

# FISCAL LAW OVERVIEW

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## 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 possible 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 or instituted through historical practice.
- 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, 321 (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. The period of time in which budget authority is available for original obligation. 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. GAO Red Book, Vol. I, p 5-3, GAO-04-261SP (Jan. 2004).
- C. Obligations. A definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States. Payment may be made immediately or in the future. An agency incurs an obligation, for example, when it places an order, signs a contract, awards a grant, purchases a service, or takes other actions that require the government to make payments to the public or from one government account to another. The standards for the proper reporting of obligations are found in section 1501(a) of title 31 of the *United States Code*. GAO, A Glossary of Terms Used in the Federal Budget Process, p.70, GAO-05-734SP (Sept. 2005) (“GAO Glossary”).
- 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 is specific statutory authority to contractually obligate the United States to future payments even though no appropriations are available to pay the obligations at the time the contract is made. Hon. Alan Cranston, 1990 WL 10007871, at \*3, Comp. Gen. No. B-239435 (Aug. 24, 1990). An example of such statutory authority is the Feed and Forage Act, 41 U.S.C. § 11.

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

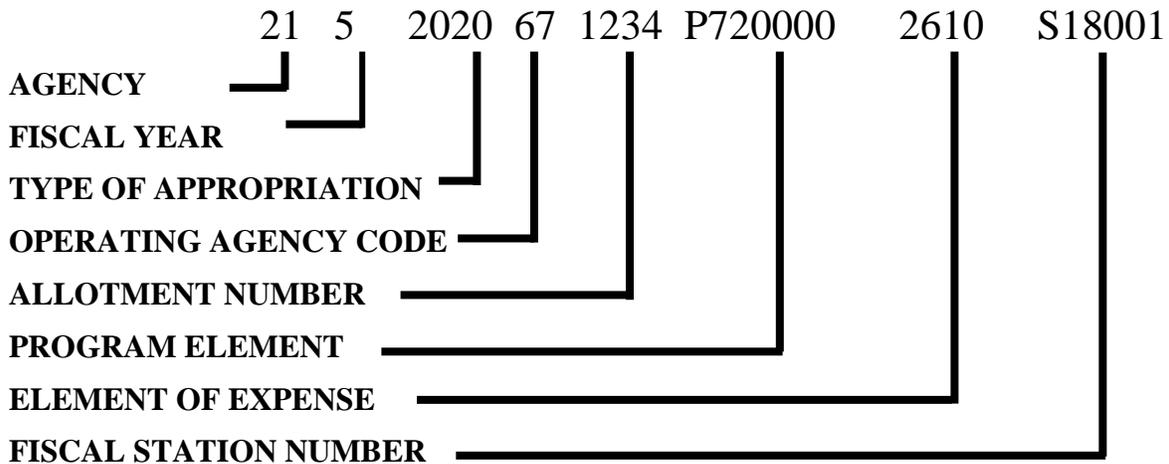
1. The Comptroller General of the United States heads the GAO, an investigative arm of Congress charged with examining all matters relating to the receipt, disbursement, and use of public funds. Established by the Budget and Accounting Act of 1921 (31 U.S.C. §§ 701, et seq.) the GAO audits government agencies.
2. The Comptroller General has the authority to issue advance decisions regarding the propriety of payments that a disbursing official or head of an agency will make or a voucher presented to a certifying official for certification, except in those instances described in paragraph 3 below (see 31 U.S.C. § 3529), BUT DoD policy is to resolve legal issues internally. DoD agencies are the military departments 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 should direct their questions through channels to the appropriate General Counsel's office for an advance decision. It is DoD policy not to seek to recover a payment from an accountable official if that individual has obtained from the General Counsel concerned an opinion advising that the payment could legally be made. DOD FMR, Vol. 5, Ch. 25, ¶ 2503 (December 2010); 31 U.S.C. § 3527(b).
3. Agency Advance Decisions. See DOD FMR, Vol. 5, Ch. 25, ¶ 2503 and Vol. 5, (December 2010); Transfer of Claims Settlement and Related Advance, Comp. Gen. No. B-275605 (Mar. 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 “GAO Red Book”) available at <http://www.gao.gov/>.

F. Accounting Classifications. See DFAS-IN Reg. 37-100-XX, The Army Management 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 Management Structure, provides a detailed breakdown of Army accounting classifications and is available at <http://asafm.army.mil/offices/BU/Dfas37.1.aspx?OfficeCode=1200>

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., Mr. Stephen M. Bodolay, 1996 WL 112423, at 1, Comp. Gen. No. B-240365.2 (March 14, 1996); Hon. Bill Alexander, 63 Comp. Gen. 422, 427-428 (1984); Secretary of Interior, 34 Comp. Gen. 195, 196 (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 GAO Glossary, p.13, GAO-05-734SP (Sept. 2005).
- b. At the present time there are thirteen (13) regular annual appropriations acts. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. See, generally, GAO Red Book, Vol. I, pp. 1-26 to 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, 2012, Pub. L. No. 112-74, Division A and Division H.
- 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 Glossary, p.46, GAO-05-734SP (Sept. 2005).
- e. Researching Appropriation Acts. In addition to LEXIS<sup>TM</sup>- and Westlaw<sup>TM</sup>-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 1998 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. GAO Red Book, Vol. I, p. 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 Glossary, 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, GAO Red Book, Vol. I, pp. 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. Id.
  - (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. However, Congress cannot expand the purposes of a specific appropriation through authorizing acts. See, generally, GAO Red Book, Vol. I, pp. 2-51 to 2-52, GAO-04-261SP (Jan. 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. Compare Bureau of Alcohol, Tobacco, Firearms, and Explosives-Words of Futurity in Fiscal Year 2006 Appropriations Act, 2007 WL 2471778, Comp. Gen. No. B-309704 (Aug. 28, 2007) (prohibiting use of “funds appropriated under this or any other Act with respect to any fiscal year” permanently precluded use of appropriations to disclose contents of Firearms Trace System database), to Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, 65 Comp. Gen. 588, 589 (1986) (prohibiting use of appropriations in “this Act or any other Act” in effect only for that fiscal year).

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, 2001 WL 1526039, at \*5, Comp. Gen. No. B-288658, (Nov. 30, 2001) (legislative history may be used to analyze Congressional intent “with the recognition that only the most extraordinary showing of contrary intentions from such analysis will justify a limitation on the ‘plain meaning’ of the statutory language”); ANGUS Chem. Co., 1987 WL 102687, at \*2, Comp. Gen. No. B-227033 (Aug. 4, 1987) (“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., 1992 WL 175870, at \*3, Comp. Gen. No. B-247853 (Jul. 20, 1992) (where Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, the clear inference is that Congress did not intend to impose legally binding restrictions, and restrictive language in committee reports and other legislative history do not impose any legal requirement on the agency); LTV Aerospace Corp., 55 Comp. Gen. 307 (1975) (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, United States Info. Agy., 1992 WL 232403, Comp. Gen. No. B-248284.2 (Sept. 1, 1992) (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 (2011), § 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 Congressional Budget 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 Chief Financial Officer and sent to Office of Management

and Budget and then 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. If the agency did not have the requested program in the Congressional Budget Justification, then that program is considered a New Start.

b. Agency Regulations. See, generally, GAO Red Book, Vol. I, 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 and deference. 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, supra., at \*2-3 (deference not accorded to Department of Agriculture's informal interpretation, as opposed to interpretation derived from rulemaking or adjudication, where agency interpretation was inconsistent with the plain meaning of the statutory language).
- (3) Agency-level regulations may also place restrictions on the use of appropriated funds.

c. Additional Research Resources:

- (1) DoD Financial Management Regulation, available at: [comptroller.defense.gov/fmr/](http://comptroller.defense.gov/fmr/).

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Ethics Counselor's Deskbook  
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- (2) DFAS-IN Manual 37-100-, The Army Management Structure (July XXXX). The manual is reissued every fiscal year . This annual publication as well as other DFAS-IN regulations can be found at: [www.asafm.army.mil/offices/BU/DFAS37100.aspx?OfficeCode=1200](http://www.asafm.army.mil/offices/BU/DFAS37100.aspx?OfficeCode=1200).
- (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, 2000 WL 675589, at \*3, Comp. Gen. No. B-285066 (May 19, 2000) (“where expenditures are not specifically authorized in an appropriation act, an agency may show that the expenditure is reasonably necessary to carry out an authorized function”); see also United States Dept. of Labor-Interagency Agreement. between Employment. and Trng. Admin. and Bureau of Intl. Affairs, 71 Comp. Gen. 402, 405 (1992) (“when we consider whether an expense is necessary, we determine only whether it falls within the agency’s legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range”).
2. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. Customs and Border Protection Relocation Expenses, 2006 WL 1985415, at \*2, Comp. Gen. B-306748 (Jul. 6, 2006) (“the necessary expense rule recognizes that when Congress makes an appropriation for a particular purpose, by implication it authorizes the agency involved to incur expenses which are necessary or incident to the accomplishment of that purpose”); Hon. Bill Alexander, 63 Comp. Gen. 422, 427 (1984) (“first and foremost, the expenditure must be reasonably related to the purposes for which the appropriation was made”); Secretary of State, 42 Comp. Gen. 226, 228 (1962) (same); Major General Anton Stephan, 6 Comp. Gen. 619 (1927) (same).
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, 66 Comp. Gen. 356, 359 (1987) (emphasis added).
  - b. The fact that an expense may be desirable or beneficial does not mean that it is a necessary expense. Utility Costs under Work-at-Home Programs, 68 Comp. Gen. 502 (1989) (payment for incremental utility costs at residential workplaces not a necessary expense); Secretary of the Interior, 34 Comp. Gen. 599 (1955) (construction of sewage system in excess of capacity required by government for joint use with reclamation camp and general public not a necessary expense even if the cost of the larger system would be about the same).
5. Determinations are fact/agency/purpose/appropriation specific. See Federal Executive Bd.-Appropriations-Employee Tax Returns-Electronic Filing, 96-1 CPD ¶ 129, Comp. Gen. No. B-259947 (Nov. 28, 1995) (New Orleans Federal Executive Board appropriations may not be used to provide its employees with means to electronically file income tax returns because there was no showing that such expenditures were reasonably related to the purpose of the appropriation); compare to Use of Appropriated Funds for an Employee Electronic Tax Return Program, 71 Comp. Gen. 28 (1991) (IRS appropriations may be used to provide its employees with means to electronically file income tax returns to facilitate tax collection efforts by improving IRS’s efficiency in processing returns, resulting in cost savings to the government).

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, §§ 4K-4O (3 March 2005).

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, 1989 WL 241549, Comp. Gen. No. B-230382 (Dec. 22, 1989) (charges for coffee breaks, bar costs, and buffet costs not payable as unauthorized entertainment expenses). 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 Memorandum for Under Secretary of Defense (Comptroller), Use of Appropriated Funds to Purchase Food at Conferences, Meetings, and Events, September 1, 2005.
  - a. Basic Allowance for Subsistence. Under 37 U.S.C. § 402, DoD is authorized to 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 Nuclear Regulatory Agy.-Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Serv. at NRC Workshops, 1999 WL 1498239, Comp. Gen. No. B-281063 (Dec. 1, 1999).

- 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 overturned, at least with respect to paying for the refreshments given to any personnel not on travel status. See Use of Appropriated Funds to Purch. Light Refreshments at Conferences, 2003 WL 174196, Comp. Gen. No. B-288266 (Jan. 27, 2003) (holding that there is no authority for payment, under General Services Administration’s travel regulation on conference planning, for light refreshments at official government-sponsored conferences where a majority of attendees are in travel status except as part of an employee’s travel subsistence allowance and such expenditures should not be authorized for employees in nontravel status).
- 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, 1997 U.S. Comp. Gen. LEXIS 104, Comp. Gen. No. B-270327 (Mar. 12, 1997) (agency authorized to pay for refreshments as a necessary expense to honor awardees where the agency determines that a reception with refreshments would materially enhance the effectiveness of its awards ceremony); Refreshments at Awards Ceremony, 65 Comp. Gen. 738 (1986) (under 5 U.S.C. § 4503, cost of refreshments are a necessary expense where agency determines that a reception with refreshments materially enhances the effectiveness of the ceremony).

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) Be careful with this exception; ensure it is not misused.
- (5) Sources: U.S. Army Corps of Engineers, 2004 WL 2085487, Comp. Gen. No. B-301184 (Jan. 15, 2004) (officers may not certify appropriations to reimburse EEO director for cost of food served at Black History Month program, despite determination that serving food would advance agency's EEO objectives, where the food served amounted to a meal and not a sampling).

f. Training:

- (1) When food constitutes a non-severable portion of the registration or attendance fee for the training program.
- (2) Food costs are non-severable if 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 a 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, 4301, 9301 (applicable to service members); Federal Hwy. Admin.-Cost of Social Events, 66 Comp. Gen. 350 (1987) (agency may expend appropriations for required registration fee at state-sponsored conference where fee included cost of social event where the social event cost was a mandatory non-separable element of the registration fee); Secretary of Agriculture, 39 Comp. Gen. 119 (1959) (same, even where employee is not in travel status).

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: Payment of a Non-Negotiable Non-Separable Facility Rental Fee that Covered the Cost of Food Served at NRC Workshops, 1999 WL 1498239, Comp. Gen. No. B-281063 (Dec. 1, 1999) (authorizing payment of all-inclusive facility rental fee even though the result was food served to agency employees at their official duty stations).

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) Conferences have been receiving a tremendous amount of scrutiny due to media reports of excessive costs at conferences. You should check with your finance office to see if they have issued any new guidance.

- (3) 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, Walter W. Pleines, 1990 WL 10007043, at \*2, Comp. Gen. No. B-233807 (Aug 27, 1990); Randall R. Pope and James L. Ryan, 64 Comp. Gen. 406 (1985) (meal cost not allowed because meal not incidental where meeting lasted only as long as meal).
- (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, Walter W. Pleines, supra., at \*3; Gerald Goldberg, 1980 WL 16668, Comp. Gen. No. B-198471 (May 1, 1980); Randall R. Pope and James L. Ryan, supra.

- (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; Use of Appropriated Funds to Purchase Light Refreshments at Confs., 2003 WL 174196, at \*5, Comp. Gen. No. B-288266 (Jan. 27, 2003).
  
- (4) DoD Sponsored Conferences:
  - (a) The conference is a formal conference with registration, a published and substantive agenda, and scheduled speakers, and not just 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; National Institutes of Health-Food at Govt.-Sponsored Confs., 2005 WL 502825, at \*4, Comp. Gen. No. B-300826 (Mar. 3, 2005).

- (5) 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. [NOTE: DoD has authority with conditions pursuant to 10 U.S.C. § 2262.]
  - (b) Conference costs include food.
  - (c) Sources: National Institutes of Health-Food at Govt.-Sponsored Confs., supra.; Contractors Collecting Fees at Agency-Hosted Confs., 2006 WL 39435, at \*2, Comp. Gen. No. B-306663 (Jan. 4, 2006) (“a government agency that lacks the authority to charge and retain fees may not cure that lack of authority by engaging a contractor to do what it may not do”). See 10 U.S.C. § 2262.
- (6) Conference Fees
- (a) Congress enacted 10 U.S.C. §2262 which provides permanent authority for the Secretary of Defense to collect fees in advance, either directly or by using a contract, from individuals and commercial participants attending DoD sponsored conferences, seminars, exhibits, symposiums, or similar meetings.
  - (b) A conference is defined as any form of meeting, workshop, seminar, symposium, or training session.
- (7) Relevant Regulations. DoD Components collecting fees by contract, to include contractors under no-cost contracts, are permitted to structure such contracts to permit contractors to offset from fees collected the actual costs incurred by the contractor (to include its fee) in providing conference-related services. Fee collections in excess of such amounts shall be credited to the appropriation from which other conference costs are payable. See also DOD FMR, Vol. 12, Ch. 32 (July 2009).

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 Department of the Army-Use of Appropriations for Bottled Water, 2008 WL 341539, Comp. Gen. No. 341539 (Feb. 4, 2008) (Corps of Engineers may provide bottled water to employees working at remote sites with no access to potable water); United States Agy. for Intl. Dev.-Purchase of Bottled Drinking Water, 1992 U.S. Comp. Gen. LEXIS 1170, Comp. Gen. No. B-247871 (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, ¶ 120203 (July 2010) (permitting use of appropriations to purchase drinking water when necessary from the government's standpoint, such as when the public water is unsafe for human consumption, there is an emergency failure of the water source on the installation, there is a temporary facility with no drinking water available within a reasonable distance, or no water fit for drinking purposes is available without cost or at a lower cost to the government); AR 30-22, ¶ 5-19 (discussing bottled water in the context of a deployment /contingency).
  - c. On January 13, 2012 the United States Court of Appeals for the D.C. Circuit repudiated the Federal Labor Relations Authority review of an arbitrator's award which determined that even if a past practice of providing bottled water violated appropriations law, that past practice overruled any fiscal law objections. The Court disagreed and stated "Federal collective bargaining is not exempt from the rule that funds from the Treasury may not be expended except pursuant to congressional appropriations. *Navy v. FLRA*, 2012 WL 104384.

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 Agy.-Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, 97-1 CPD ¶ 230, Comp. Gen. No. B-276601 (Jun. 26, 1997) (authorizing appropriations to purchase refrigerators where on-site cafeteria was not open for dinner, the nearest commercially available eating facility was 10-15 minutes away, and having food delivered for dinner required a 15-20 minute commute from the headquarters facility to the Visitors Center to receive deliveries); Purchase of Microwave Oven, 1983 U.S. Comp. Gen. LEXIS 1307, Comp. Gen. No. B-210433 (Apr. 15, 1983) (permitting appropriation to purchase microwave oven where commercial facilities were unavailable, 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, 2004 WL 1853469, Comp. Gen. No. B-302993 (June 25, 2004) (modifying the earlier decisions and 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, 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 and maintenance of special clothing and equipment, for government benefit, which protects against hazards in the performance of duties); 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, 2002 WL 31242199, Comp. Gen. No. B-288828 (Oct. 3, 2002); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Engs., 2002 WL 31521355, Comp. Gen. No. B-289683 (Oct. 7, 2002) (both provide an excellent overview of each of these authorities).

- b. Opinions and Regulations on-point. See also White House Communications Agy.-Purchase or Rental of Formal Wear, 71 Comp. Gen. 447 (1992) (authorizing tuxedo rental or purchase); Internal Revenue Service-Purchase of Safety Shoes, 67 Comp. Gen. 104 (1987) (authorizing safety shoes for supply clerk whose work included movement of heavy objects with various equipment); DoD FMR, Vol. 10, Ch. 12 (July 2010), ¶ 120220 (civilian uniform allowances); 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. HUD Gifts, Meals, and Entertainment Expenses, 68 Comp. Gen. 226, 228 (1989); see also, Hon. Fortney H. Stark, 64 Comp. Gen. 382 (1985) (holiday greeting cards and letters are personal expenses); Use of Appropriated Funds for Navy Fireworks Display, 82-2 CPD ¶ 1, Comp. Gen. No. B-205292 (Jun. 2, 1982) (fireworks display was unauthorized entertainment and could not be funded with appropriations).
- a. Statutory-based Exceptions. Congress does occasionally provide permanent or one-time authority to entertain. See Claim of Karl Pusch, 1975 WL 7779, Comp. Gen. No. B-182357 (Dec. 9, 1975) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who twice took foreign naval officers to Boston Playboy Club); Golden Spike Natl. Historic Site, 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 a sampling of food) in furtherance of cultural awareness programs including equal employment opportunity training programs. Internal Revenue Service-Live Entertainment and Lunch Expense of Natl. Black History Month, 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); U.S. Army Corps of Engineers, North Atlantic Div.-Food for a Cultural Awareness Program, 2004 WL 2085487, Comp. Gen. No. B-301184 (Jan. 15, 2004) (appropriations not authorized for cost of catered meal served at cultural awareness program).

- c. Agencies that are authorized emergency and extraordinary expense or similar funds (e.g., representation funds), may also use such funds to entertain distinguished visitors to the agency. See discussion beginning on page 44, infra., for an overview. See also Hon. Michael Rhode, Jr., 1993 WL 86813, at \*2, Comp. Gen. No. B-250884 (Mar. 18, 1993) (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. Servs. Admin.-Seasonal Decorations, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations as consistent with work-related objectives because they contribute to a pleasant working atmosphere thereby improving morale and efficiency); Purchase of Decorative Items for Individ. Ofcs. at the United States Tax Court, 64 Comp. Gen. 796 (1985) (modest expenditure on art work proper as being consistent with work-related objectives of improving efficiency and morale and adding to the dignity of the Federal courts, where not primarily for the personal convenience or personal satisfaction of a government employee); but see Hon. Fortney H. Stark, 64 Comp. Gen. 382 (1985) (Christmas cards and greeting letters were not a proper expenditure because they were for personal convenience). See also AFI 65-601, Vol. 1, ¶ 4.26.2 (prohibiting use of appropriations to purchase or mail seasonal greeting cards).

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 sanctioned the use of appropriated funds to purchase business cards for agency employees. See Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, 1998 WL 807760, Comp. Gen. No. 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”) (emphasis added).
  - 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 Service-Purchase of Information Cards, 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, ¶ 7-11 (27 Mar. 2006); but see Department of Defense memorandum, 15 July 1999, and Department of the Army memorandum, 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).
  - c. Navy policy is found in Assistant Secretary of the Navy (Financial Management and Comptroller) Memoranda “Business Cards” of 9 Mar 99 and 26 Aug 99.

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 Bureau of Land Management-Availability of Appropriations to Pay Expenses for Employees to Obtain a Certified Govt. Fin. Mgr. Designation, 1995 WL 628851, Comp. Gen. No. B-260771 (Oct. 11, 1995) (appropriation not available to cover costs of obtaining professional recognition of employee’s credentials); Secretary of Health, Education, and Welfare, 46 Comp. Gen. 695 (1967) (state license fees imposed on Public Health Service medical doctor not payable absent statutory authority); A. N. Ross, 22 Comp. Gen. 460 (1942) (fee for attorney’s 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. Department of the Army-Availability of Funds for Security Clearance Expenses, 2006 WL 2598204, Comp. Gen. No. B-307316 (Sept. 7, 2006) (expenses of Army captain’s cost of renouncing Turkish citizenship in order to obtain security clearance necessary for assignment to United States Army Center for Health Promotion and Preventive Medicine); National Security Agy.-Request for Advance Decision, 1994 WL 601818, Comp. Gen. No. B-257895 (Oct. 28, 1994) (commercial drivers’ licenses for scientists and engineers to perform security testing at remote sites); Air Force-Appropriations-Reimbursement for Costs of Licenses or Certificates, 73 Comp. Gen. 171 (1994) (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 for Army civilian employees, as permitted in 5 U.S.C. § 5757. This authority may be redelegated at the discretion of the MACOM Commanders. Scope of Professional Credentials Stat., 2004 WL 1878807, Comp. Gen. No. 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, 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,” and to “provide badges or buttons in recognition of special service, good conduct, and discharge under conditions other than dishonorable.” 10 U.S.C. § 1125.
    - (1) The Army has implemented this statute in AR 600-8-22, Military Awards (11 Dec. 2006). 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, and 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, ¶ 11-2.

- (4) Trophies may include, but are not limited to, loving cups, plaques, badges, buttons, and similar objects that represent the type of achievement or contest. Cash prizes or savings bonds are not authorized. The awards will not exceed the value of \$75 for an individual award or \$250 for a team award. AR 600-8-22, ¶ 11-3. 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, ¶ 1-7d. See also Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, 1992 WL 409431, Comp. Gen. No. B-247687 (Apr. 10, 1992) (approving the use of appropriated funds to purchase belt buckles as awards for the annual "Peacekeeper Challenge").
  - (5) The Navy implemented this statute in Secretary of the Navy Instruction 1650.1G (Navy and Marine Corps Awards Manual) of 7 Jan 02.
  - (6) 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 LAWYER, Nov. 1997, at 6.
- b. Awards for Civilian Employees of the U.S. Government. Congress has provided agencies with various authorities to pay awards to their employees. See Title 5, United States Code, Chapter 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, ¶ 0311 (Jun. 2010). 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 National Security Agy.-Availability of Appropriations to Purchase Food as a Nonmonetary Award under the Govt. Employees Incentive Awards Act, 1997 WL 93303, Comp. Gen. B-271511 (Mar. 4, 1997) (appropriations may be used to purchase food and food vouchers for use as nonmonetary awards for civilian employees); Awarding of Desk Medallion by Naval Sea Systems Command, 1980 WL 16052, B-184306 (Aug. 27, 1980) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements).
- c. Awards for Contractor Employees. No awards for contractor employees are authorized. Such awards are outside the scope of applicable award authorities for military personnel and civilian employees. Award fees and other forms of award to the contractor itself (but not to the individual employees) may be authorized, but only through the contracting officer, and only in accordance with the terms of the contract.
- d. 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 44, infra., for an overview.
- e. 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 for Contractors; Only the Secretary of the Army, Army Chief of Staff, and Army Sergeant Major may personalize coins with name.

11. Use of Office Equipment. Lorraine Lewis, Esq., 1999 WL 54498, Comp. Gen. No. 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](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 (4 December 2008), ¶ 6-; Air Force Instruction 33-106 (9 Jan. 2002, Incorporating through change 2, 12 Feb 2010), Managing High Frequency Radios, Personal Wireless Communication Systems, and the Military Affiliate Radio System, Sec. B.
  - a. AR 25-1, ¶ 6-4w: Official use limited to requirements that cannot be satisfied by other available telecommunications methods and are authorized when warranted by mission requirements, technical limitation, feasibility, or cost considerations; authorized personal use of cellular phones is subject to the same restrictions and prohibitions that apply to other communication systems per ¶ 6-1e.
  
  - b. AFI 33-106, Sec. B., ¶ 4.9.3: Like land line telephones, Air Force cellular telephones are to be used for official and authorized purposes; “official” purposes include any calls in furtherance of the Air Force mission; in addition, subject to local command and supervisor restrictions, members are authorized to use cellular phones to make short infrequent personal calls when appropriate (e.g., notifying family members of changes in schedules, checking on medical, school, or childcare appointments, inquiring as to car repair status).
  
13. Chaplain Programs. 10 U.S.C. § 1789. Permanent authorization for chaplain-led programs (retreats, conferences) to maintain strong families; authorized support services are costs of transportation, food, lodging, child

care, supplies, fees, and training materials for members of the armed forces and their family members while participating in these programs.

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. Hon. Bill Alexander, 63 Comp. Gen. 422, 433 (1984) (41 U.S.C. § 12 prohibition against funding DoD construction projects unless specifically authorized by Congress, interpreted to prohibit use of general appropriations for such projects);
2. This step in the analysis again requires review of the Appropriations and Authorization Acts, statutes, and regulations. For example, 10 U.S.C. § 2491a(a) states that “funds appropriated to the Department of Defense may not be used to equip, operate, or maintain a golf course at a facility or installation of the Department of Defense,” except in limited circumstances.
3. For a discussion of the permanency of prohibitions/restrictions, see “Miscellaneous Statutory Provisions” discussed above at p. 9.

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. See e.g., Funding for Tech. Assistance for Conservation Progs. Enumerated in Sec. 2701 of the 2002 Farm Bill, 2002 WL 31371936, at \*9, Comp. Gen. No. B-291241 (Oct. 8, 2002) (general operating appropriation not available to fund programs, even though reasonably related to the general appropriation, where the expenditure falls specifically within the scope of another appropriation); Hon. Lane Evans, 2002 U.S. Comp. Gen. LEXIS 145, Comp. Gen. No. B-289209 (May 31, 2002) (Coast Guard may not use Oil Spill Liability Trust Fund appropriations to pay administrative costs of processing Oil Pollution Act claims because annual operating expense appropriations are available to pay necessary expenses for the operation and maintenance of the Coast Guard); Hon. Bill Alexander, 63 Comp. Gen. 422, 443-47 (1984) (may not use Army O&M funds to finance civic/humanitarian activities during training exercise when Congress has appropriated foreign assistance funds specifically for that purpose).
  - a. That a specific appropriation is exhausted is immaterial. Secretary of Commerce, 36 Comp. Gen. 386 (1956).

- b. General appropriations may not be used as a back-up for a more specific appropriation. General Services Administration, 38 Comp. Gen. 758 (1959) (agency operating appropriations generally not available to reimburse GSA to fund tenant agency's changes, alterations, and improvements to office space); Secretary of the Navy, 20 Comp. Gen. 272 (1940) (regular Navy appropriation not available to supplement specific construction appropriation to build more expensive structure).
  
- c. Limitation applies even if specific appropriation is included in the more general appropriation. Library of Congress, 1997 WL 692913, Comp. Gen. No. B-278121 (Nov. 7, 1997) (prohibiting use of portion of Library of Congress operating fund earmarked for purchase of materials for any other operating expense); Secretary of the Interior, 20 Comp. Gen. 739 (1941) (cost of transporting motor vehicle to be charged against amounts specifically appropriated for the purchase automobiles and not against agency's general operating appropriation).

2. If there are two appropriations equally available:

- a. The agency may choose either appropriation. Department of Homeland Security-Use of Mgmt. Directorate Appropriations to Pay Costs of Component Agencies, 2006 WL 2567514, Comp. Gen. No. 307382 (Sep. 5, 2006) (costs chargeable to both Management Directorate appropriations or component agencies' management and administration appropriations) ; Payment of SES Performance Awds. of the Railroad Retirement Board's Office of Inspector General, 68 Comp. Gen. 337 (1989) (performance awards payable from either Board's general appropriation or appropriations of its Office of Inspector General). GAO generally affords agencies broad discretion in determining whether a specific expenditure is reasonably related to the accomplishment of an authorized purpose. Hon. Howard M. Metzenbaum, 63 Comp. Gen. 145, 150 (1984) ("Although GAO generally affords agencies broad discretion in determining whether a specific expenditure is reasonably related to the accomplishment of an authorized purpose, an agency's discretion in such matters is not unlimited"); Secretary of Agriculture, 18 Comp. Gen. 285, 292 (1938) (while Congress leaves largely to administrative discretion the choice of ways and means to accomplish the objects of an appropriation, administrative discretion may not transcend the statutes, nor be exercised in conflict with law, nor for the accomplishment of purposes unauthorized by the appropriation).
- 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, 1997 WL 702260, at \*3, Comp. Gen. No. B-272191 (Nov. 4, 1997) ("Once that election has been made, the agency must continue to use the same appropriation for that purpose unless the agency, at the beginning of the fiscal year, informs the Congress of its intent to change for the next fiscal year"). The election is binding even after the chosen appropriation is exhausted. Hon. Clarence Cannon, B-139510, May 13, 1959 (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. (Army not required to elect between O&M and Real Property Maintenance, Defense appropriation where Congress expressly authorized for fiscal year in question the use of O&M in addition to RPM,D funds for major repair and minor construction projects); 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 the costs incurred to operate and maintain the organization, such as personal services, supplies, and utilities. DoD FMR, Vol. 2A, Ch. 1 (Oct. 2008), ¶ 010201.B.1.
  - b. Costs budgeted in the Operation and Maintenance and Military Personnel appropriations are considered expenses. Costs budgeted in the Research, Development, Test and Evaluation, Base Realignment and Closure, and Family Housing appropriations include both expenses and investments. Id., ¶ 010201.C.3.
  - c. Items procured from the Defense Working Capital Funds will be treated as expenses in all cases except when intended for use in weapon system outfitting, government furnished material on new procurement contracts, or for installation as part of a weapon system modification, major reactivation, or major service life extension. Id., ¶ 010201.C.4.
  - d. Guidelines for determining expense costs. Id., ¶ 010201.D.1.
    - (1) Labor of civilian, military, or contractor personnel.
    - (2) Rental charges for equipment and facilities.
    - (3) Food, clothing, and fuel.
    - (4) Supplies and materials designated for supply management of the Defense Working Capital Funds.
    - (5) Maintenance, repair, overhaul, rework of equipment.

- (6) Assemblies, spares and repair parts, and other items of equipment that are not designated for centralized item management and asset control and which have a system unit cost less than the currently approved dollar threshold of \$250,000 for expense and investment determinations.
  - (7) Cost of incidental material and items that are not known until the end item is being modified or conditional requirements and are considered expenses because the material is needed to sustain or repair the end item.
  - (8) Engineering efforts to determine what a modification will ultimately be or to determine how to satisfy a deficiency.
- e. Investments are the costs that result in the acquisition of, or an addition to, end items. These costs benefit future periods and generally are of a long-term character such as real property and personal property. Id., ¶ 010201.B.2. Investments are costs to acquire capital assets such as real property and equipment. Id., ¶ 010201.D.2.
- f. Criteria for determining costs to be classified as investments. Id., ¶ 010201.D.2.
- (1) All items of equipment, including assemblies, ammunition and explosives, modification kits (the components of which are known at the outset of the modification), spares and repair parts not managed by the Defense Working Capital Funds, that are subject to centralized item management and control.
  - (2) All equipment items that are not subject to centralized item management and asset control and have a system unit cost equal to or greater than the currently approved expense and investment dollar threshold of \$250,000. The validated requirement may not be fragmented or acquired in a piecemeal fashion in order to circumvent the expense and investment criteria policy.
  - (3) Construction, including the cost of land and rights therein (other than leasehold). Construction includes real property equipment installed and made an integral part of such facilities, related site preparation, and other land improvements.

- (4) The cost of modification kits, assemblies, equipment, and material for modernization programs, ship conversions, major reactivations, major remanufacture programs, major service life extension programs, and the labor associated with incorporating these efforts into or as part of the end item are considered investments. All items included in the modification kit are considered investment even though some of the individual items may otherwise be considered as an expense. Components that were not part of the modification content at the outset and which are subsequently needed for repair are expenses. The cost of labor for the installation of modification kits and assemblies is an investment.
  - (5) Supply management items of the Defense Working Capital Funds designated for weapon system outfitting, government-furnished material on new procurement contracts, or for installation as part of a weapon system modification or modernization, major reactivation or major service life extension.
  - (6) Also considered as investments are support elements such as data, factory training, support equipment and interim contractor support, which are required to support the procurement of a new weapon system or modification.
- g. 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, Pub. L. No. 112-74, § 8030 (Dec. 23, 2011) (establishing the threshold at \$250,000 for FY 2012).
- (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**. DOD FMR, Vol. 2A, Ch 1, ¶ 010201.D.1.
  - (2) Investments. Other Procurement, Army (OPA) appropriations are used to acquire equipment items that are **centrally managed** or **cost \$250,000 or more**. Id., ¶ 010201.D.2.

- (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.

## 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.

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- (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., Hon. Robert C. Byrd, 2007 WL 2737318, Comp. Gen. No. B-308762 (Sept. 17, 2007) (Department of Homeland Security's Preparedness Directorate required to adjust accounts of all appropriations benefitting from shared services to reflect the actual value of benefits received to avoid unlawful augmentation); Use of Agencies' Appropriations to Purchase Computers for Dept. of Labor's Exec. Computer Network, 70 Comp. Gen. 592 (1991) (GAO found violation of Purpose Statute where Secretary of Labor failed to allocate costs of centrally-purchased computer network to subordinate agencies based on actual value of computer equipment provided to each agency).

- (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 Maritime Admin. Disposition of Funds Recovered From Pvt. Party For Damage to Govt. Bldg, 2002 WL 1554364, Comp. Gen. No. B-287738 (May 16, 2002) (agency required to deposit into the Treasury as miscellaneous receipts amounts recovered from private party for damage to a government building and equipment); Interest Earned on Unauthorized Loans of Fed. Grant Funds, 71 Comp. Gen. 387 (1992) (interest must be deposited into Treasury as miscellaneous receipts); but see, Bureau of Alcohol, Tobacco, and Firearms-Augmentation of Appropriations- Replacement of Autos by Negligent Third Parties, 67 Comp. Gen. 510 (1988) (noting that 31 U.S.C. § 3302 only applies to monies received, not to other property or services such as in-kind replacement of damaged automobile).
  - (a) Expending the retained funds generally constitutes an improper augmentation of an appropriation. Director, United States Information Agy., 46 Comp. Gen. 31, 34 (1966).

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., 71 Comp. Gen. 224 (1992) (funds advanced to agency for publications and other services may be used only for operating expenses directly related to services to be performed); Administrator, Veterans Administration, 40 Comp. Gen. 356 (1960) (retaining and using cash derived from property acquired by an appropriation for a revolving supply fund would amount to an unauthorized augmentation of the revolving fund).
- d. **Defense Gifts.** 10 U.S.C. § 2608. The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, monetary 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(f). 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(e). 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(b). 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.
  - k. Retention of Conference Fees. 10 U.S.C. § 2262 authorizes DoD to collect and retain conference fees.
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 procurement costs to fund replacement contracts. Bureau of Prisons-Disposition of Funds Paid in Settlement of Breach of Contract Action, 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, 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, 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, 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, 73 Comp. Gen. 210 (1994) (General Services Administration may deposit commission rebate checks from travel center contractors to the general Treasury where agency elects not to credit rebates to appropriation originally charged); Secretary of War, 23 Comp. Gen. 648 (1944) (amounts collected for erroneous or illegal charges must be deposited to the credit of the appropriation originally charged even if lapsed). This rule applies to refunds in the form of a credit. See GAO Red Book, Vol. II, p. 6-191 (Feb. 2006); Appropriation Accounting-Refunds and Uncollectables, 1995 WL 761474, Comp. Gen. No. B-257905 (Dec. 26, 1995) (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. Hon. John D. Dingell, 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 Svcs.-Detail of Ofc. of Community Svcs. Employees, 64 Comp. Gen. 370, 382 (1985).
- (2) Exceptions.
  - (a) A law authorizes nonreimbursable details. See, e.g., 3 U.S.C. § 112 (nonreimbursable details to White House); Hon. William D. Ford, 1987 WL 101529, Comp. Gen. No. B-224033 (Jan. 30, 1987) (same).
  - (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 Commissions, 1988 WL 227433B, Comp. Gen. No. 230960 (Apr. 11, 1988).
    - (i) Details falling within this exception must entail minimal cost, and the receiving agency cannot obtain the service by other means. Department of Health and Human Svcs.-Detail of Ofc. of Community Svcs. Employees, 64 Comp. Gen. 370, 380 (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.
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 2012, Congress provided the following authority within the Army O&M appropriation: "[f]or expenses, not otherwise provided for, necessary for the operation and

maintenance of the Army, as authorized by law; and not to exceed \$12,478,000 can be used for emergencies and extraordinary expenses to be expended on approval and authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes . . . .” Department of Defense Appropriations, Pub. L. No. 112-74 (Dec. 23, 2011).

- 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 Entertainment Exps., 68 Comp. Gen. 226 (1989) (agency operating appropriation not available for unauthorized purpose).

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 to extend official courtesies to dignitaries and officials of foreign governments.
    - (1) DoD Regulations: [DOD Instruction 7250.13, Official Representation Funds](#) (30 Jun 2009); [DOD FMR, Vol. 10, Ch. 12, ¶ 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](#) (17 Feb 2004).
    - (4) Navy Regulation: [SECNAV 7042.7, Guidelines for Use of Official Representation Funds](#) (14 Mar. 2006).
    - (5) Dept. of Defense memorandum, 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 (30 Aug. 2011).
  - 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, ¶ 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 Instruction 7250.13, ¶ 3a; AR 37-47, ¶ 2-1. Official courtesies are subject to required ratios of authorized guests to DoD personnel. See, e.g., DoD Instruction 7250.13, Encl 3, ¶ 2; AR 37-47, ¶¶ 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 \$335. See, DoD Instruction 7250.13, Encl 3, ¶ 4.a.(1)(h)3. See also, AR 37-47, ¶ 2-9a(1). GSA sets the dollar figure and adjusts it from time to time. The current limit of \$335 went into effect on 1 Jan 08 and is still in effect.
  - (2) Gifts to DoD personnel may cost no more than \$40. Dept. of Defense memorandum, 23 December 2002, Subject: Official Representation Funds
  - (3) AR 37-47, ¶ 2-9d, prohibits use of ORF to purchase gifts and mementos for presentation to DoD personnel.
- c. Levels of expenditures. Levels of expenditures are to be “modest.” DoD Instruction 7250.13, Encl 3, ¶ 2b(7)(b); AR 37-47, ¶ 2-2a.

- d. Prohibitions on Using Representational Funds. DoD Instruction 7250.13, Encl 3, ¶ 4.a.2; AR 37-47, ¶ 2-10.
- (1) Any use not specifically authorized by regulation requires an exception to policy. AR 37-47, ¶ 2-10.
  - (2) Per AR 37-47, ¶ 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 be specifically approved in advance by the Service Secretary. AR 37-47, ¶ 2-4g; United States Army School of the Americas-Use of Official Representation Funds, 69 Comp. Gen. 197 (1990) (new commander reception distinguished from change of command ceremony).
- e. Approval and accounting procedures. AR 37-47, Chapter 3; AFI 65-603, ¶ 8; SECNAVINST 7042.7J, ¶ 10.
- (1) Fiscal year letters of authority. AR 37-47, ¶ 3-1a(1)(a).
  - (2) Written appointment of certifying and approving officer. AR 37-47, ¶ 3-1b.
  - (3) Written appointment of representation fund custodian. Id.

- (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, ¶ 3-1e(1)(a).
- (5) Legal review. AR 37-47, ¶ 3-1c(4).
- f. Community Relations and Public Affairs Funds. AR 360-1, ¶ 4-5. Do not use public affairs funds to supplement official representation funds. Doing so violates 31 U.S.C. § 1301(a).

## 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., Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, (Dec. 16, 2009); National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, (Jan. 7, 2011). 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 Military Construction Authorization Act itself, or 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 \$2.0 million.

- (2) A military department may not carry out military construction projects expected to exceed \$2.0 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., Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, (Dec. 16, 2009); Military Construction Appropriations and Hurricane Supplemental Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220, 1220-21 (Oct. 13, 2004); H.R. CONF. REP. NO. 108-773, at \*2 (Oct. 9, 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 420-1, Army Facilities Management (Nov. 2, 2007), ¶ 4-9b(1).
  - b. Authorized Use. 10 U.S.C. § 2805(a). See AR 420-1, ¶ 4-9b(1). The Secretary concerned may use these funds to carry out UMMC projects not otherwise authorized by law to fund unforeseen requirements that cannot be delayed until the next MILCON cycle.
    - (1) An UMMC project is defined as a military construction project with an approved cost of \$2.0 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); AR 420-1, App. D.
    - (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, 2005 WL 3315080, at \*11-12, Comp. Gen. No. B-303145 (Dec. 7, 2005) (O&M appropriation generally not available for construction projects costing more than \$750,000, even if transferred to Defense Emergency Response Fund).
    - (1) Statutory Exception for UMMC Projects. 10 U.S.C. § 2805(c). See AR 420-1, ¶ 4-9b (9)(c)1. The Secretary of a military department may use O&M funds to finance UMMC projects costing less than \$750,000.
    - (2) There used to be an exception that allowed use of O&M for projects costing less than \$1.5 million if they were intended solely to correct life-threatening, health-threatening, or safety-threatening deficiencies, but the FY12 amendments to 10 U.S.C. § 2805(c) eliminated that exception.
  - b. 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 FMR, Vol. 3, Ch. 17, ¶ 170102.L; AR 420-1, ¶ 4-17a; see also Hon. Michael B. Donley, 1991 WL 315260, Comp. Gen. No. B-234326 (Dec. 24, 1991) (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. Hon. Michael B. Donley, supra.
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, or 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).
    - (4) Like Active Component projects, every Army Reserve Military Construction undertaking must be specifically authorized and funded in MILCON legislation or performed under special statutory authority. AR 140-483, Army Reserve Land and Facilities Management (Jul. 24, 2007), ¶ 4-7a.

- b. Unspecified Minor Military Construction-Army Reserve (“UMMCAR”). Like Military Construction, Army (MCA), Congress specifically appropriates UMMCAR for the construction of facilities pursuant to the authority conferred by Title 10, United States Code, Chapter 1803; Consolidated Appropriations Act, 2008, supra., 121 Stat. at 2255; and for projects costing \$1.5 Million or less (\$3 Million if intended solely to correct a deficiency that is a threat to life, health, or safety); AR 140-483, ¶ 4-7c(1).
- c. Congressional Notification. 10 U.S.C. § 18233a.
  - (1) Expenditure or contributions in excess of \$750,000 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. 10 U.S.C. § 18233a(a).
  - (2) This limitation does not apply to:
    - (a) Facilities acquired by lease, or to projects specifically approved by Congress. 10 U.S.C. §18233a(b).
    - (b) Projects intended solely to correct a deficiency that threatens life, health or safety may have an approved cost of up to \$1.5 million. 10 U.S.C. § 18233b.

- d. Military Construction Funded with Operation & Maintenance accounts. 10 U.S.C. § 18233a; AR 140-483.
  - (1) Unspecified Minor Military Construction costing \$750,000 or less. 10 U.S.C. § 18233b. Like Active Component projects, RC UMMC projects may be funded with O&M appropriations if within the cost limitation prescribed by 10 U.S.C. § 2805(c) (currently \$750,000).
  - (2) There used to be an exception that allowed use of O&M for projects costing less than \$1.5 million if they were intended solely to correct life-threatening, health-threatening, or safety-threatening deficiencies, but the FY12 amendments to 10 U.S.C. § 2805(c) eliminated that exception for all components.

6. Exercise-Related UMMC Projects.

- a. All Exercise-Related Projects. See AR 415-32, Engineer Troop Unit Construction in Connection With Training Activities (Apr. 15, 1998), ¶ 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. AR 415-32, ¶ 3-11d.
  - (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, ¶ 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 Hon. Bill Alexander, supra. (noting that the “temporary structure” exception is extremely limited in scope). But see AR 415-32, ¶ 3-5c (stating that “the Army may use [O&M] funds for structures that are of a minor or temporary nature that are completely removed at the end of an exercise, 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. 559, 587 (Apr. 16, 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 specifically 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, 1221 (Nov. 6, 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 Forces 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, 117 Stat. 1392, 1723 (Nov. 24, 2003).
- (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, 118 Stat. 1811, 1823 (Oct. 28, 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, 119 Stat. 3136, 3508 (Jan. 6, 2006).
  - h. Section 122 of the National Defense Authorization Act, 2007, extended Section 2808 authority, as amended by Section 2809 of the National Defense Authorization Act, 2006, through FY 2007. Pub. L. No. 109-289, § 122, 120 Stat. 1257, 1315 (Sept. 29, 2006).
  - i. Section 2801 of the National Defense Authorization Act for Fiscal Year 2008, supra., 122 Stat. at 538, extended this authority through Fiscal Year 2008, and further provided:
    - (1) Notification to the pertinent Congressional committees and a 10-day waiting period for unspecified overseas minor military construction projects with an estimated cost of more than the amounts set forth in 10 U.S.C. § 2805(c) (\$750,000); and
    - (2) The total cost of projects under this authority in Fiscal Year 2008 may not exceed \$200 Million.
8. Other Military Construction Authorities.
- a. Emergency Construction Projects. 10 U.S.C. § 2803. See DoD Dir. 4270.5 (Feb. 12, 2005); AR 420-1, ¶ 4-9b(2); see also DoD FMR, Vol. 3, Chs. 7 and 17.
  - b. Contingency Construction Projects. 10 U.S.C. § 2804. See DoD Dir. 4270.5; AR 420-1, ¶ 4-9b(6); see also DoD FMR, Vol. 3, Ch. 17.
  - c. Projects Resulting from a Declaration of War or National Emergency. 10 U.S.C. § 2808. See DoD Dir. 4270.5; AR 420-1, ¶ 4-9b(7); see also DoD FMR, Vol. 3, Ch.17.
  - d. Environmental Response Actions. 10 U.S.C. § 2810. See DoD FMR, Vol. 3, Chs. 7 and 17.

- e. The Restoration or Replacement of Damaged or Destroyed Facilities. 10 U.S.C. § 2854. See AR 420-1, ¶ 4-9b(3); see also DoD FMR, Vol. 3, Chs. 7 and 17.
9. Maintenance and Repair Projects.
- a. Maintenance and repair projects are not construction. See AR 420-1, ¶ 4-17b. 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 420-1, ¶ 5-31a, and Glossary, Sec. II, defines “preventive maintenance” as the “systematic care, servicing, and inspection of equipment, utility plants and systems, buildings and structures, and grounds facilities for the purpose of detecting and correcting incipient failures and accomplishing minor maintenance.” 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, Project Definition and Work Classification (Mar. 18, 2010), ¶ 1-6.
  - 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 FMR, Vol. 2B, Ch. 8, ¶ 080105 (December 2010 2007). The DoD FMR defines “Sustainment” to mean “the maintenance and repair activities necessary to keep an inventory of facilities in good working order. It includes regularly scheduled adjustments and inspections, preventive maintenance tasks, and emergency response and service calls for minor repairs. It also includes major repairs and replacement of facility

components (usually accomplished by contract) that are expected to occur periodically throughout the life cycle of facilities. This work includes regular roof replacement, refinishing of wall surfaces, repairing and replacement of heating and cooling systems, replacing tile and carpeting, and similar types of work.”

- (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 420-1, ¶ 4-17b, and Glossary, Sec. II. The term “repair” means “to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated functional purpose.”
- (a) The term “repair” includes:
    - (i) 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.

- (ii) A utility system or component may be considered “failing” if it is energy inefficient or technologically obsolete.
- (b) 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, ¶ 080302; see also, Magnavox-Use of Contract Underrun Funds, 83-2 CPD ¶ 401, 1983 WL 27368, at \*1, Comp. Gen. No. B-207433 (Sept. 16, 1983) (funds remaining available due to cost underrun not available for obligation to acquire additional quantities of items after expiration of period of availability).

## 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, Dept. of Commerce, 44 Comp. Gen. 695 (1965) (requisition for printing of items to be delivered after expiration of funds not proper where copy for printing not furnished to Government Printing Office until seven months after end of fiscal year).
- 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. Farmers Home Admin. Purchase of Office Chairs, 73 Comp. Gen. 259, 262 (1994) (chairs ordered and paid with obligations of one fiscal year were a bona fide need even though not delivered until following fiscal year where agency demonstrated continuing need for chairs to furnish office space and to replace stock).
  - (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. See Chairman, United States Atomic Energy Commission, 37 Comp. Gen. 155, 159 (1957) (if material needed in the future for work or processes currently under way cannot be obtained on the open market at the time needed for use, a contract for its delivery when needed may be considered a bona fide need of the fiscal year when the contract is made).

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 or a lease of real or personal property (including maintenance of such property when part of the lease agreement) for a period not to exceed 12 months at any time during the fiscal year. 10 U.S.C. § 2410a. Non-military department or agency may use 41 U.S.C § 2531 to use current funds to award a severable service contract that crosses fiscal years.

(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 years. See DFAS-IN 37-1, Tbl. 8-1; Incremental Funding of U.S. Fish and Wildlife Svc. Research Work Orders, 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 31 § 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, a specific requirement, 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, 1999 WL 795735, Comp. Gen. No. B-282601 (Sept. 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 has held that it is improper to “bank” an agency’s annual funds with a GSA account to cover future year needs. See Implementation of the Library of Congress FEDLINK Revolving Fund, 2001 WL 1029307, Comp. Gen. No. B-288142 (Sept. 6, 2001); see also Continued Availability of Expired Appropriation for Additional Project Phases, 2001 WL 717355, Comp. Gen. No. B-286929 (Apr. 25, 2001) (expired appropriation not available for additional phases of project even though first phase was funded with that appropriation).
- 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.
- (2) 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.<sup>1</sup>

## 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 FMR, Vol. 14, Chap. 1; DFAS-IN Reg. 37-1.

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<sup>1</sup> 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);
  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). The Comptroller General views any obligation for which Congress has not appropriated funds to be in excess of the amount available in an appropriation. The Hon. Robert C. Byrd, 2002 WL 31521399, at \*5, Comp. Gen. No. B-300192 (Nov. 13, 2002) (“If Congress has not appropriated funds for a particular purpose, or has specifically prohibited a use of appropriated funds, we view any obligation for that purpose as in excess of the amount available”). Accordingly, a violation of the “Purpose Statute” also may lead to a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. United States Dept. of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Intl. Labor Affairs, 71 Comp. Gen. 402, 406 (1992) (“When an agency’s appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act”); Hon. Dan Burton, 2002 WL 1611488, at \*3, Comp. Gen. No. B-290005 (Jul. 1, 2002) (Antideficiency Act violated by contracting for work for which agency had no authority); Hon. Bill Alexander, 63 Comp. Gen. 422, 437-38 (1984) (same).
  - 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 FMR, Vol. 14, Ch. 10, ¶ 100205.

- (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 2008, Pub. L. No. 110-116, § 8033, 121 Stat. 1295, 1322 (Nov. 13, 2007). Use of O&M in excess of this threshold is a purpose violation and may trigger an Antideficiency Act violation. See DoD FMR, Vol. 14, Ch. 10, ¶ 100207.
- 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 2011, the Fort Tiefert contracting officer awarded a contract for 100 computers at a total price of \$260,000. The funds certified as available were FY 2011 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, ¶ 0803; Matter of Expired Funds and Interagency Agreements Between GovWorks and the Dept. of Defense, 2007 WL 2120292, at \*8-9, Comp. Gen. No. B-308944 (Jul. 17, 2007) (Antideficiency Act violated where agency used funds available in one year to fund bona fide need of subsequent year).
- 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 Tiefert contracting officer awarded a contract on 15 August 2011 for 50 off-the-shelf computers. The contract price totaled \$200,000 and cited FY 2011 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 2011. Any fiscal issues here?

3. Amount. Making or authorizing obligations or expenditures in excess of funds available in an APPROPRIATION, 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 Tiefert 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. 31 U.S.C. § 1342(b); Army’s Authority to Accept Svcs. from the American Assoc. of Retired Persons/Natl. Retired Teachers Assoc., 1982 WL 27133, Comp. Gen. No. B-204326, at \*1 (Jul. 26, 1982) (voluntary services prohibited except in the emergencies specified; however, gratuitous services permitted).
  - 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/Natl. Retired Teachers Assoc., *supra*.
  - b. Acceptance of voluntary services does not create a legal obligation. Hagan v. United States, 671 F.2d 1302 (Ct. Cl. 1982); T. Head & Co., Inc., 1990 WL 278270, Comp. Gen. No. B-238112 (Jul. 30, 1990).
2. Examples of Voluntary Services Authorized by Law
  - a. 5 U.S.C. § 593 (members of Administrative Conference of the United States not entitled to pay for service).
  - 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. To Mr. Vernon R. Kruse, 1973 WL 7901, Comp. Gen. No. B-177836 (Apr. 24, 1973) (exception not applied where property owner incurred expenses to remedy damage to land caused by government); Voluntary Svcs.-Towing of Disabled Navy Airplane, 10 Comp. Gen. 248 (1930) (exception not applied for towing of disabled Navy plane where no sudden emergency involving loss of human life or destruction of government property shown); Voluntary Svcs. in Emergencies, 2 Comp. Gen. 799 (1923) (exception applied for costs incurred by private ship in responding to distress call from Army troop transport taking on water). 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 American Assoc. of Retired Persons/Natl. Retired Teachers Assoc., supra.

- b. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. Hon. Tom Tauke, 1988 WL 228230, Comp. Gen. No. B-206396 (Nov. 15, 1988); The Agency for Intl. Dev.-Waiver of Compensation Fixed by or Pursuant to Statute, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries or accept less than the salary established by law); Director, Bureau of the Budget, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable where compensation not fixed by law).
  - 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, 1987 WL 101336, Comp. Gen. No. B-211079.2 (Jan. 2, 1987) (improper augmentation would occur) with Senior Community Serv. Employmt. Prog., 1987 WL 103072, Comp. Gen. No. B-222248 (Mar. 13, 1987) (improper augmentation would not occur).
- D. Investigating and Reporting ADA Violations. 31 U.S.C. §§ 1351, 1517(b); OMB Circular A-11, § 145; DoD FMR, Vol. 14, Chs. 4-7; DFAS-IN 37-1, Ch. 4, ¶ 040204; U.S. DEP'T ARMY, ANTIDEFICIENCY ACT (ADA) INVESTIGATION MANUAL (Jan. 1998) 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 from 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 FMR, Vol. 14, Ch. 9, ¶ 0901.
  - 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, ¶ 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, ¶ 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 FMR, Vol. 14, Ch. 4, ¶ 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 FMR, Vol. 14, Ch. 7.
- 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 FMR, Vol. 14, Ch. 5, ¶ 050301E.
- 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 § 145.7 DoD FMR, Vol. 14, Ch. 7, ¶0705.

## **VII. CONCLUSION.**