War, B-40355, 23 Comp. Gen. 648 (1944). This rule applies to refunds in the form of a credit. See Principles of Fed. Appropriations Law, vol. II, ch. 6, 6-111, GAO/OGC 92-13 (2d ed. 1992), Appropriation Accounting—Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130 (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed).

c. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments that it intends to deliver to the rightful owner, it need not deposit the funds into the treasury as a miscellaneous receipt. The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).

d. Nonreimbursable Details.

(1) The Comptroller General has held that nonreimbursable agency details of personnel to other agencies are generally unallowable. Department of Health and Human Servs.—Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

(2) Exceptions.

(a) A law authorizes nonreimbursable details. See, e.g., 3 U.S.C. § 112 (nonreimbursable details to White House); The Honorable William D. Ford, Chairman, Comm. on Post Office and Civil Serv., House of Representatives, B-224033, 1988 U.S. Comp. Gen. LEXIS 1695 (Jan. 30, 1987).

(b) The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission. Details to Congressional Comm'ns., B-230960, 1988 U.S. Comp. Gen. LEXIS 334 (Apr. 11, 1988).

(c) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means. Department of Health and Human Servs. Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

I. Emergency and Extraordinary Expense Funds.

1. Definition. Emergency and Extraordinary Expense (EEE) funds are appropriations that an agency has much broader discretion to use for "emergency and extraordinary expenses." Expenditures made using these funds need not satisfy the normal purpose rules.

2. Historical Background. Congress has provided such discretionary funds throughout our history for use by the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438.

3. Appropriations Language.

a. For DOD, Congress provides EEE funding authority as a separate item in the applicable Operation and Maintenance appropriation. For example, in FY 2006, Congress provided the following authority within the Army O&M appropriation: "for expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; and **not to exceed $11,478,000 can be used for emergencies and extraordinary expenses . . . .**".

b. Not all agencies receive emergency and extraordinary expense funds. If Congress does not specifically grant an agency emergency and extraordinary expense funds, that agency may not use other appropriations for such purposes. See HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989).

4. Statutory Background.

a. 10 U.S.C. § 127. Emergency and extraordinary expenses.

(1) Authorizes the Secretary of Defense and the Secretary of a military department to spend EEE funds for "any purpose he determines to be proper, and such a determination is final and conclusive."

(2) Requires a quarterly report of such expenditures to the Congress.

(3) Congressional notice requirement. In response to a $5 million payment to North Korea in the mid-90s using DOD EEE funds, Congress amended 10 U.S.C. § 127, imposing the following additional restrictions on DOD's use of these funds:

(a) If the amount to be expended exceeds $1 million: the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 15 days.

(b) If the amount exceeds $500,000 (but is less than $1 million): the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 5 days.

5. Regulatory Controls. Emergency and extraordinary expense funds have strict regulatory controls because of their limited availability and potential for abuse. The uses DOD makes of these funds and the corresponding regulation(s) dealing with such usage are as follows:

a. Official Representation Funds (ORF). This subset of EEE funds are is to extend official courtesies to dignitaries and officials of foreign governments.

(1) DOD Regulations: DOD Directive 7250.13, Official Representation Funds (17 Feb. 2004); DOD FMR, vol. 10, ch. 12, para. 120222.B.

(2) Army Regulation: AR 37-47, Representation Funds of the Secretary of the Army (12 March 2004).

(3) Air Force Regulation: AFI 65-603, Official Representation Funds: Guidance and Procedures (30 Jan. 2002).

(4) Navy Regulation: SECNAV 7042.7, Guidelines for Use of Official Representation Funds (5 Nov. 1998).

(5) Department of Defense memorandum, dated 23 December 2002, subject: Official Representation Funds.

b. Criminal Investigation Activities. This subset of EEE funds is available for unusual expenditures incurred during criminal investigations or crime prevention. See Army Regulation: AR 195-4, Use of Contingency Limitation .0015 Funds For Criminal Investigative Activities (15 Apr. 1983).

c. Intelligence Activities. This subset of EEE funds is available for unusual expenditures incurred during intelligence investigations. See Army Regulation: AR 381-141(C), Intelligence Contingency Funds (30 July 1990).

d. Other Miscellaneous Expenses (other than official representation). This subset of EEE funds is available for such uses as Armed Services Board of Contract Appeals witness fees and settlements of claims. AR 37-47, para. 1-5b.

6. Procedures for Use of Official Representation Funds (ORF).

a. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. DOD Directive 7250.13, para. 3.1; AR 37-47, para. 2-1. Official courtesies are subject to required ratios of authorized guests to DOD personnel. See, e.g., DOD Directive 7250.13, para. E2.4.3; AR 37-47, paras. 2-1b and 2-5. Courtesies are defined as:

(1) Hosting of authorized guests to maintain the standing and prestige of the United States;

(2) Luncheons, dinners, and receptions at DOD events in honor of authorized guests;

(3) Entertainment of local authorized guests for civic or community relations;

(4) New commander receptions;

(5) Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and foreign vessels to U.S. ports;

(6) Official functions in observance of foreign national holidays and similar occasions in foreign countries; and

(7) Dedication of facilities.

b. Gifts. Official representation funds may be used to purchase, gifts, mementos, or tokens for authorized guests.

(1) The gift may cost no more than $285.00. See DOD Directive 7250.13, para. E.2.4.1.8. See also AR 37-47, para. 2-9a(1).

(2) Gifts to DOD personnel may cost no more than $40. 23 Dec 02, OSD Memo.

c. Levels of expenditures. Levels of expenditures are to be "modest." DOD Directive 7250.13, para. E2.2.1.2.4.2; AR 37-47, para. 2-2a.

d. Prohibitions on Using Representational Funds. DOD Directive 7250.13, para. E2.4.2; AR 37-47, para. 2-10.

(1) Any use not specifically authorized by regulation requires an exception to policy. AR 37-47, para. 2-10.

(2) Per AR 37-47, para. 2-10 exceptions will not be granted for the following:

(a) Classified projects and intelligence projects;

(b) Entertainment of DOD personnel, except as specifically authorized by regulation;

(c) Membership fees and dues;

(d) Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);

(e) Gifts and mementos an authorized guest wishes to present to another;

(f) Personal items (clothing, cigarettes, souvenirs);

(g) Guest telephone bills;

(h) Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and

(i) Repair, maintenance, and renovation of DOD facilities.

(3) Use for retirements and change of command ceremonies, is permitted as an exception, but must specifically be approved in advance by the Service Secretary. AR 37-47, para. 2-4g; United States Army School of the Americas—Use of Official Representation Funds, B-236816, 69 Comp. Gen. 242 (1990) (new commander reception distinguished from change of command ceremony).

e. Approval and accounting procedures. AR 37-47, Chapter 3; AFI 65-603, para 4; SECNAVINST 7042.7J, para 8.

(1) Fiscal year letters of authority. AR 37-47, para. 3-1b.

(2) Written appointment of certifying and approving officer.

(3) Written appointment of representation fund custodian.

(4) Funds must be requested and made available before obligation. Requests for retroactive approval must be forwarded to the SA or his designee. AR 37-47, para. 3-1d.

(5) Legal review. AR 37-47, para. 3-1f(2).

f. Community Relations and Public Affairs Funds. AR 360-1, para. 4-5. Do not use public affairs funds to supplement official representation funds. Doing so violates 31 U.S.C. § 1301.

J. Military Construction

1. Congressional oversight of the Military Construction Program is extensive and pervasive.

2. "Specified" Military Construction Projects. 10 U.S.C. § 2802. The Secretary of Defense (SECDEF) and the Secretaries of the military departments may carry out military construction projects authorized by law.

a. Source of Funding. See, e.g., Military Construction Appropriations and Hurricane Supplemental Appropriations Act, 2005, Pub. L. No. 108-324 (2004); H.R. CONF. REP. NO. 108-773 (2004). Congress provides annual funding and approval for "specified" military construction projects in the Military Construction Appropriations Act.

(1) Congress funds the entire military construction program with lump sum appropriations. The Army's principal appropriations are the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation.

(2) The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by project.

b. Authorized Use.

(1) Congress normally "specifies" military construction projects expected to exceed $1.5 million.

(2) A military department may not carry out military construction projects expected to exceed $1.5 million without specific Congressional authorization and approval.

3. "Unspecified" Minor Military Construction (UMMC) Projects. 10 U.S.C. § 2805(a).

a. Source of Funding. See, e.g., Military Construction Appropriations and Hurricane Supplemental Appropriations Act, 2005, Pub. L. No. 108-324 (2004); H.R. CONF. REP. NO. 108-773 (2004). Congress provides annual funding and approval for UMMC projects in the Military Construction Appropriations Act.

(1) Congress appropriates "Unspecified Minor Construction" funds to each military department in the conference report that accompanies the Military Construction Appropriations Act; however, the conference report does not break down these appropriations by project.

(2) The Army refers to its "unspecified" appropriation as "Unspecified Minor Military Construction, Army" (UMMCA). See AR 415-15, para. 1-1a(1); Glossary, sec. I.

b. Authorized Use. 10 U.S.C. § 2805(a). See AR 415-15, para. 1-6b(1) and App. B. The Secretary concerned may use these funds to carry out UMMC projects not otherwise authorized by law.

(1) An UMMC project is defined as a military construction project with an approved cost of $1.5 million or less.

(2) However, an UMMC project may have an approved cost up to $3 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.

c. Requirements for Use. 10 U.S.C. § 2805(b)(2).

(1) Before beginning an UMMC project with an approved cost greater than $750,000, the Secretary concerned must approve the project.

(2) In addition, the Secretary concerned must:

(a) Notify the appropriate committees of Congress; and

(b) Wait 21 days.

4. UMMC Projects Financed by Operation & Maintenance (O&M) Funds

a. General Prohibition on the Use of O&M Funds for construction. See 41 U.S.C. § 12; see also Department of Defense--Transfer and Use of Defense Emergency Response Funds, B-303145 (December 7, 2005).

b. Statutory Exception for UMMC Projects. 10 U.S.C. § 2805(c). See AR 415-15, para. 1-6c(1); AR 420-10, para. 4-1c. The Secretary of a military department may use O&M funds to finance UMMC projects costing less than:

(1) $1.5 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.

(2) $750,000 if the project is intended for any other purpose.

c. Project scope is critical.

(1) A "military construction project" includes all work necessary to produce a complete and usable facility, or a complete and usable improvement to an existing facility. 10 U.S.C. § 2801(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.L; AR 415-15, para. 2-3a; AR 415-32, Glossary, sec. II; AR 420-10, para. 4-1c; see also The Honorable Michael B. Donley, B-234326, Dec. 24, 1991 (unpub.) (concluding that the Air Force improperly split a project involving 12 related trailers into 12 separate projects).

(2) An agency may not treat "clearly interrelated" construction activities as separate projects. The Honorable Michael B. Donley, *supra*; The Honorable Bill Alexander, House of Representatives, B-213137, Jan. 30, 1986 (unpub).

5. Reserve Component Construction Authorities.

a. Specified Military Construction Projects. 10 U.S.C. § 18233. The Secretary of Defense may carry out military construction projects authorized by law.

(1) Includes authority to acquire, lease, or transfer, and construct, expand, rehabilitate, or convert and equip such facilities as necessary to meet the missions of the reserve components.

(2) Allows the SECDEF to contribute amounts to any state (including the District of Columbia, Puerto Rico, and the territories and possessions of the United States, (10 U.S.C. § 18232(1)) for the acquisition, conversion, expansion, rehabilitation for specified purposes.) 10 U.S.C. § 18233(a)(2)-(6).

(3) Authorizes the transfer of title to property acquired under the statute to any state, so long as the transfer does not create a state enclave within a federal installation. 10 U.S.C. § 18233(b).

b. Military Construction Funded with Operation & Maintenance accounts. 10 U.S.C. § 18233a; AR 140-483, Ch. 7.

(1) Unspecified Minor Military Construction. 10 U.S.C. § 18233a(a)(1). Unlike Active Duty, RC UMMC projects are funded with O&M appropriations. Similar funding limits apply.

(a) Expenditure or contributions in excess of $1.5 million may not be made until the SECDEF has notified the appropriate committees of Congress of the location, nature, and estimated cost of the project, and waited 21 days after notification.

(b) This limitation does not apply to facilities acquired by lease, or to projects specifically approved by Congress. 10 U.S.C. §18233a(a)(2)(A) & (B).

(c) Projects intended solely to correct a deficiency that threatens life, health or safety may have an approved cost of up to $3 million. 10 U.S.C. § 18233a(a)(2)(C).

(2) Minor Construction Projects. 10 U.S.C. § 18233a(b).

(a) Projects intended solely to correct a deficiency that threatens life, health or safety may have an approved cost of up to $1.5 million.

(b) For any other project, the limit is $750,000. 10 U.S.C. § 18233a(b)(2).

6. Exercise-Related UMMC Projects.

a. All Exercise-Related Projects. See Military Construction Appropriations and Hurricane Supplemental Appropriations Act, 2005, Pub. L. No. 108-324, § 113 (2004); see also AR 415-32, para. 3-11d; and JCSI 4600.01, EXERCISE-RELATED CONSTRUCTION STANDARD OPERATING PROCEDURES (20 June 2001).

(1) If a military department expects to spend more than $100,000 for temporary or permanent construction during a proposed exercise involving U.S. personnel, the SECDEF must notify the appropriate committees of Congress of the plans and scope of the exercise.

(2) The SECDEF must provide this notice 30 days before the start of the exercise.

b. Exercise-Related UMMC Projects Coordinated or Directed by the Joint Chiefs of Staff (JCS) Outside the U.S.

(1) O&M Funds. 10 U.S.C. § 2805(c)(2). See AR 415-32, para. 3-5.

(2) General Rule. The Secretary of a military department may not use O&M funds to finance exercise-related UMMC projects coordinated or directed by the JCS outside the U.S.

(3) Exception. The Secretary of a military department may arguably use O&M funds to finance minor and/or temporary structures or any structures that are removed completely at the end of an exercise (e.g., tent platforms, field latrines, shelters, range targets, installed relocatable structures, etc.). See The Honorable Bill Alexander, *supra* (noting that the "temporary structure" exception is extremely limited in scope). But see AR 415-32, para. 3-5c. (stating that "the Army may use [O&M] funds, except when the exercise-related construction is JCS directed or coordinated outside the United States").

7. Combat and Contingency Related O&M Funded Construction.

a. On 22 February 2000, the Army Deputy General Counsel (Ethics and Fiscal) issued an opinion stating that the Army should use O&M funds to build structures during combat and contingency operations if the structures "are clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations." See Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000) (a/k/a "the Reres Doctrine"). To qualify for this Combat and Contingency Exception, the opinion stated the project must:

(1) be clearly intended to meet a temporary operational requirement;

(2) be intended to facilitate combat or contingency operations; and

(3) not be used for the purpose of satisfying requirements of a permanent nature at the conclusion of combat or contingency operations (i.e., follow-on operations, future exercises).

b. On 27 February 2003, the Under Secretary of Defense (Comptroller), issued a policy memorandum clarifying DOD's position on the use of O&M funds for construction in support of contingency missions. See Memorandum, DOD Deputy General Counsel (Fiscal), Subject: Availability of Operation and Maintenance Appropriations for Construction, (February 27, 2003). The memorandum authorizes the use of O&M funds for such construction where:

(1) the construction is necessary to meet an urgent military operational requirement of a temporary nature;

(2) the construction will not be carried out with respect to a military installation as defined under 10 U.S.C. 2801; and,

(3) the United States has no intention to use the construction after the operational requirement has been satisfied.

c. On 16 April 2003, Congress enacted the Emergency Wartime Supplemental Appropriation for FY 2003. See Emergency Wartime Supplemental Appropriations for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003).

(1) Section 1901 of the supplemental appropriation authorized the Secretary of Defense to transfer up to $150 million of funds appropriated in the supplemental act to carry out military construction projects not otherwise authorized by law. Such funds would then be available to DOD pursuant to the Secretary's authority to carry out contingency construction under 10 U.S.C. § 2804.

(2) Section 1901 clarified the definition of "military installation" to exclude projects that would previously have been permitted under the Under Secretary's 27 February 2003 memorandum. "Military Installation" includes not only buildings, structures & real property improvements under US operational control, but also, any building, structure or real property improvement to be used by the Armed Forces, regardless of whether such use is anticipated to be temporary or of longer duration.

(3) The conference report accompanying the supplemental appropriation rejected the policy articulated in the Under Secretary's 27 February 2003 memorandum, and insisted the Secretary of Defense use his authority pursuant to 10 U.S.C. § 2804 to carry out contingency related construction in the future.

d. On 6 November 2003, the President signed the Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003).

(1) Section 1301 of the act provided "temporary authority" for the use of O&M funds for military construction projects during FY 04 where the Secretary of Defense determined:

(a) the construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forcers in support of Operation Iraqi Freedom or the Global War on Terrorism;

(b) the construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence;

(c) the United States has no intention of using the construction after the operational requirements have been satisfied; and,

(d) the level of construction is the minimum necessary to meet the temporary operational requirements.

e. Section 2808 of the National Defense Authorization Act, 2004, provided new authority with terms similar to those of Section 1301 above. Pub. L. No. 108-136, § 2808.

(1) Within seven days of when funds are first obligated, Secretary of Defense must submit detailed notice of the project to the congressional committees.

(2) Total cost of projects under this authority was limited to $200 million in FY04.

(3) **Important: The statute provides that this authority and the authority of 10 U.S.C. § 2805 are the only legal authorities to use O&M for construction projects.**

f. Section 2810 of the Ronald Reagan National Defense Authorization Act, 2005, extended Section 2808 authority through FY 2005. Pub. L. No. 108-375, § 2810 (2004).

g. Section 2809 of the National Defense Authorization Act, 2006, extended Section 2808 authority through FY 2006 but amended the total for all projects in FY 2006 to $100 million. Pub. L. No. 109-163, § 2809.

8. Other Military Construction Authorities.

a. Emergency Construction Projects. 10 U.S.C. § 2803. See DOD Dir. 4270.36; AR 415-15, paras. 1-6b(2) and 5-19, app. C; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

b. Contingency Construction Projects. 10 U.S.C. § 2804. See DOD Dir. 4270.36; AR 415-15, para. 1-6b(6); see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

c. Projects Resulting from a Declaration of War or National Emergency. 10 U.S.C. § 2808. See DOD Dir. 4270.36; AR 415-15, para. 1-6b(7) and app. D, para. D-2; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

d. Environmental Response Actions. 10 U.S.C. § 2810. See DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

e. The Restoration or Replacement of Damaged or Destroyed Facilities. 10 U.S.C. § 2854. See DOD Dir. 4270.36; AR 415-15, para. 1-6b(3) and app. D, para. D-1; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

9. Maintenance and Repair Projects.

a. Maintenance and repair projects are not construction. See AR 420-10, Glossary, sec. II. Therefore, maintenance and repair projects are not subject to the $750,000 O&M limitation on construction. See 10 U.S.C. § 2811(a) (specifically permitting the Secretary of a military department to use O&M funds to carry out repair projects for "an entire single-purpose facility or one or more functional areas of a multipurpose facility"). But see 10 U.S.C. § 2811 (requiring secretarial approval if the estimated cost of the project exceeds $5 million and congressional notification if the estimated cost of the project exceeds $10 million).

b. Maintenance. AR 420-10, Glossary, sec. II, defines maintenance as the "work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose." It includes work required to prevent damage and sustain components (e.g., replacing disposable filters; painting; caulking; refastening loose siding; and sealing bituminous pavements). See DA Pam 420-11, para. 1-6a.

c. Repair.

(1) Statutory Definition. 10 U.S.C. § 2811(e). A "repair project" is defined as a project to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.

(2) "New" DOD Definition. DOD Reg. 7000.14-R, vol. 2B, ch. 8, para. 080105. See Memorandum, Deputy Comptroller, Office of the Under Secretary of Defense (Program/ Budget), subject: Definition for Maintenance and Repair (2 July 1997) [hereinafter DOD Repair Memorandum]. The term "repair" means to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.

(a) When repairing a facility, the military department or agency may:

(i) Repair components of the facility by replacement; and

(ii) Use replacements that meet current building standards or code requirements.

(b) The term "repair" includes:

(i) Interior rearrangements that do not effect load-bearing walls; and

(ii) The restoration of an existing facility to: (a) allow for the effective use of existing space; or (b) meet current building standards or code requirements (e.g., accessibility, health, safety, or environmental).

(c) The term "repair" does not include additions, new facilities, and functional conversions. See 10 U.S.C. § 2811(c).

(3) Army Definition. See AR 415-15, para. 2-3b; AR 420-10, Glossary, sec. II; DA Pam 420-11, paras. 1-6 and 107; see also Memorandum, Assistant Chief of Staff for Installation Management, subject: New Definition of "Repair" (4 Aug. 1997) [hereinafter DA Repair Memorandum]. The term "repair" means to restore of a facility or a facility component to such a condition that the Army may use it effectively for its designated functional purpose.

(a) The DA Repair Memorandum states that: "The new definition is more liberal and expands [the Army's] ability to provide adequate facilities for [its] soldiers and civilians;" however, the DA Repair Memorandum also states that: "A facility must exist and be in a failed or failing condition in order to be considered for a repair project." Cf. DA Pam 420-11, para. 1-7e (stating that "[r]epair means that the facility or facility component has failed, or is in the incipient stages of failing, or is no longer performing the functions for which it was designated").

(b) The term "repair" includes:

(i) Overhauling, reprocessing, or replacing deteriorated components, parts, or materials;

(ii) Correcting deficiencies in failed or failing components to meet current building standards or code requirements if the Army can perform the work more economically by performing it concurrently with the restoration of other failed or failing components.

(iii) Relocating or reconfiguring components (e.g., partitions, windows, and doors) during a major repair project if they are replacements for existing components;

(iv) Relocating or reconfiguring utility systems during a major repair project to meet current building standards or code requirements if the total area or population served by the utility system remains the same; and

(v) Incorporating additional components during a major repair project if: (a) the system is in a failed or failing condition; and (b) incorporating the addition components makes the replacement system safer and more efficient.

(c) The term "repair" does not include:

(i) Bringing a facility or facility component up to applicable building standards or code requirements when it is not in need of repair;

(ii) Increasing the quantities of components for functional reasons;

(iii) Extending utilities or protective systems to areas not previously served;

(iv) Increasing exterior building dimensions; or

(v) Completely replacing a facility.

IV. AVAILABILITY AS TO TIME.

A. The Time Rule. 31 U.S.C. §§ 1502(a), 1552.

An appropriation is available for obligation for a definite period of time. An agency must obligate an appropriation during its period of availability, or the authority to obligate expires.

B. The "Bona Fide Needs" Rule. 31 U.S.C. § 1502(a).

1. An agency may obligate appropriated funds only for bona fide needs that arise during the appropriation's period of availability. See DFAS-IN 37-1, para. 080302; DFAS-DE 7000-4, para. 4c; see also Magnavox—Use of Contract Underrun Funds, B-207453, Sept. 16, 1983, 83-2 CPD ¶ 401.

2. Supply Contracts.

a. General Rule. Supplies are the bona fide need of the fiscal year in which the agency needs or consumes them. Thus, supplies with which the agency needs to operate during a given fiscal year are generally the bona fide need of that fiscal year. See Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965).

b. Exceptions. The Comptroller General has held that supplies ordered in one fiscal year for use in a subsequent fiscal year are the bona fide need of the year of purchase if one of two exceptions applies.

(1) The Stock-Level (Inventory) Exception. Supplies ordered to meet authorized stock levels are the bona fide need of the year of purchase, even if the agency does not use them until a subsequent fiscal year.

(2) The Lead-Time Exception. If the agency cannot obtain supplies on the open market when it needs them because the time required to order, produce, and deliver the supplies requires the agency to purchase them in a prior fiscal year, the supplies are considered the bona fide need of the year of purchase.

3. Service Contracts.

a. General Rule. Services are generally the bona fide need of the fiscal year in which they are performed.

b. Exceptions.

(1) Severable Service Contracts. A military department or DOD agency may use current year funds to award a severable service contract for a period not to exceed 12 months at any time during the fiscal year. 10 U.S.C. § 2410a.

(2) Non-Severable Service Contracts. An agency may use current year funds to award a non-severable service contract (i.e., a contract that seeks a single or unified outcome, product, or report), even if contract performance crosses fiscal year. See DFAS-IN 37-1, tbl. 8-1; Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994) (concluding that work on an environmental impact statement properly crossed fiscal years).

C. "PARKING" FUNDS

1. The "Bona Fide Needs" Rule Still applies.

2. Intra-Governmental Acquisitions: Banking Your Money With GSA / Ordering off of GWACs (Government-wide Acquisition Contracts). (See also Chapter 8, Fiscal Law Deskbook).

a. The Economy Act (31 U.S.C. § 1535) provides general authority to transfer funds to another agency to enter into a contract under certain conditions. If the other agency does not award the contract before the end of the fiscal year, the funds expire as provided by 1535(d) and the funds must be deobligated and returned to the requesting agency. Neither the servicing agency nor the requesting agency can use these funds for new obligations in a subsequent fiscal year.

b. When an authority other than the Economy Act is used for an interagency agreement, the deobligation provisions of 31 U.S.C. § 1535 may not apply. If your funds were **properly obligated**, they remain obligated and can continue to be used by the other agency. Generally, funds are properly obligated if you have a legitimate separate authority, a written agreement (MOA, order, etc) with the other agency, and a Bona Fide Need of the current fiscal year. (GAO provides an excellent

explanation of Economy Act and non-Economy Act transactions in National Park Service Soil Surveys, B-282601, September 27, 1999.)

c. Elements of the General Services Administration, e.g., The Federal Systems Integration and Management Center (FEDSIM) and the Federal Computer Acquisition Center (FEDCAC), provide services under separate authority (a designation by the Office of Management and Budget) as an executive agent for government wide acquisitions, and the Information Technology Fund (40 U.S.C. § 757).

d. Many IT managers incorrectly believe that their funds can be "banked" with FEDSIM and FEDCAC for use in future years. This belief is fueled from time-to-time by aggressive, but ill-informed, GSA marketing representatives. The "banked" funds, however, will not be legally obligated if they do not satisfy a Bona Fide Need of the current fiscal year. The GAO believes that it is improper to "bank" an agency's annual funds with a GSA account to cover future year needs. See Matter of: Implementation of the Library of Congress FEDLINK Revolving Fund, B-288142, Sep. 6, 2001; See also Matter of: Continued Availability of Expired Appropriation for Additional Project Phases, B-286929, Apr. 25, 2001.

e. Parking funds in the GSA Information Technology Fund was a possible violation of the Antideficiency Act when the United States Army Claims Service (USARCS) provided the GSA fund with $11.6 million of FY 1997 through FY 2000 Operation and Maintenance Funds for procurement of support services and information technology. See OFFICE OF THE INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE, ARMY CLAIMS SERVICE MILITARY INTERDEPARTMENTAL PURCHASE REQUESTS, REPORT NO. D-2002-109 (June 19, 2002) (hereinafter DOD REPORT NO. 02-109).

(1) Of the $11.6 million, $3.8 million were obligated *without defining* USARCS' needs and *without establishing a bona fide need* for tasks relating to the personnel claims software development project, the torts and affirmative claims software development project, and the acquisitions of hardware and software. $2.8 million of these funds were "banked" in the GSA IT Fund to meet "future" requirements. The report also found that $8.5 million of the funds were obligated within the last three days of FY 2000. Although USARCS could technically obligate funds at the end of a fiscal year, the obligation should be based on a valid need in the fiscal year of the appropriation in order to comply with the bona fide need rule.1

V. AVAILABILITY AS TO AMOUNT.

A. Administrative Subdivision of Funds. 31 U.S.C. § 1514(a) requires agencies to control the various subdivisions of appropriations.

1. The Office of Management and Budget APPORTIONS funds over their period of availability to agencies for obligation. See 31 U.S.C. § 1512.

2. Agencies subdivide these funds among their subordinate activities.

3. In the Army, the Operating Agency/Major Command (MACOM) generally is the lowest command level at which the FORMAL ADMINISTRATIVE SUBDIVISIONS of funds required by 31 U.S.C. § 1514 are maintained for O&M appropriations. Below the MACOM level, O&M subdivisions generally are informal targets or allowances.

B. Agencies promulgate regulations to control the rate of obligation and expenditure of funds. See, e.g., DOD 7000.14-R, vol. 14, app. A; DFAS-IN Reg. 37-1.

---

1 The report also found that USARCS had violated the "purpose" bona fide need rules, in addition to "time" bona fide need rules. Specifically, USARCS incorrectly obligated $3.3 million of O & M funds for the development of personnel claims software and the torts and affirmative claims software instead of research, development, test and evaluation, and/or procurement funds. See DOD REPORT NO. 02-109, pp. 16-18. Last, the report found that USARCS may have exercised better control over administrative costs by partnering with larger Army contracting offices. *Id.* at pp. 10-11.

VI. THE ANTIDEFICIENCY ACT.

A. Prohibitions. The Antideficiency Act prohibits any government officer or employee from:

1. making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A);

2. making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds, or amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). 31 U.S.C. § 1517(a)(2);

3. incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); or

4. accepting voluntary services unless otherwise authorized by law. 31 U.S.C. § 1342.

B. Antideficiency Issues with P-T-A.

1. "Purpose Statute." 31 U.S.C. § 1301(a). A violation of the "Purpose Statute" also may lead to a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); Funding for Army Repair Projects, B-272191, 97-2 CPD ¶ 141; To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

a. Common "Purpose" Issues - O&M Funds.

(1) There is a limitation of $750,000 on the use of O&M funds for construction. This is a "per project" limit. See 10 U.S.C. § 2805(c). Exceeding this threshold may be a reportable ADA violation. See DOD 7000.14-R, vol. 14, ch. 10, para. B.5.a.

(2) DOD activities may use O&M funds for purchase of investment items costing less than $250,000. See Department of Defense Appropriations Act, FY 2006, Pub. L. No. 109-148, § 8036 (2005). Use of O&M in excess of this threshold is a purpose violation and may trigger an antideficiency violation. See DOD 7000.14-R, vol. 14, ch. 10, para. B.7.d.

b. Analysis. Officials **may** be able to avoid an Antideficiency violation if:

(1) Proper funds were available at the time of the erroneous obligation;

(2) Proper funds were available continuously from the time of the erroneous obligation; and

(3) Proper funds were available for the agency to correct the erroneous obligation.

Discussion Problem: On 3 August 2004, the Fort Tiefort contracting officer awarded a contract for 100 computers at a total price of $260,000. The funds certified as available were FY 2004 O&M funds. The computers were to be used in a newly completed warehouse complex. Any fiscal issues here?

2. "Bona Fide Needs Rule."

a. A violation of the Bona Fide Needs Rule (31 U.S.C. § 1502(a)) also may result in a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. See DFAS-IN 37-1, ch. 8, para. 0803.

b. To determine whether a Bona Fide Needs Rule violation is correctable, follow the same analytical process used for correcting a "Purpose Statute" violation.

Discussion Problem: Having some end-of-year money to spend, the Fort Tiefort contracting officer awarded a contract on 15 August 2004 for 50 off-the-shelf computers. The contract price totaled $200,000 and cited FY 2004 O&M funds. The computers were to be used in a warehouse complex that would be completed (i.e., ready for installation of the computers) sometime in November 2004. Any fiscal issues here?

3. Amount. Making or authorizing obligations or expenditures in excess of funds available in an APPROPRITATION, APPORTIONMENTS, or FORMAL ADMINISTRATIVE SUBDIVISIONS violates the Antideficiency Act. 31 U.S.C. §§ 1341 and 1517. To determine whether making or authorizing obligations in excess of funds available in an INFORMAL SUBDIVISION results in an Antideficiency Act violation, follow the same analytical process in determining whether a "Purpose" violation violates the Antideficiency Act.

Discussion Problem: On 30 August, Fort Tiefort had $170,000 remaining in its O&M allowance. On 2 September, the contracting officer awarded a contract for $170,000 using these

funds, but the Defense Accounting Office recorded this obligation as $120,000. As a result, the Directorate of Resource Management believed erroneously that the Fort still had $50,000 left in the O&M allowance. To avoid losing this money, the contracting officer awarded a contract on 20 September obligating $50,000 in O&M. Is there an ADA violation?

C. Limitation on Voluntary Services. 31 U.S.C. § 1342.

1. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. To Glenn English, B-223857, Feb. 27, 1987 (unpub.).

   a. Voluntary services are those services rendered without a prior contract for compensation or without an advance agreement that the services will be gratuitous. Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.).

   b. Acceptance of voluntary services does not create a legal obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, July 30, 1990 (unpub).

2. Examples of Voluntary Services Authorized by Law

   a. 5 U.S.C. § 593 (agencies may accept voluntary services in support of alternative dispute resolution).

   b. 5 U.S.C. § 3111 (student intern programs).

   c. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).

   d. 10 U.S.C. § 2602 (the President may accept assistance from Red Cross).

   e. 10 U.S.C. § 10212 (the SECDEF or a Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).

   f. 33 U.S.C. § 569c (the Corps of Engineers may accept voluntary services on civil works projects).

3. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs.—Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.

4. Gratuitous Services Distinguished.

   a. It is not a violation of the Antideficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation. Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.).

   b. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int'l Dev.—Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable).

   c. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program—State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, Jan. 2, 1987 (unpub.) (augmentation would occur) with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur).

D. Investigating and Reporting ADA Violations. 31 U.S.C. §§ 1351, 1517; OMB Circular A-11 § 145.2; DOD Reg. 7000.14-R, vol. 14, chs. 4-7; DFAS-IN 37-1, ch. 4, para. 040204; U.S. DEP'T ARMY, ANTIDEFICIENCY ACT (ADA) INVESTIGATION MANUAL (Jan. 1998) available at http://www.asafm.army.mil/fo/fod/ada/ada.asp#manual.

1. General. A violation of the Antideficiency Act is a serious matter. Violators are subject to appropriate administrative discipline, including suspension of duty without pay or removal from office. 31 U.S.C. §§ 1349(a), 1518. Knowing and willful violators are subject to a $5,000 fine and imprisonment for two years. 31 U.S.C. §§ 1350, 1519; DOD Reg. 7000.14-R, vol. 14, ch. 9, para. C.

2. Flash Report. The commander of an Army activity at which a suspected violation occurs must send a flash report through command channels to DA within 15 days of discovery. DFAS-IN 37-1, ch. 4, para. 040204.B.

3. Investigations.

a. The first step is a preliminary review. The commander must appoint an investigating officer (IO), a legal representative, and a subject matter expert to an investigating team. The investigating team conducts the preliminary review to determine whether and Antideficiency Act violation occurred. The results of the preliminary review must reach DA not later than 90 days from the date of discovery of the potential violation. DFAS-IN 37-1, ch. 4, para. 040204.

b. If the preliminary review determines that a violation occurred, a formal investigation must be conducted. The purpose of the formal investigation is to determine the relevant facts and circumstances of the violation – what caused the violation, what are appropriate corrective actions, and who was responsible. DOD Reg. 7000.14-R, vol. 14, ch. 4, para. 0401. A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within 9 months after the formal investigation began. DOD Reg. 7000.14-R, vol. 14, ch. 6, para. C.1.

c. If the IO believes criminal issues may be involved, the investigation should be suspended immediately and the IO should consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. DOD 7000.14-R, vol. 14, ch. 5, para. I.5.

d. Prior to taking disciplinary action, the Service must submit a preliminary summary report of violation, with legal counsel coordination, to the OSD (Comptroller) and to DFAS. The OSD (Comptroller) will forward the report to the OSD Deputy General Counsel (Fiscal) for a final determination concerning the occurrence of the ADA violation. Following that review, the report will be returned for final Department/Agency action. Memorandum, Under Secretary of Defense (Comptroller), to Department and Agency Comptrollers; subject: Processing of Antideficiency Act (ADA) Violation Cases (19 November 2003).

4. Reports to the President and Congress. The Secretary of Defense must report violations to the President and Congress. OMB Cir. A-11 § 145.6, DOD Reg. 7000.14-R, vol. 14, ch. 7, para. E.

VII. CONCLUSION.