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FISCAL MATTERS: AN INTRODUCTION TO FEDERAL FISCAL LAW & PRINCIPLES

By Matthew H. Solomson, Chad E. Miller, and Wesley A. Demory

Mandatory—or direct—spending accounts for more than half of spending by the U.S. Government. This category includes spending for entitlement programs and certain other payments to people, businesses, nonprofit institutions, and state and local governments. In general, those payments are dictated by statutory criteria and are not normally constrained by the annual appropriation process.[1] In 2009, such mandatory outlays rocketed to $2.1 trillion from $1.6 trillion in 2008.[2] According to the Congressional Budget Office, mandatory spending is projected to continue to surge, ranging between $1.9 trillion and $2.1 trillion through 2013, and then steadily increasing to $3.0 trillion in 2020.[3] With respect to discretionary spending—according to CBO estimates based upon the assumption that such spending will keep pace with inflation—outlays will total approximately $1.4 trillion in 2011.[4]

In Fiscal Year 2009, the Federal Government expended nearly $537 billion on contracts.[5] For FY 2010, that sum already has reached nearly $245 billion.[6] Thus, Justice Stephen Breyer was

IN BRIEF

Matthew H. Solomson is a Trial Attorney with the Commercial Litigation Branch, U.S. Department of Justice, where he litigates Government contracts and other cases before the U.S. Court of Federal Claims and the Court of Appeals for the Federal Circuit. Chad E. Miller is an Assistant General Counsel with KPMG LLP and previously served as Associate Counsel to the Assistant Secretary of the Navy (Financial Management & Comptroller), where he advised agency officials on fiscal law. Both are adjunct professors at the University of Maryland School of Law, where they co-teach Government contracts law. Wesley A. Demory is a third-year law student at the University of Maryland School of Law and a law clerk concentrating in export controls at Thomsen & Burke LLP. The views expressed herein are those of the authors only and do not necessarily reflect the views of the United States, the Department of Justice, KPMG LLP, or the University of Maryland.

not exaggerating when he commented, during oral argument in *Allison Engine Co. v. United States ex rel. Sanders*, that "government money today is in everything."[7]

Although no one would contest the importance to Government contracts professionals of an understanding of the Federal Acquisition Regulation or the Competition in Contracting Act, fiscal law remains largely an ignored backwater, studied only by the Government Accountability Office, federal agency attorneys, and Contracting Officers. However, since federal agencies are creatures of law and can function only to the extent authorized by law,[8] Government contracts professionals—particularly those in private practice or employed by Government contractors—must possess at least a basic understanding of the mechanics of how the Government controls its contracting dollars. If the FAR constitutes the nuts-and-bolts of federal procurement law, its superstructure is composed of fiscal law. Accordingly, an understanding of basic federal fiscal law and principles is a must.

This BRIEFING PAPER covers the basics of fiscal law, including how budget and contracting authority flows from Congress to Executive Branch agencies, as well as how Congress exercises control over such authority and why that control matters in Government contracting. First, the PAPER addresses how funds are appropriated and allocated to federal agencies and reviews the primary legal authorities that govern fiscal law. Second, the PAPER discusses the three major restrictions Congress places on how federal money is spent. Finally, the PAPER explains the role of the Antideficiency Act and explores the role that statute has played in significant Government contract cases.

Overview Of The Appropriations Process

The U.S. Constitution grants Congress the exclusive "power of the purse." Article I, Section 8, for example, gives Congress the power to "pay the Debts and provide for the common Defense and general Welfare of the United States."[9] Moreover, Article I, Section 9, provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[10] Through permanent legislation and annual appropriations acts, Congress creates Executive Branch agencies and funds their activities.

As explained below, Congress makes federal funds available for obligation and expenditures through appropriations acts (and occasionally by other legislation). Subsequent administrative actions release appropriations to the spending agencies. The use or "availability" of appropriations once enacted and released is governed by various authorities: the terms of the appropriation act itself, legislation authorizing the appropriation, enabling legislation prescribing an agency function or creating a program funded by the appropriation, general statutory provisions allowing or prohibiting certain uses of appropriated funds, and general rules that have been developed largely through decisions of the GAO and the courts of law.

Together, these sources, along with certain provisions of the Constitution, form the basis of fiscal (or appropriations) law, an area where questions arise in as many contexts as there are federal actions (including, e.g., contracts and grants) that involve spending money. In general, fiscal law rules and principles govern the purpose, amounts, manner, and timing of obligations and expenditures.

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■ Authorizations & Appropriations

While the Constitution grants Congress the power over appropriations, the actual authorization-appropriations process is derived from the rules of the U.S. House of Representatives and Senate. The basic formal process consists of two steps: (1) the enactment of an authorization measure that may create (or continue) an agency or program, as well as authorize the subsequent enactment of appropriations, and (2) enactment of appropriations to provide funds for the authorized agency or program.[11] Although there is no constitutional requirement that an authorization precede an appropriation, some statutes mandate prior authorization for specific situations.[12]

The authorizing and appropriating responsibilities are divided among various legislative committees. For example, most standing committees—such as the House Committee on Armed Services and the Senate Committee on Commerce, Science, and Transportation—have authorizing responsibilities related to the agencies and programs under their jurisdiction. The Appropriations Committees of the House and Senate have jurisdiction over appropriations measures. House and Senate rules generally preclude the authorizers and appropriators from encroaching upon each other's responsibilities.[13]

On the other hand, not all federal agencies and programs are funded through this process. Funding for some agencies and programs is provided by the authorizing legislation itself, thus bypassing the two-step process. Such "direct spending" currently constitutes more than half of all federal spending and primarily is directed towards entitlement programs, funded by permanent appropriations in the authorizing law.[14] Some entitlements, such as Medicaid, are funded in appropriations acts, but the amount appropriated is controlled by the authorizing legislation.[15]

■ Authorizing Legislation

An authorizing measure establishes, continues, or modifies an agency or program for a fixed or indefinite period of time, ordinarily by delineating, for example, the duties and functions of an agency or program, its organizational structure, and the responsibilities of agency or program officials.[16] Authorizing legislation also—as its name denotes—authorizes the enactment of appropriations for an agency or program. Although that may seem like an unnecessary step, "legislation authorizing appropriations is a directive to the Congress itself concerning the amount of funds it can appropriate."[17] In that regard, "[t]he rules of the House of Representatives prohibit appropriations for expenditures not previously authorized by law."[18] The Senate has a similar, but less restrictive, rule.[19]

Accordingly, authorizations shape the boundaries of related appropriations and are categorized as either definite or indefinite. Definite authorizations set specific dollar limits for fiscal years, while indefinite authorizations are less specific and may simply authorize "such sums as may be necessary to carry out the provisions of this act."[20] In addition, authorizations often include spending restrictions that restrict the scope of appropriations. However, when an appropriation exceeds the scope of an authorization, the appropriation generally stands.[21]

■ Appropriations Measures

An appropriations measure provides budget authority to an agency for specified purposes. Congress finances federal programs and activities by providing budget authority.[22] "Budget authority is a general term referring to various forms of authority provided by law to enter into financial obligations that will result in immediate or future outlays of government funds."[23] Such authority encompasses a variety of legislative measures, including, but not limited to: (a) "provisions of law that make funds available for obligation and expenditure"; (b) "borrowing authority, which means authority granted to a Federal entity to borrow and obligate and expend the borrowed funds, including through the issuance of promissory notes or other monetary credits"; and (c) "contract authority, which means the making of funds available for obligation but not for expenditure."[24]

Every fiscal year, Congress passes multiple appropriations acts.[25] There are currently 12 regular appropriations acts, including defense, energy and water development, and the Legislative Branch.[26]

These acts give agencies the budget authority discussed above and give the Treasury the authority to make payments pursuant to those obligations.[27] Appropriations differ from authorizations in that the latter do not convey budget authority to an agency.[28]

Ideally, Congress passes general appropriations acts prior to the start of a fiscal year.[29] When Congress, however, fails to pass appropriations acts by October 1, Congress may elect to pass a continuing appropriation that supplies agencies with temporary budget authority.[30] Additionally, Congress also passes supplemental appropriations acts that give additional budget authority as necessary during a current fiscal year.[31]

The general rule is that statutory language must be explicit to create an appropriation.[32] The GAO employs a two-factor test to determine whether language in legislation constitutes an appropriation and requires that Congress at minimum use language (1) directing a payment (2) out of a particular source of funds.[33] The exception to this rule is when an act directs an agency to collect fees and makes these receipts available for agency expenditures. For example, Congress may create revolving funds. The GAO has interpreted these situations as constituting permanent appropriations that do not require further direction from Congress, even though they do not fall within the general two-prong rule.[34]

Although Congress typically passes either separate appropriations acts or consolidated appropriations acts, Congress may include appropriations language in other legislation. For example, the Health Care and Education Reconciliation Act of 2010[35] established a fund and appropriated "out of any funds in the Treasury not otherwise appropriated, $1,000,000,000 for Federal administrative expenses to carry out [the Patient Protection and Affordable Care Act]."[36] This language, while not contained in a separate appropriations act, meets the GAO's two-factor test for an appropriation.[37]

■ Enforcing The Authorization-Appropriations Process

The distinction between—and the proper sequencing of—authorization and appropriations bills is enforced through "points of order"[38] and House and Senate rules dating from the 19th century.[39] These rules prohibit unauthorized appropriations, which may be either appropriations for unauthorized agencies and programs or appropriations in excess of an authorized amount, and the inclusion of authorizing language in appropriations measures.[40] In addition, the House's rules, but not the Senate's, preclude appropriations in authorizing legislation.[41]

If, for whatever reason, unauthorized appropriations are enacted into law through circumvention of House and Senate rules, in most cases the agency may spend the entire amount.[42] In that regard, the GAO has held:[43]

> [T]he effect of Senate Rule XVI and House Rule XXI…is merely to subject the given provision to a point of order (a procedural objection raised by a congressman alleging a departure from rules governing the conduct of business). If a point of order is not raised, or if one is raised but not sustained, the validity of the provision, if enacted, is not affected. The cited rules have no application once the legislation has been enacted.

■ Apportionment & Allotments

Before the enactment of the Budget and Accounting Act in 1921, there was no annual centralized budgeting in the Executive Branch. Instead, agencies independently sent budget requests to congressional committees with no coordination of the various requests. The Budget and Accounting Act required the President to coordinate the budget requests for all agencies and to send a comprehensive budget to the Congress. The act also created the Bureau of the Budget, now the Office of Management and Budget, to help the President implement these requirements. Congress has amended the requirements a number of times and has codified them as Chapter 11, Title 31, U.S. Code.[44]

Chapters 13, 15, and 33 of Title 31, U.S. Code, govern the process of budget execution and control. Among those various statutory provisions, are the provisions of the Antideficiency Act. Under the Antideficiency Act, discussed in more detail below, the President must apportion funds to Executive Branch agencies.[45] The President delegated this duty to the Bureau of the Budget, now the OMB.[46] An apportionment is the "'action by which OMB

distributes amounts available for obligation…in an appropriation or fund account.'"[47] In other words, the apportionment is the OMB's plan for how to spend the resources provided by law.[48] Generally, apportionments regulate the rate of spending during the fiscal year by limiting the amount of funds that may be obligated, typically by specifying particular time periods, activities, projects, objects, or a combination thereof.[49]

The OMB apportions (i.e., distributes) budgeted amounts to Executive Branch agencies, thereby making funds in appropriation accounts (administered by the Treasury Department) available for obligation.[50] In allocating budget authority by time periods or activities, the apportionment system controls the use of available budget authority, thereby reducing the need for supplemental or deficiency appropriations. Each agency then makes allotments pursuant to the OMB apportionments or other statutory authority.[51] An allotment is a delegation of authority to agency officials that allows them to incur obligations within the scope and terms of the delegation.[52]

This execution and control phase of the appropriations process refers generally to the time period during which budget authority made available by the appropriations acts remains available for obligation. An agency's task during this phase is to spend the money Congress has authorized and allocated to the agency to carry out the objectives of its program legislation.

■ Other Sources Of Fiscal Law

(a) *Government Accountability Office*—The GAO, headed by the Comptroller General of the United States, conducts fiscal investigations into agency spending and issues opinions to congressional and agency officials regarding fiscal law matters. The Comptroller General has the authority to settle the accounts of the U.S. Government, which includes the authority to issue legal decisions regarding federal funding.[53] The head of an agency may request a decision by the Comptroller General regarding the use and obligation of appropriated funds.[54] While these decisions are binding on the GAO and the Executive Branch, it is up to the federal agencies to implement and enforce the decisions.[55]

(b) *Federal Courts and Boards of Contract Appeals*—The Tucker Act grants exclusive jurisdiction to the U.S. Court of Federal Claims over contract claims against the Government in excess of $10,000.[56] Similarly, the various boards of contract appeals hear disputes under the Contract Disputes Act.[57] Appeals from both fora are heard by the U.S. Court of Appeals for the Federal Circuit.[58] Because such contract cases periodically involve questions of fiscal law, board and federal court decisions cannot be overlooked when researching a fiscal law question.

(c) *Legislative History*—Legislative histories—including conference reports, committee reports, and floor debates—serve a limited role and are not binding upon agencies.[59] When interpreting an appropriations act's language, the starting point is its plain meaning.[60] Legislative histories may be used only to illuminate the intent of Congress when resolving ambiguities.[61] The Comptroller General addressed the role of legislative history in a bid protest decision, *LTV Aerospace Corporation*.[62] There, the legislative history of a lump-sum appropriations act imposed conditions upon the use of funds and the Navy made obligations that did not meet those conditions. The GAO, however, concluded that the absence of explicit instructions in the act itself gave the Navy the flexibility to spend without the need to comply with the conditions specified in the legislative history.[63] Nevertheless, agencies often follow the nonbinding instructions in conference and committee reports out of fear of repercussions during subsequent annual budget requests.[64]

The Fiscal Law Limitation Triad: Purpose, Time & Amount

According to the Supreme Court, "[t]he 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."[65] As explained above, Congress regulates the expenditure of funds via authorization and appropriation statutes. In particular, Congress places limits upon (1) the *purpose* for which funds may be expended, (2) the *time* periods during which appropriations are available, and (3) the *amount* of funds available for spending. This

section of the PAPER explores the parameters of those restrictions.

■ Purpose

"Purpose" is the first of the three controls that federal statutes impose on the legal availability of appropriated funds. Originally enacted in 1809, the current law restricting the purpose for which agencies may use funds provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[66] In plain English, agencies may only expend funds on purchases for which Congress has specifically appropriated such funds. Other uses of the funds are not authorized and the GAO will not support such expenditures.[67]

At the most elementary level, a constitutional authorization provides the clearest indication of whether the funds are available for a particular purpose. For example, in Article I, the Constitution gives Congress the power to "raise and support Armies"[68] and to "provide and maintain a Navy."[69] Therefore, appropriations must be available for such purposes.

Unfortunately for most agencies, specific constitutional authority is not available for every activity in which a particular agency may engage. Rather, organic statutes provide the clearest intent of the purpose for which Congress made funds available for an agency's use. However, the level of detail for such authority varies wildly from very specific[70] to very broad.[71] Where the legislation contains a clearly stated purpose, there is no need or ability to interpret the agency's authority for the expenditure.[72] Additionally, legislation may contain a clearly stated limitation on the purpose of the appropriation.[73] Congress frequently provides a stated purpose to fund a specific program or goal. Often, the stated purpose is something for which the agency might not have otherwise had authority. For example, in FY 2008, the Department of Defense Appropriations Act made funds "available to provide transportation of medical supplies and equipment to America Samoa…and…to the Indian Health Service when… in conjunction with a civil-military project."[74] This language leaves no room to question the permissibility of the DOD's authority to undertake such action.

Yet, such detailed specificity is relatively uncommon, and largely impractical for general agency operations. As mentioned above, a fundamental principle of fiscal law is that an agency may only expend funds where there is clear authority to do so. Nevertheless, based upon an understanding that all appropriations provisions cannot contemplate every necessary expenditure for the efficient operation of a federal agency, Congress will sometimes pass legislation allowing a federal entity to expend funds for the necessary expenses related to a broader objective. Thus, the Department of Defense can expend funds for "all necessary expenses…in connection with communication and other services and supplies that may be necessary for the national defense,"[75] and federal agencies can pay for the "necessary expenses" for certain types of awards for employees.[76]

Despite such broader grants of statutory authority, agency purchasing needs may be necessary, but may not be captured with enough specificity in existing legislation. In fact, as far back as 1927, the Comptroller General considered the concept "well-settled" that "where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object."[77] Thus, the GAO has developed what is termed the *"necessary expense" doctrine* to assist in interpreting whether, within reasonable limits, an agency's desired actions are permissible.

The necessary expense doctrine has become essential in determining whether an agency has incurred proper expenditures. Although the GAO's official position is that "the Comptroller General has never established a precise formula for determining the application of the necessary expense rule,"[78] the GAO's appropriation decisions provide considerable guidance for understanding how the necessary expense doctrine applies.

For example, the Department of Homeland Security asked the GAO to provide an advance opinion regarding the agency's authority to use funds for a certain purpose. Customs and Border Protection, a component of the DHS, has employees assigned to border stations or portions within the United States, but who reside across

the border in Canada or Mexico.[79] Although there was no policy regarding where such employees lived, in 2005 (as a consequence of the events of September 11, 2001), Customs issued a new requirement that employees' primary residences be in the United States. Failure to comply with the requirement would result in disciplinary action, including possible removal from federal service.[80] Customs asked the GAO if agency appropriations were available to pay for the expenses that employees would incur by complying with the new requirement.

Citing the necessary expense doctrine, the GAO indicated that it uses a three-part test to determine whether an appropriation is available for a particular expenditure: "(1) the expenditure must bear a logical relationship to the purpose of the appropriation sought to be charged; (2) the expenditure may not be prohibited by law; and (3) the expenditure must not be provided for by another appropriation."[81] In analyzing the issue, the GAO acknowledged that there was no law either providing for or prohibiting such expenditure. The Comptroller General then turned to the "logical relationship" question and found that Customs articulated a reasonable rationale for its new policy. Given that Customs' appropriation authorized expenditures "for necessary expenses for, among other things, the enforcement of laws relating to border security," the GAO did not have any objection to Customs' determining that its funds were available for such expenditures.[82]

Interestingly, the GAO detailed why the Customs question was easily distinguishable from an earlier case where an agency was not permitted to use its funds despite a new requirement imposed on its employees.[83] In 1979, the Merit Systems Protections Board, a federal agency responsible for the adjudication of certain appealable personnel actions within the federal service, established a new requirement that all appeals officers must be attorneys admitted to the bar. The MSPB established a "Bar Assistance Program" to assist the nonattorney appeals officers in defraying the cost of bar membership fees for one time.[84] If the nonattorney appeals officers did not become bar-admitted attorneys, they would lose their jobs. In lieu of identifying the expenditure as a necessary expense having a logical relationship to the purpose of the appropriation, the GAO relied on a long line of decisions that require an employee to bear the costs of qualifying for the duties of the position.[85]

Most GAO decisions regarding necessary expenses focus on the first prong of the test: whether the expenditure bears a logical relationship to the purpose of the appropriation. The GAO makes these determinations on a case-by-case determination. What the GAO has found acceptable for one agency it has found unacceptable for another.[86] However, the GAO has also overruled prior decisions when the reasoning for them was no longer valid. For example, in 2004, the GAO issued a sweeping decision to allow federal agencies to purchase kitchen equipment, something that had been categorically prohibited previously, because the expectations of the modern workplace included such things as refrigerators, microwave ovens and other appliances.[87] Thus, necessary expense analyses focus on the agency's stated rationale, with particular emphasis on whether the use of the funds benefit the agency.[88]

Although uncommon, the GAO occasionally has the opportunity to consider whether the second prong of the necessary expense doctrine applies. For example, in 1994, Congress prohibited the use of appropriated funds to equip, operate, or maintain a golf course at a facility or installation of the DOD. Citing two federal statutes requiring that defense agencies participate in water conservation efforts and cooperate with state entities to resolve water resource issues in concert with conservation of endangered species, respectively, the DOD tried to argue that it could use appropriated funds through these programs to water a certain golf course. The GAO rejected this argument, relying on the plain meaning of the statute prohibiting the maintenance of a golf course, and found that this was a specific prohibition.[89]

The third part of the test is whether the expense has been otherwise provided for under a more specific appropriation. If a more specific appropriation is available for the expenditure, the agency cannot justify the purchase as a necessary expense of the more general appropriation.[90] The GAO addressed this issue recently with the

District of Columbia. The D.C. courts asked if they could pay certain settlements based on a particular statute. Rejecting the request, GAO argued that the cited statute did not create a separate authority allowing the D.C. courts to pay for such settlements because Congress had appropriated funds specifically for the D.C. courts' payment of settlements and judgments incurred by the District government. Therefore, the D.C. courts had to use the specific appropriation, unless specifically allowed otherwise by law.[91] This is even true where no funds remain in the more specific account.[92]

Finally, when considering whether funds are available for a particular purpose, there are rare circumstances when two appropriations are available for the same purpose. One of the clearest examples occurred in 1989, when the Railroad Retirement Board determined that both its general appropriations and a separate appropriation for its Office of Inspector General were available to pay performance awards to certain senior employees. The GAO concurred.[93] However, the GAO required that once the agency selected its preferred appropriation, then that appropriation should be used from that time forward, unless statutory language changed the dual availability situation.[94]

■ Time

The "bona fide needs" statute, 31 U.S.C.A. § 1502, restricts when appropriated funds may be expended. It provides that "[t]he balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability … [and] is not available for expenditure for a period beyond the period otherwise authorized by law."[95] As explained in more detail below, a fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in—or, in some cases, arising prior to, but continuing to exist in—the fiscal year for which the appropriation was made.

(1) *Obligations During the Availability Period*—Appropriations are categorized by duration as annual, multiple year, or no-year appropriations.[96] All appropriations are presumed annual and available only for a certain fiscal year unless otherwise specified.[97] Multiple year appropriations include those with a definite time period greater than one fiscal year. For example, military construction typically involves five-year appropriations.[98] Under the bona fide needs statute, all obligations pursuant to annual and multiple year appropriations must fall within the stated availability period. In contrast, no-year appropriations have an indefinite availability period and thus are not subject to that statute.[99] To fall within the definition of an obligation, a firm and binding agreement for goods or services must exist.[100] Thus, a draft contract, tentative agreement, contingent liability, or order lacking specifics does not create an obligation until finalized.[101]

(2) *Current, Expired, and Closed Accounts*—The Department of the Treasury tracks and records appropriated funds using separate fund accounts. During an appropriation's availability period, an associated account is categorized as "current," meaning an agency may obligate funds against the account. If an agency does not obligate its appropriated funds within the availability period, the funds expire and the agency cannot make new obligations against the account.[102] However, these "expired" accounts may still remain open for up to five years to accommodate payments or adjustments related to previous obligations.[103] After five years from expiration, the accounts are "closed" and no longer available for any payments or adjustments.[104]

(3) *Bona Fide Needs Rule*—In addition to falling within the availability period, an obligation must relate to a bona fide need of that particular period.[105] This "bona fide needs" rule is grounded in 31 U.S.C.A. § 1502(a)'s language that funds may only be used for "payment of expenses *properly incurred*…[or for] contracts *properly made*."[106] The term "properly" ensures that only legitimate needs of a period are fulfilled and prevents an agency from incurring obligations simply because the funds are available.[107]

Determining whether there is a bona fide need depends largely upon the facts and circumstances.[108] The considerations include the nature of the obligation and transaction, the contract and delivery timing, the normal rate of consumption,

historical inventory levels, production lead time, and the degree of governmental control.[109]

(4) *Continuing Needs*—Agencies may face a situation where a need arises in one availability period, but the agency does not obligate funds to address the need. In such cases, there may be an unfulfilled and "continuing need" that extends into subsequent periods.[110] These continuing needs are chargeable against subsequent periods without violating the bona fide needs rule.[111] A need qualifies as a proper continuing need when (a) the need continues to exist in the subsequent period, (b) the agency possessed discretionary authority to make an obligation during the original availability period, and (c) the agency did not make an obligation for the need in the original period. Examples of situations when agencies may make obligations after the end of an availability period include bid protests,[112] terminations for default,[113] terminations for convenience,[114] and contract modifications.[115]

(5) *Current vs. Future Needs*—Year-end spending by agencies commonly involves questions regarding the bona fide needs rule. Although agencies are free to obligate funds through the last day of an availability period, these obligations may be subject to higher scrutiny since they must be for the current period, not a future period. The line between a current need and a future need can blur and the GAO gives agencies some flexibility.[116]

(6) *Supply Contracts*—Although the bona fide needs rule restricts obligations only to those benefiting the current appropriation's availability period, the rule does not restrict an agency from replenishing inventory reserved for future use.[117] To fall within this "inventory exception," stock levels must be at reasonable and historical values.[118] Reasonable levels may include increases over previous years if there is a need for the increased levels.[119]

Agencies generally charge supply purchases when the supplies become available for use (upon delivery), rather than when purchased. One exception to that general rule considers the time between the order and scheduled delivery. If an agency orders supplies in one availability period and delivery occurs in a subsequent period, the "normal lead time exception" enables the agency to charge the obligation to the first period as long as it schedules delivery within the normal lead time for those supplies.[120] However, if the agency schedules delivery later than the normal lead time, the exception does not apply and the agency charges the supplies to the subsequent delivery period.

For example, the National Labor Relations Board subscribed to online databases, including Westlaw, and the subscription contracts ended on September 30, the last day of the fiscal year.[121] The GAO concluded that renewing the subscription for another year using current year funds was proper because the NLRB had a bona fide need to have the subscriptions in place on October 1 without any delay in delivery.[122] However, the NLRB also renewed several subscription contracts scheduled to end on October 31, 31 days into the subsequent fiscal year.[123] With respect to those subscriptions, the GAO concluded that 31 days was far longer than the normal lead time for activating new subscriptions and the NLRB should have used funds for the new year.[124]

(7) *Service Contracts*—Procured services generally are chargeable at the time of performance.[125] In some cases, agencies may procure services where performance extends across availability periods. The type of service, either severable or nonseverable, will dictate which period's funds the agency charges.[126]

Severable services are continuing or recurring in nature and "can be separated into components that independently meet a separate need of the Government."[127] For example, lawn mowing and clerical work are typically severable services. Severable services generally may not cross time periods and must be incrementally charged in the year they are performed[128] unless otherwise authorized by statute.[129] Two such statutes provide that military and civilian agencies, respectively, may contract for severable services crossing fiscal years and may fully fund the contracts using the earlier period's appropriation so long as the total contract period does not exceed one year.[130]

In contrast, nonseverable services are single undertakings that often involve the delivery of a specified end product.[131] For example, a building

construction contract typically involves a nonseverable service. Agencies fully charge nonseverable services in the period they award the contract, not when the performance occurs.[132]

■ Amount

The third aspect of congressional control over appropriated funds is termed "amount." Thus, not only must federal funds must be used for a proper purpose and in a proper time, but agencies must ensure that they have sufficient funds in the relevant account with no restrictions on the use of such funds to complete the determination of legal availability.

Unlike in the case of personal bank accounts, Congress does not actually transfer funds from the Treasury to individual agencies. Rather, account numbers are established by the Department of Treasury, and agencies draw on "budget authority" to fund their expenditures.[133] This authority is shaped, in part, by the nature of the appropriation amount, which is how Congress seeks to control how much an agency spends in a given fiscal year.

The basic amount restriction[134] prohibits an agency from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."[135] An agency triggers this statute when it depletes all the available funds in a given account, the amount in an earmark, or the amount that is otherwise available except for some restriction as written in the appropriations act.

As discussed above, agencies do not receive the full amounts available in the appropriations act on the first day of the period of availability. Rather, Congress and the OMB control how much money is available to an agency through a system of apportionments and allocations.[136] The violation of one of these administrative divisions may, in turn, create a violation of yet other statutory restrictions and result in an amount violation.[137] Failure to abide by amount restrictions may result in a reportable Antideficiency Act violation, as discussed in the next section of the PAPER

Although Congress used to appropriate funds with a high level of specificity, the dramatic growth of the Federal Government over the past 230 years has resulted in broader, more general appropriations language and more numerous appropriation accounts to cover the variety of efforts that Government must undertake to keep the country running. For example, in FY 1905, the Department of Justice received $3,000 specifically for stationery. By comparison, in FY 2008, Congress appropriated $97,832,000 for "expenses necessary for the administration of the Department of Justice," but there are a host of other divisions within the DOJ that received specific appropriations.[138]

With respect to amount, congressional appropriations may be divided into two broad categories: lump-sum or line-item. Lump-sum appropriations are generally significant dollar amounts to cover broad agency operations and programs. For example, in FY 2008, Congress appropriated $ 22,693,617,000 "[f]or expenses, not otherwise provided for, necessary for the operation and maintenance of activities and agencies of the Department of Defense (other than the military departments), as authorized by law."[139] In some instances, appropriations language will include seemingly narrower categories of authorized purposes, such as that for FY 2008 in the Military Personnel, Navy account:[140]

> For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve provided for elsewhere), midshipmen, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97-377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $23,318,476,000.

Such appropriations nevertheless are termed "lump sum" because of the broad application of these types of expenditures.

By contrast, line-item appropriations fund a specific program or purpose. In FY 2010, Congress appropriated $11,880,000 to the Department of Agriculture specifically "for the Native American Institutions Endowment Fund."[141] Similarly, the Department of Energy received $243,823,000 for the "necessary expenses for Strategic Petroleum

Reserve facility development and operations and program management activities."[142]

A quantity of a lump-sum appropriation designated for a specific purpose is called an "earmark."[143] Often confused with a line item,[144] earmarks frequently are used to subdivide larger amounts of appropriations for clearly identifiable projects. Consider, for example, this appropriation language:[145]

> For expenses, not otherwise provided for, necessary for the operation and maintenance of activities and agencies of the Department of Defense (other than the military departments), as authorized by law, $28,115,793,000: Provided, That not more than $50,000,000 may be used for the Combatant Commander Initiative Fund authorized under section 166a of title 10, United States Code….

In that example, no more than $50 million is said to be earmarked for the Combatant Commander Initiative Fund. There are hundreds of examples of such earmarks throughout the appropriations acts.

Earmarking is not the only language to affect the amount that an agency receives. Congress will use language such as "none of the funds appropriated" or "no more than" or "at least." These cues shape the amounts that are available for the purposes described in the appropriations provision.[146] Failure to follow such instructions may create violations of the purpose statute, as discussed above.[147] However, where the purpose is otherwise authorized, but the amount has been exceeded or the obligation is created in advance of the appropriation, then the agency potentially has violated the amount restrictions.

Antideficiency Act

Congress passed the Antideficiency Act to prevent executive agencies from engaging in a variety of fiscal malfeasance, including, for example, obligating funds in advance of appropriations, comingling funds, and using funds for purposes other than those for which they were appropriated—so-called "coercive deficiencies" that often required Congress to enact supplemental appropriations.[148]

The first iteration of the Antideficiency Act was passed during the 19th century due to the increasing frustration of Congress with the failure of Executive Branch agencies to stay within the budgets allocated to them. The original version, enacted in 1870, made it unlawful for any department of the Government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year.[149]

Congress's concern was not limited simply to agency overobligations and overexpenditures for authorized purposes. Rather, Congress also sought to prevent agencies from using appropriated funds for unauthorized purposes. In response to continuing overobligations and overexpenditures, Congress amended the law in 1905, adding criminal penalties for violating the Act.[150] Congress amended the Act yet again in 1906, further tightening controls on apportionments.[151] Although the legislative debate focused largely upon the problem of overall deficiencies, several committee members and other representatives emphasized the need to prevent Executive Branch departments from taking funds authorized for one purpose and using them for another, noting that such abuses were a significant cause of deficiencies.[152]

■ Antideficiency Act Basics

The Antideficiency Act currently is codified at 31 U.S.C.A. §§ 1341–42, 1350–51, and 1511–19, statutory provisions which, together, prohibit any Government officer or employee from (a) obligating, expending, or authorizing an obligation or expenditure of funds in excess of the amount available in an appropriation, an apportionment, or a formal subdivision of funds,[153] (b) incurring an obligation, or "involv[ing]" the Government "in a contract for the payment of money" in advance of an appropriation, unless otherwise authorized by law,[154] and (c) accepting voluntary services, except for certain emergencies and as otherwise authorized by law.[155]

As noted above, formal subdivisions of appropriations are made by Executive Branch departments and agencies and ordinarily are referred to as apportionments, allocations, and allotments.[156] Informal subdivisions of appropriations are known as allowances and are made by agencies at lower levels. Allowances do not create an absolute limitation on obligational authority. In other words,

because allowances are *not* formal subdivisions of funds, an Antideficiency Act violation does not necessarily result if an allowance is exceeded.[157]

Accordingly, the Antideficiency Act effectively imposes fiscal controls at three levels: (1) the appropriations level, (2) the apportionment level, and (3) the formal subdivision level. The fiscal controls at the appropriations level are based upon 31 U.S.C.A. § 1341(a)(1)(A) and (B), while the controls at the latter two levels are derived from 31 U.S.C.A. § 1517(a). If a Government employee violates any of those fiscal controls, the employee violates the Act and is subject to criminal and administrative penalties.[158]

In sum, the Antideficiency Act serves to enforce the purpose, time, and amount restrictions discussed in the above sections of this PAPER, and "extends to all provisions of law that implicate the availability of agency appropriations."[159] Thus, "[d]etermining what amount, if any, is available for a particular obligation or expenditure, begins with examining the language in the agency's appropriations act, but it does not end there: agencies must consider the effect of all laws that address the availability of appropriations for that expenditure."[160] In other words, if there is a statutory restriction on available appropriations for a program, either in the relevant appropriations act or in a separate statute, the agency is not free to increase funding for that program beyond that limit.[161]

For example, the GAO recently concluded that the Election Assistance Commission violated the purpose statute, 31 U.S.C.A. § 1301(a), when the EAC obligated certain grant payments for a purpose other than that specified in the appropriation.[162] The EAC attempted to justify its use of the funds in question based upon language in a conference report and the apportionment made by the OMB.[163] The GAO explained that, "to determine the purpose of an appropriation, the starting point is the plain meaning of the statute" and "[i]f the statutory language provides an unambiguous expression of the intent of Congress, then the inquiry ends there."[164] In the EAC's case, "[b]ecause the appropriation at issue…was available only for requirements payments, not for poll worker and mock election grants, EAC violated 31 U.S.C.A. § 1301(a) when it obligated funds from the appropriation for purposes other than requirements payments."[165] Although the EAC maintained it reasonably relied upon OMB's apportionment, the GAO concluded "that an agency violates the law if it obligates funds without proper budget authority to do so even if it genuinely acts in reliance on OMB apportionment."[166] In that regard, the GAO noted that the OMB itself "advises agencies not to use its apportionment of funds to determine the legality of using funds for a given purpose."[167]

On the other hand, "[n]ot every violation of 31 U.S.C. § 1301(a) also constitutes a violation of the Antideficiency Act."[168] In other words, "[e]ven though an expenditure may have been charged to an improper source, the Antideficiency Act's prohibition against incurring obligations in excess or in advance of available appropriations is not also violated unless no other funds were available for that expenditure."[169] But, where no other funds were authorized to be used for the purpose in question (or where those authorized were already obligated), both 31 U.S.C.A. § 1301(a) and § 1341(a) have been violated.[170] The GAO also "would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriate fund source, although available at the time, was subsequently obligated, making readjustment of accounts impossible."[171]

Thus, Government officials can "correct" a purpose statute violation if all three of the following conditions are met: (1) proper funds (i.e., the proper appropriation, the proper year, and the proper amount) were available at the time of the erroneous obligation; (2) proper funds were available at the time of correction for the agency to correct the erroneous obligation; and (3) proper funds were available continuously from the time of the erroneous obligation to the time of correction.[172] Similarly, although a time violation (e.g., a violation of the bona fide needs rule) also may result in a violation of 31 U.S.C.A. § 1341 or § 1517, such a violation is correctable under the same conditions. In contrast, there is no way to correct an amount violation.

■ Antideficiency Act Applications

The Antideficiency Act presents more than just theoretical issues for contractors, and makes frequent appearances in court decisions. First, the Government may argue that a contract is null and void if the contractor knew, or should have known, of a specific funding prohibition.[173] Similarly, where an alleged implied-in-fact contract likely would result in an Antideficiency Act violation, the U.S. Supreme Court has held that a Contracting Officer is presumed not to have made such a contract.[174] For example, in *Hercules, Inc. v. United States*, a contractor argued "that the context in which the Government compelled it to manufacture Agent Orange constitute[d] an implied-in-fact agreement by the Government to indemnify for losses to third parties."[175] The Supreme Court, however, rejected the contractor's position, concluding instead as follows:[176]

> There is…reason to think that a contracting officer would not agree to the open-ended indemnification alleged here. The Anti-Deficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation. Ordinarily no federal appropriation covers contractors' payments to third-party tort claimants in these circumstances, and the Comptroller General has repeatedly ruled that Government procurement agencies may not enter into the type of open-ended indemnity for third-party liability that petitioner…claims to have implicitly received under the Agent Orange contracts. We view the Anti-Deficiency Act, and the contracting officer's presumed knowledge of its prohibition, as strong evidence that the officer would not have provided, in fact, the contractual indemnification…claim[ed].

Second, even where both the contractor and Contracting Officer are unaware of a specific funding prohibition, a contract cannot exist if it would necessitate a violation of the Antideficiency Act.[177] In *Sam Gray Enterprises v. United States*, for example, a contractor sought damages for the Government's alleged breach of a lease agreement for housing. The Court of Federal Claims held there was no contract, primarily for lack of contracting authority. The Federal Circuit affirmed, explaining that "[n]o appropriation was shown to have been made that could cover five years worth of rental housing on any basis, whether as a lease or a guarantee."[178] Accordingly, "[w]ithout such an appropriation, there can be no contracting authority for anyone, even a contracting officer, to bind the government to any contract extending beyond the fiscal year in which any contract was entered into."[179] Consistent with the general rule that the Government is not bound by the acts of its agents beyond the scope of their actual authority, the fact that the contractor "may have believed that authority existed is irrelevant."[180] Because the contractor could not demonstrate the existence of a multi-year or no-year appropriation, "there [could] be no contracting authority, regardless of the position of the representatives of the government."[181]

More recently, in *Rick's Mushroom Service, Inc. v. United States*, the Federal Circuit held that, "[b]ecause the contracting officer would have no authority under the [Antideficiency Act] to enter into an indemnity agreement without an appropriation, [the court could] not find an implied-in-fact warranty by the government to indemnify [the contractor] for its litigation costs in defending against third party claims."[182]

On the other hand, the Federal Circuit concluded, in *Massachusetts Bay Transportation Authority v. United States*, that "[n]o authority supports the theory that the government is not liable for breach of its contractual undertakings."[183] In that case, the Federal Circuit reversed the trial court's holding "that the federal government could not be liable for design errors because of the Anti-Deficiency Act."[184]

The problem for contractors, however, is that, while the Government may raise the Antideficiency Act in defense of contract suits—i.e., to argue that a contract was unauthorized—contractors may not have standing to sue the Government based upon violations of the Act.[185]

Conclusion

While a detailed understanding of fiscal law is virtually essential for Federal Government counsel, Contracting Officers, and other agency officials whose duties involve managing Government contracts, anyone who advises a Government contractor—or who is responsible for the performance of a Government contract—must have more than a passing familiarity with fiscal

law as well. Government attorneys and contracting officials must be ever vigilant for potential Antideficiency Act violations that not only risk their careers, but also the ire of the relevant inspector general or even Congress. The contractor, on the other hand, faces a business partner (i.e., the sovereign) that, even in its commercial capacity, is bound only by agents with actual authority to enter agreements and to spend Government funds, properly appropriated and allocated. Accordingly, contractors must remain acutely aware of how their Government procurement contracts—and, more particularly, other, less formal agreements—are authorized and funded.

GUIDELINES

These *Guidelines* are intended to assist you in providing advice regarding, and litigating contract claims involving, fiscal law. They are not, however, a substitute for professional representation in any specific situation.

1. Understand the appropriations process, including the differences between authorizations, appropriations, and the process by which budget authority flows down to Executive Branch agencies.

2. Keep in mind that a Government agency may almost never be estopped from denying the authority of its agents, particularly when public funds are involved; rather, a Government official must possess actual authority to contract in order to enter a binding agreement with a private party.

3. Remember that the authority of a Government official to enter into a contract may be restricted by fiscal law, even if that official otherwise possesses the necessary contracting authority in a general sense (i.e., the official has a contracting warrant).

4. Better safe, than sorry—do not hesitate to ask a Government official for the source of the official's contracting or budgetary authority if you have a legitimate concern.

5. When examining a fiscal law question, be sure to consider the full range of possible legal sources that may govern the answer, including, but not limited to, an agency's authorizing legislation, appropriation statutes, legislative history, GAO decisions, and court cases. A reliable starting point for research is the GAO's PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, commonly referred to as the GAO Redbook, available at *http://www.gao.gov* and on Westlaw.

6. Federal funding may be unavailable—and thus not authorized to be spent—because Congress has placed a purpose, time, or amount restriction on the funds; always be cognizant of such restrictions and understand their parameters.

7. Beware of fiscal law problems, particularly with agreements that are not standard procurement contracts.

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3/ CBO, The Budget and Economic Outlook: Fiscal Years 2010 to 2020, at 51 (Jan. 2010), available at http://www.cbo.gov/ftpdocs/108xx/doc10871/BudgetOutlook2010_Jan.cfm.

4/ CBO, The Budget and Economic Outlook: Fiscal Years 2010 to 2020, at 66 (Jan. 2010), available at http://www.cbo.gov/ftpdocs/108xx/doc10871/BudgetOutlook2010_Jan.cfm. (explaining that "[h]istorically, trends in overall discretionary spending have been heavily influenced by spending on defense" and that "[n]ondefense discretionary programs encompass such activities as transportation, education grants, housing assistance, health-related research, most homeland security activities, the federal justice system, foreign aid, and maintenance of national parks").

5/ See http://www.usaspending.gov.

6/ See http://www.usaspending.gov.

7/ Transcript of Oral Argument at 36:3–4, 2008 WL 512755, Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662 (2008), 50 GC ¶ 251.

8/ Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997) ("Anyone entering into an agreement with the Government takes the risk of accurately ascertaining the authority of the agents who purport to act for the Government, and this risk remains with the contractor even when the Government agents themselves may have been unaware of the limitations on their authority."); Fed-

eral Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947); Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 416–17 (1990) (holding that erroneous advice given to a federal employee by OPM personnel did not create an estoppel when finding to the contrary would violate the principle "that payments of money from the Federal Treasury are limited to those authorized by statute").

9/ U.S. Const. art. I, § 8, cl. 1.

10/ U.S. Const. art. I, § 9, cl. 7.

11/ Heniff Jr., Overview of the Authorization-Appropriations Process 1 (Congressional Research Service June 17, 2008), available at http://www.senate.gov/reference/resources/pdf/RS20371.pdf.

12/ See, e.g., Department of Energy Organization Act, 42 U.S.C.A. § 7270 ("Appropriations to carry out the provisions of this chapter shall be subject to annual authorization."); 10 U.S.C.A. § 114(a) (providing that no funds may be appropriated for military construction, military procurement, and certain related research and development "unless funds therefor have been specifically authorized by law."); 31 U.S.C.A. § 1341(a)(1)(B) ("An officer or employee of the United States Government or of the District of Columbia government may not…involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.").

13/ Heniff Jr., Overview of the Authorization-Appropriations Process 1 (Congressional Research Service June 17, 2008), available at http://www.senate.gov/reference/resources/pdf/RS20371.pdf.

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15/ Heniff Jr., Overview of the Authorization-Appropriations Process 1 (Congressional Research Service June 17, 2008), available at http://www.senate.gov/reference/resources/pdf/RS20371.pdf.

16/ Heniff Jr., Overview of the Authorization-Appropriations Process 2 (Congressional Research Service June 17, 2008), available at http://www.senate.gov/reference/resources/pdf/RS20371.pdf.

17/ Hon. Dianne Feinstein U.S. Senate, Comp. Gen. Dec. B-260759, May 2, 1995, 1995 WL 262565, at *4.

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20/ GAO, 1 Principles of Federal Appropriations Law 2-41 (3d ed. Jan. 2004).

21/ GAO, 1 Principles of Federal Appropriations Law 2-34 (3d ed. Jan. 2004) (stating that once enacted, challenging the appropriation is merely academic).

22/ Hon. Robert C. Byrd, Ranking Minority Member, Comm. on Appropriations, U.S. Senate, Comp. Gen. Dec. B-302335, Jan. 15, 2004, 2004 WL 187281, at *3.

23/ Hon. Robert C. Byrd, Ranking Minority Member, Comm. on Appropriations, U.S. Senate, Comp. Gen. Dec. B-302335, Jan. 15, 2004, 2004 WL 187281, at *3.

24/ 2 U.S.C.A. § 622(2)(A) (defining "budget authority").

25/ See Doke, Jr. & Shager, "2009 Procurement Review," Briefing Papers No. 10-2, at 1–5 (Jan. 2010) (discussing appropriations activity in 2009).

26/ See Library of Congress, Status of Appropriations Legislation for Fiscal Year 2010, http://thomas.loc.gov/home/approp/app10.html (listing the regular appropriations and additional acts).

27/ 2 U.S.C.A. § 622 ("The term 'budget authority' means the authority provided by Federal law to incur financial obligations" including borrowing authority and contracting authority.).

28/ See GAO, 1 Principles of Federal Appropriations Law 2-40 (3d ed. Jan. 2004).

29/ See, e.g., Legislative Branch Appropriations Act, 2010, Pub. L. No. 111-68, div. A, 123 Stat. 2023 (2009) (enacting legislative branch appropriations for FY 2010 on October 1, 2009).

30/ See, e.g., Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, div. B, 123 Stat. 2023, 2043 (2009) (enacting continuing appropriations that extend inter alia the Omnibus Appropriations Act, 2009); Further Continuing Appropriations, 2010, Pub. L. No. 111-88, div. B, 123 Stat. 2904, 2972 (2009) (providing additional continuing appropriations for the Small Business Administration).

31/ See, e.g., Making Supplemental Appropriations for Fiscal Year 2009 for the Consumer Assistance To Recycle and Save Program, Pub. L. No. 111-47, 123 Stat. 1972 (2009) (providing supplemental funding to the "Cash for Clunkers" program).

32/ 31 U.S.C.A. § 1301(d) ("A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made.").

33/ See GAO, 1 Principles of Federal Appropriations Law 2-17 (3d ed. Jan. 2004).

34/ See GAO, 1 Principles of Federal Appropriations Law 2-17 to 2-20 (3d ed. Jan. 2004) (discussing revolving funds and related decisions).

35/ Pub. L. No. 111-152, 124 Stat. 1029 (2010).

36/ Pub. L. No. 111-152, § 1005(b), 124 Stat. 1029, 1036 (2010).

37/ See also Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (1972) (including appropriations language).

38/ See GAO, A Glossary of Terms Used in the Federal Budget Process 78 (GAO-05-734SP, Sept. 2005), available at http://www.gao.gov/new.items/d05734sp.pdf (defining a point of order as "[a]n objection raised on the House or Senate floor or in committees to an action being taken as contrary to that body's rules" and explaining that, "[i]n the House, for example, a point of order may be raised under Rule XXI objecting to an appropriation in an appropriation bill that was not previously authorized by law").

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51/ 31 U.S.C.A. §§ 1513(d), 1514.

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58/ 28 U.S.C.A. § 1295; 41 U.S.C.A. § 607(g).

59/ Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("It is a fundamental principle of appropriations law that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency.").

60/ Election Assistance Comm'n—Obligation of Fiscal Year 2004 Requirements Payments Appropriation, Comp. Gen. Dec. B-318831, Apr. 28, 2010, 2010 WL 1766085, at *3.

61/ Election Assistance Comm'n—Obligation of Fiscal Year 2004 Requirements Payments Appropriation, Comp. Gen. Dec. B-318831, Apr. 28, 2010, 2010 WL 1766085, at *3 ("While views expressed in legislative history may be relevant in statutory interpretation, those views are not a substitute for the statute itself where the statute is clear on its face."); see, e.g., Shannon v. United States, 512 U.S. 573, 583 (1994) (declining to give effect to "legislative history that is in no way anchored in the text of the statute.").

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64/ LTV Aerospace Corp., Comp. Gen. Dec. B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 324, 75-2 CPD ¶ 203, at 22 ("[Agencies] ignore such expressions of intent at the peril of strained relations with the Congress.").

65/ United States v. MacCollom, 426 U.S. 317, 321 (1976).

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72/ Election Assistance Comm'n—Obligation of Fiscal Year 2004 Requirements Payments Appropriation, Comp. Gen. Dec. B-318831, Apr. 28, 2010, 2010 WL 1766085 (An agency must follow the plain language of an appropriation and may not rely on the language in legislative history).

73/ Hon. James M. Collins House of Representatives, Comp. Gen. Dec. B-202716, Oct. 29, 1981.

74/ Pub. L. No. 110-116, § 8059, 121 Stat. 1295, 1328 (2007).

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81/ Customs & Border Protection—Relocation Expenses, Comp. Gen. Dec. B-306748, July 6, 2006, 2006 WL 1985415, at *2.

82/ Customs & Border Protection—Relocation Expenses, Comp. Gen. Dec. B-306748, July 6, 2006, 2006 WL 1985415, at *2–3.

83/ Customs & Border Protection—Relocation Expenses, Comp. Gen. Dec. B-306748, July 6, 2006, 2006 WL 1985415, at *3.

84/ Use of Agency Funds for Bar Membership Expenses, Comp. Gen. Dec. B-204021, Apr. 16, 1982, 61 Comp. Gen. 357.

85/ Use of Agency Funds for Bar Membership Expenses, Comp. Gen. Dec. B-204021, Apr. 16, 1982, 61 Comp. Gen. 357, 360.

86/ Compare Internal Revenue Serv.—Use of Appropriated Funds for an Employee Electronic Tax Return Program, Comp. Gen. Dec. B-239510, Oct. 17, 1991, 71 Comp. Gen. 28 (agency permitted to fund a program to enable employees to electronically file their tax returns free of charge) with Federal Executive Board—Appropriations—Employee Tax Returns, Comp. Gen. Dec. B-259947, Nov. 28,1995, 96-1 CPD ¶ 129 (agency not permitted to use appropriations to provide employees with the means to electronically file their personal income tax returns because such costs are personal to the employees).

87/ Use of Appropriated Funds To Purchase Kitchen Appliances, Comp. Gen. Dec. B-302993, June 24, 2004, 2004 WL 1853469.

88/ Use of Appropriated Funds To Purchase Kitchen Appliances, Comp. Gen. Dec. B-302993, June 24, 2004, 2004 WL 1853469.

89/ Prohibition on Use of Appropriated Funds for Defense Golf Courses, Comp. Gen. Dec. B-277905, Mar. 17, 1998, 98-1 CPD ¶ 135.

90/ Hon. Lane Evans Ranking Democratic Member Comm. on Veterans' Affairs House of Representatives, Comp. Gen. Dec. B-289209, May 31, 2002, 2002 WL 1554350 (agency may not pay claims based on one appropriation where the funds are explicitly authorized as a necessary expense of a different, more general appropriation).

91/ District of Columbia Courts—Authority To Pay Settlements & Judgments, Comp. Gen. Dec. B-318426, Nov. 2, 2009, 2009 WL 3725002.

92/ Secretary of Commerce, Comp. Gen. Dec. B-129401, Nov. 9, 1956, 36 Comp. Gen. 386.

93/ Payment of SES Performance Awards of the Railroad Retirement Board's Office of Inspector General, Comp. Gen. Dec. B-231445, Mar. 20, 1989, 68 Comp. Gen. 337.

94/ Payment of SES Performance Awards of the Railroad Retirement Board's Office of Inspector General, Comp. Gen. Dec. B-231445, Mar. 20, 1989, 68 Comp. Gen. 337.

95/ 31 U.S.C.A. § 1502(a).

96/ See GAO, 1 Principles of Federal Appropriations Law 5-4 (3d ed. Jan. 2004).

97/ 31 U.S.C.A. § 1301(c)(2); see Cong. Requesters, Comp. Gen. Dec. B-277719, Aug. 20, 1997, 1997 WL 475167, at *1 ("Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the year covered.").

98/ See GAO, 1 Principles of Federal Appropriations Law 5-7 (3d ed. Jan. 2004).

99/ See Severable Servs. Contracts, Comp. Gen. Dec. B-317636, Apr. 21, 2009, 2009 CPD ¶ 89, at 4 ("[31 U.S.C.A. §] 1502(a) applies to appropriations limited to a definite period, and no-year funds are not so limited. Thus, neither it, nor the bona fide needs rule derived from it, applies to no-year funds.").

100/ See Expired Funds & Interagency Agreements Between GovWorks & the Dep't of Def., Comp. Gen. Dec. B-308944, July 17, 2007, 2007 CPD ¶ 157 (agreements were not specific enough in "scope, nature, complexity, and purpose" to constitute obligations).

101/ See Natural Res. Conservation Serv.—Obligating Orders With GSA's AutoChoice Summer Program, Comp. Gen. Dec. B-317249, July 1, 2009, 2009 WL 2004210, at*4–6 (agency did not create an obligation when it submitted an automobile order that lacked a vehicle model and price); Expired Funds & Interagency Agreements Between GovWorks & the Dep't of Def., Comp. Gen. Dec. B-308944, July 17, 2007, 2007 CPD ¶157; Nat'l Mediation Bd.—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Bds. Under the Ry. Labor Act, Comp. Gen. Dec. B-305484, June 2, 2006, 2006 WL 1669294 (contingent liabilities).

102/ See 31 U.S.C.A. § 1553(a) ("After the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account under [31 U.S.C.A. § 1552(a)], the account shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account."); Nat'l Labor Relations Bd.—Improper Obligation of Severable Servs. Contract, Comp. Gen. Dec. B-308026, Sept. 14, 2006, 2006 WL 2673583, at *4 (NLRB inappropriately attempted to use expired funds from a previous period by altering an executed contract); Continued Availability of Expired Appropriation for Additional Project Phases, Comp. Gen. Dec. B-286929, Apr. 25, 2001, 2001 WL 717355, at *4 ("Nothing in the bona fide needs rule suggests that expired appropriations may be used for a project for which a valid obligation was not incurred prior to expiration merely because there was a need for that project during that period.").

103/ 31 U.S.C.A. § 1553(a) ("After the end of the period of availability…the account shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account.").

104/ 31 U.S.C.A. § 1552(a) ("On September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose.").

105/ See Dep't of Agric.—Coop. Agreement for Use of Aircraft, Comp. Gen. Dec. B-308010, Apr. 20, 2007, 2007 WL 1246850, at *4; GAO, 1 Principles of Federal Appropriations Law 5-11 (3d ed. Jan. 2004).

106/ 31 U.S.C.A. § 1502(a) (emphasis added); see Dep't of Agric.—Coop. Agreement for Use of Aircraft, Comp. Gen. Dec. B-308010, Apr. 20, 2007, 2007 WL 1246850, at *4.

107/ See GAO, 1 Principles of Federal Appropriations Law 5-13 (3d ed. Jan. 2004).

108/ See Dep't of Agric.—Coop. Agreement for Use of Aircraft, Comp. Gen. Dec. B-308010, Apr. 20, 2007, 2007 WL 1246850, at *4.

109/ See generally, Judge Advocate General, 77th Fiscal Law Course, 3-16 to 3-18 (2007).

110/ See 31 U.S.C.A. § 1553(b) (obligations made to accounts that are now closed may be properly charged against current funds).

111/ See 31 U.S.C.A. § 1553(b) ("[A]fter the closing of an account…obligations and adjustments to obligations that would have been properly chargeable to that account, both as to purpose and in amount, before closing and that are not otherwise chargeable to any current appropriation account of the agency may be charged to any current appropriation account of the agency available for the same purpose," provided that the total amount does not exceed one percent of the appropriations for the charged account.); Hon. Jack Kingston, Chairman, Subcomm. on Legislative Branch, Comm. on Appropriations, House of Representatives, Comp. Gen. Dec. B-302760, May 17, 2004, 2004 WL 1146276, at *7 ("From a bona fide need perspective, so long as the agency has identified a prior legitimate need that continues to exist, the appropriation current at the time the agency acts upon that need is available for the agency to use to satisfy that need.").

112/ See 31 U.S.C.A. § 1558(a) ("[F]unds available to an agency for obligation for a contract at the time a protest or other action referred to in [31 U.S.C.A. § 1558(b)] is filed in connection with a solicitation for, proposed award of, or award of such contract shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest or other action.").

113/ See Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action, Comp. Gen. Dec. B-210160, Sept. 28, 1983, 84-1 CPD ¶ 91; Funding of Replacement Contracts, Comp. Gen. Dec. B-232616, Dec. 19, 1988, 88-2 CPD ¶ 602.

114/ See Navy, Replacement Contract, Comp. Gen. Dec. B-238548, Feb. 5, 1991, 91-1 CPD ¶ 117; Funding of Replacement Contracts, Comp. Gen. Dec. B-232616, Dec. 19, 1988, 88-2 CPD ¶ 602 (funds are available for reprocurement of the same items or services if the contract award was improper and the agency acts without delay).

115/ See Recording Obligations Under EPA Cost-Plus-Fixed-Fee Contract, Comp. Gen. Dec. B-195732, June 11, 1980, 59 Comp. Gen. 518, 521 (funds are available for contract modifications if they do not exceed the scope or "antecedent liability" of the original contract); see also Nash, "Funding Overruns: The Evolving Bona Fide Needs Rule," 23 Nash & Cibinic Rep. ¶ 52 (Oct. 2009). But see Fin. Crimes Enforcement Network—Obligations under a Cost–Reimbursement, Nonseverable Servs. Contract, Comp. Gen. Dec. B-317139, June 1, 2009, 2009 CPD ¶ 158 (concluding that cost overruns are chargeable in the time period of the overrun, not in the original period.); Former President Transition Travel Expenses on Inauguration Day, Comp. Gen. Dec. B-203336, Sept. 23, 1982, 61 Comp. Gen. 612 (increasing the ceiling of a cost contract addresses a new bona fide need and is chargeable in the current time period).

116/ See GAO, 1 Principles of Federal Appropriations Law 5-16 to 5-18 (3d ed. Jan. 2004).

117/ See Farmers Home Admin. (FmHA) Purchase of Office Chairs, Comp. Gen. Dec. B-251706, Aug. 17, 1994, 73 Comp. Gen. 259, 262 ("An agency may issue orders to replace stock items used in the year in which the contract is made, even though the replacement items will not be used until the following fiscal year.").

118/ See GAO, 1 Principles of Federal Appropriations Law 5-13 (3d ed. Jan. 2004) ("The bona fide needs rule does not prevent maintaining a legitimate inventory at reasonable and historical levels, the "need" being to maintain the inventory level so as to avoid disruption of operations.").

119/ See Farmers Home Admin. (FmHA) Purchase of Office Chairs, Comp. Gen. Dec. B-251706, Aug. 17, 1994, 73 Comp. Gen. 259, 262 ("The stock items need not be merely replacement items but could be additional stock for expanded…needs.").

120/ See Farmers Home Admin. (FmHA) Purchase of Office Chairs, Comp. Gen. Dec. B-251706, Aug. 17, 1994, 73 Comp. Gen. 259, 262 (items ordered from a federal supply schedule were properly charged to the period when ordered, rather than when delivered, because "the delivery timeframe was reasonable under the facts and circumstances").

121/ Nat'l Labor Relations Bd.—Funding of Subscription Contracts, Comp. Gen. Dec. B-309530, Sept. 17, 2007, 2007 WL 2737159, at *2.

122/ Nat'l Labor Relations Bd.—Funding of Subscription Contracts, Comp. Gen. Dec. B-309530, Sept. 17, 2007, 2007 WL 2737159, at *5.

123/ Nat'l Labor Relations Bd.—Funding of Subscription Contracts, Comp. Gen. Dec. B-309530, Sept. 17, 2007, 2007 WL 2737159, at *2.

124/ Nat'l Labor Relations Bd.—Funding of Subscription Contracts, Comp. Gen. Dec. B-309530, Sept. 17, 2007, 2007 WL 2737159, at *5.

125/ See GAO, 1 Principles of Federal Appropriations Law 5-23 (3d ed. 2004).

126/ See GAO, 1 Principles of Federal Appropriations Law 5-24 to 5-25 (3d ed. Jan. 2004).

127/ Funding for Air Force Cost Plus Fixed Fee Level of Effort Contract, Comp. Gen. Dec. B-277165, Jan. 10, 2000, 2000 CPD ¶ 54; see GAO, 1 Principles of Federal Appropriations Law 5-24 (3d ed. Jan. 2004).

128/ Fin. Crimes Enforcement Network—Obligations Under a Cost–Reimbursement, Nonseverable Servs. Contract, Comp. Gen. Dec. B-317139, June 1, 2009, 2009 CPD ¶ 158; Hon. Jerry Lewis, Chairman, Subcomm. on Def., Comm. on Appropriations, House of Representatives, Comp. Gen. Dec. B-287619, July 5, 2001, 2001 WL 761741, at *6.

129/ See Chem. Safety & Hazard Investigation Bd., Comp. Gen. Dec. B-318425, Dec. 8, 2009, 2009 WL 5184705 (services that require a bundle of tasks, each having no value standing alone, are nonseverable). But see Hon. Lowell Weicker, Jr., Chairman, Subcomm. on Labor, Health & Human Servs., & Educ., Comm. on Appropriations, Comp. Gen. Dec. B-217722, Mar. 18, 1985, 64 Comp. Gen. 359, 362–65 (National Institutes of Health research grants are severable when the grant is not for a particular outcome or work product in a given fiscal year). Most training services and construction contracts are nonseverable. Severable services are typically measured in terms of the amount of time worked or the level of effort rather than a specific deliverable. Funding for Air Force Cost Plus Fixed Fee Level of Effort Contract, Comp. Gen. Dec. B-277165, Jan. 10, 2000, 2000 CPD ¶ 54, at 5.

130/ 10 U.S.C.A. § 2410a (applying to "[t]he Secretary of Defense, the Secretary of a military department, or the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy" regarding severable services and the lease and subsequent maintenance of real or personal property); 41 U.S.C.A. § 253l. See Severable Servs. Contracts, Comp. Gen. Dec. B-317636, April 21, 2009, 2009 CPD ¶ 89, at 3–5 (construing these statutes as only applying to annual appropriations).

131/ Fin. Crimes Enforcement Network—Obligations under a Cost-Reimbursement, Nonseverable Servs. Contract, Comp. Gen. Dec. B-317139, June 1, 2009, 2009 CPD ¶ 158; Nat'l Mediation Bd.—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Bds. Under the Ry. Labor Act, Comp. Gen. Dec. B-305484, June 2, 2006, 2006 WL 1669294, at *6–7 (a contract with an arbitrator involved nonseverable services because the contract contemplated the arbitrator making an award); EEOC—Payment for Training of Mgmt. Interns, Comp. Gen. Dec. B-257977, Nov. 15, 1995, 1995 WL 683813 (two-year training program was nonseverable because completion of the entire program was a prerequisite to permanent employment); Incremental Funding of U.S. Fish & Wildlife Serv. Research Work Orders, Comp. Gen. Dec. B-240264, Feb. 17, 1994, 73 Comp. Gen. 77 (research contract involved nonseverable services because the objective was a final research report); Proper Fiscal Year Appropriation To Charge for Contract & Contract Increase, Comp. Gen. Dec. B-219829, July 22, 1986, 65 Comp. Gen. 741 (preparation of a study on the adjustment needs of Vietnam-era veterans was nonseverable even when the contract required several interim reports as deliverables because the deliverables were independent of the study as a whole).

132/ See Incremental Funding of Multiyear Contracts, Comp. Gen. Dec. B-241415, June 8, 1992, 71 Comp. Gen. 428 ("Contracts that cannot be separated for performance by fiscal year may not be funded on an incremental basis without statutory authority"); Note that a failure to obligate the entire amount of funds for the nonseverable services in the year of the contract may violate the bona fide needs rule. See, e.g., Fin. Crimes Enforcement Network—Obligations under a Cost-Reimbursement, Nonseverable Servs. Contract, Comp. Gen. Dec. B-317139, June 1, 2009, 2009 CPD ¶ 158 (design, development, and implementation of a data retrieval system was improperly charged incrementally because the services were not subdivided for separate performance in any one fiscal year).

133/ See http://www.senate.gov/reference/glossary_term/budget_authority.htm.

134/ There are numerous restrictions related to the amount of funds available, including indemnifications, receipt of voluntary services, or augmentation of appropriations. However, these issues are outside the basic scope of this Paper.

135/ 31 U.S.C.A. § 1341(a)(1)(A).

136/ 31 U.S.C.A. §§ 1511–1519.

137/ 31 U.S.C.A. § 1517.

138/ Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat 1844, 1897 (2007).

139/ Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, 121 Stat. 1295, 1299 (2007) ("Operation and Maintenance, Defense-wide").

140/ Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, 121 Stat. 1295, 1296 (2007) ("Operation and Maintenance, Defense-wide").

141/ Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-80, 123 Stat. 2090, 2095 (2009).

142/ Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2862 (2009).

143/ See GAO, A Glossary of Terms Used in the Federal Budget Process 46–47 (GAO-05-734SP, Sept. 2005), available at http://www.gao.gov/new.items/d05734sp.pdf; see GAO, 2 Principles of Federal Appropriations Law 6-26 (3d. ed. Oct. 2006).

144/ See GAO, A Glossary of Terms Used in the Federal Budget Process 46–47 (GAO-05-734SP, Sept. 2005), available at http://www.gao.gov/new.items/d05734sp.pdf; see GAO, 2 Principles of Federal Appropriations Law 6-26 (3d. ed. Oct. 2006).

145/ Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3409, 3413 (2009) ("Operation and Maintenance, Defense-wide").

146/ See, e.g., Star-Glo Assocs., LP v. United States, 414 F.3d 1349 (Fed. Cir. 2005).

147/ See 31 U.S.C.A. § 1301(a).

148/ In re Project Stormfury—Australia—Indemnification for Damages, Comp. Gen. Dec. B-198206, Apr. 4, 1980, 59 Comp. Gen. 369, 372 (explaining that "Congress was tired of receiving appropriation requests which it could not, in good conscience, refuse because the agency had legally or morally committed the United States to make good on a promise. We term such commitments 'coercive deficiencies' because the Congress has little choice but to appropriate the necessary funds."); PCL Constr. Servs., Inc. v. United States, 41 Fed. Cl. 242, 251 (1998). For an overview of the history of the Antideficiency Act, see Peterson, "Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice," 2009 B.Y.U. L. Rev. 327, 339–340 (2009).

149/ Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251.

150/ Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257

151/ Act of Feb. 27, 1906, ch. 510, 34 Stat. 27, 49.

152/ DOJ Office of Legal Counsel, Memorandum Opinion for Assistant Attorney General for Administration, Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation (Jan. 19, 2001), available at http://www.justice.gov/olc/2001opinions.htm.

153/ 31 U.S.C.A. §§ 1341(a)(1)(A), 1517(a).

154/ 31 U.S.C.A. § 1341(a)(1)(B).

155/ 31 U.S.C.A. § 1342.

156/ 31 U.S.C.A. §§ 1511–1517.

157/ Admin., Housing & Home Fin. Agency, Appropriations— Subdivision of Budget Apportionments Into Allotments & Smaller Segments— Antideficiency Act Conformance, Comp. Gen. Dec. B-132861, Oct. 4, 1957, 37 Comp. Gen. 220, 221–22; Cessna Aircraft Co. v. Dalton, 126 F.3d 1442, 1452 (Fed. Cir. 1998), 39 GC ¶ 564.

158/ Government employees who violate the Antideficiency Act are subject to adverse

personnel actions, including suspension without pay and removal from office. 31 U.S.C.A. §§ 1349(a), 1518. In addition, a knowing and willful violation of the Antideficiency Act is a felony. 31 U.S.C.A. §§ 1350, 1519; see also United States v. Nave, 733 F. Supp. 1002, 1003 (D. Md. 1990) (suggesting that a judge who orders an expenditure in violation of the Antideficiency Act "could conceivably be open to criminal prosecution"). But see Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990) ("Our research has failed to turn up a single prosecution under the Anti-Deficiency Act in its entire existence since 1905.").

159/ U.S. Secret Service—Statutory Restriction on Availability of Funds Involving Presidential Candidate Nominee Protection, Comp. Gen. Dec. B-319009, Apr. 27, 2010, 2010 WL 1709148, at *3 (quoting Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations, Comp. Gen. Dec. B-317450, Mar. 23, 2009, 2009 CPD ¶ 72.

160/ Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations, Comp. Gen. Dec. B-317450, Mar. 23, 2009, 2009 CPD ¶ 72, at 5.

161/ Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations, Comp. Gen. Dec. B-317450, Mar. 23, 2009, 2009 CPD ¶ 72, at 5 (discussing Thompson v. Cherokee Nation, 334 F.3d 1075, 1084 (Fed. Cir. 2003)).

162/ Election Assistance Comm'n—Obligation of Fiscal Year 2004 Requirements Payments Appropriation, Comp. Gen. Dec. B-318831, Apr. 28, 2010, 2010 WL 1766085.

163/ Election Assistance Comm'n—Obligation of Fiscal Year 2004 Requirements Payments Appropriation, Comp. Gen. Dec. B-318831, Apr. 28, 2010, 2010 WL 1766085, at *1.

164/ Election Assistance Comm'n—Obligation of Fiscal Year 2004 Requirements Payments Appropriation, Comp. Gen. Dec. B-318831, Apr. 28, 2010, 2010 WL 1766085, at *3 & n.11 (quoting Lincoln v. Vigil, 508 U.S. 182, 194 (1993), for the proposition that "even where Congress has shown an interest in funding certain programs, 'these representations do not translate do through the medium of legislative history into binding legal obligations'").

165/ Election Assistance Comm'n—Obligation of Fiscal Year 2004 Requirements Payments Appropriation, Comp. Gen. Dec. B-318831, Apr. 28, 2010, 2010 WL 1766085, at *3.

166/ Election Assistance Comm'n—Obligation of Fiscal Year 2004 Requirements Payments Appropriation, Comp. Gen. Dec. B-318831, Apr. 28, 2010, 2010 WL 1766085, at *4.

167/ Id. (discussing OMB Circular No. A-11, "Preparation, Submission and Execution of the Budget" (Aug. 7, 2009)).

168/ Hon. Bill Alexander U.S. House of Representatives, Comp. Gen. Dec. B-213137, June 22, 1984, 63 Comp. Gen. 422, 424.

169/ Hon. Bill Alexander U.S. House of Representatives, Comp. Gen. Dec. B-213137, June 22, 1984, 63 Comp. Gen. 422, 424.

170/ Hon. Bill Alexander U.S. House of Representatives, Comp. Gen. Dec. B-213137, June 22, 1984, 63 Comp. Gen. 422, 424.

171/ Hon. Bill Alexander U.S. House of Representatives, Comp. Gen. Dec. B-213137, June 22, 1984, 63 Comp. Gen. 422, 424.

172/ Hon. Bill Alexander U.S. House of Representatives, Comp. Gen. Dec. B-213137, June 22, 1984, 63 Comp. Gen. 422, 424.

173/ Hooe v. United States, 218 U.S. 322, 332–33 (1910), 38 GC ¶ 119; Hercules, Inc. v. United States, 516 U.S. 417, 427 (1996) ("The Anti-Deficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation."); Ferris v. United States, 27 Ct. Cl. 542, 546 (1892) ("An appropriation per se merely imposes limitations upon the Government's own agents;…its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.").

174/ Hercules, 516 U.S. at 426–27.

175/ Hercules, 516 U.S. at 426.

176/ Hercules, 516 U.S. at 426–28 (footnotes and internal citations omitted).

177/ Sam Gray Enters. v. United States, No. 99-5095, 2000 WL 701733, 250 F.3d 755 (table) (Fed. Cir. May 31, 2000) (unpublished), aff'g 43 Fed. Cl. 596 (1999).

178/ 2000 WL 701733, at *2.

179/ 2000 WL 701733, at *2.

180/ 2000 WL 701733, at *2.

181/ 2000 WL 701733, at *2.

182/ Rick's Mushroom Service, Inc. v. United States, 521 F.3d 1338, 1346 (Fed. Cir. 2008), 50 GC ¶ 135 ("[B]ecause the contracting officer had no authority to enter into an open-ended indemnity agreement, there could be no mutual intent to contract, a prerequisite for an implied-in-fact contract.").

183/ Mass. Bay Trans. Auth. v. United States, 129 F.3d 1226, 1232 (Fed. Cir. 1997), 40 GC ¶ 312.

184/ Id. But see Rick's Mushroom, 521 F.3d at 1346 n.4.

185/ Cessna Aircraft Co. v. Dalton, 126 F.3d 1442, 1451–52 (Fed. Cir. 1998), 39 GC ¶ 564 ("[I]f the primary intended beneficiary of a statute or regulation is the government, then a private party cannot complain about the government's failure to comply with that statute or regulation, even if that party derives some incidental benefit from compliance with it."); Contel Page Servs., Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,736 (finding that a FAR regulation requiring the contracting officer to determine that funds were available before exercising option related to internal procedures and did not create any rights in the contractor, and therefore the Contracting Officer's failure to make the determination would not render the exercise of the option ineffective); GAO, 2 Principles of Federal Appropriations Law 6-141 n.136 (3d. ed. Oct. 2006) (discussing Cessna and explaining that "the court held that the provisions of the Antideficiency Act were only internal government operating requirements and, as such, they did not confer legal rights on outside parties").