

# FEDERAL APPROPRIATIONS LAW

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# Overview

- Introduction to Fiscal Law
- Availability of Appropriations as to Purpose
- Availability of Appropriations as to Time
- The Anti-Deficiency Act
- Obligating Appropriated Funds
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# Introduction to Fiscal Law

## The Appropriations Process

- U.S. Constitution, Art. I, § 8, grants Congress the power to “. . . lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . .”
- U.S. Constitution, Art. I, § 9, provides that “[N]o Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law.”
- The Supreme Court’s Fiscal Philosophy: “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” *United States v. MacCollom*, 426 U.S. 317 (1976).

# Key Terminology

## Fiscal Year

- The Federal Government's fiscal year begins on 1 October and ends on 30 September.
- Period of Availability. Most appropriations are available for obligation for a limited period of time, *e.g.*, one fiscal year for operation and maintenance appropriations. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for obligation thereafter.
- Obligation. An obligation is any act that legally binds the government to make payment. Obligations are amounts representing orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period.

# Key Terminology

## Budget Authority

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

Examples of budget authority include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections.

- “Contract Authority,” as noted above, is a limited form of budget authority. Contract authority permits agencies to obligate funds in advance of appropriations, but not to pay or disburse those funds absent some additional appropriations authority.

# Key Terminology

## Authorization Act

- An authorization act is a statute, passed annually by Congress, which authorizes the appropriation of funds for programs and activities.
- An authorization act does not provide budget authority. That authority stems from the appropriations act.
- Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.

# Key Terminology

## Appropriations Act

- An appropriations act is the most common form of budget authority.
- An appropriation is a statutory authorization “to incur obligations and make payments out of the Treasury for specified purposes.”
- The making of an appropriation must be stated expressly. An appropriation may not be inferred or made by implication.

# Government Accountability Office

- The Comptroller General of the United States heads the GAO, an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds. Until 6 July 2004, “GAO” stood for General Accounting Office.
- GAO was established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) to audit government agencies.
- GAO issues opinions and reports to federal agencies concerning the obligation and expenditure of appropriated funds.

# Limitations on the Use of Appropriated Funds

- The authority of executive agencies to spend appropriated funds is limited.
- An agency may obligate and expend appropriations only for a proper **purpose**.
- 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).
- An agency must obligate funds within the **amounts** appropriated by Congress and formally distributed to or by the agency.

# Limitations -- Purpose

- The “Purpose Statute” requires agencies to apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law.
- The “Necessary Expense Doctrine” - Where a particular expenditure is not specifically provided for in the appropriation act, it is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation.
- The GAO applies a three-part test to determine whether an expenditure is a “necessary expense” of a particular appropriation:
  - The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carryout out either a specific appropriation or an authorized agency function for which more general appropriations are available.
  - The expenditure must not be prohibited by law.
  - The expenditure must not be otherwise provided for; that is, it must not be something that falls within the scope of some other appropriation or statutory funding scheme.

# Limitations -- Time

- Appropriations are available for limited periods. An agency must incur a legal obligation to pay money within an appropriation's period of availability. If an agency fails to obligate funds before they expire, they are no longer available for new obligations.
- Expired funds retain their "fiscal year identity" for five years after the end of the period of availability. During this time, the funds are available to adjust existing obligations or to liquidate prior valid obligations, but are not available for new obligations.
- Five years after the funds have expired, they become "cancelled" and are not available for obligation or expenditure for any purpose.
- Appropriations are available only for the bona fide need of an appropriation's period of availability.

## Limitations -- Amount

- The Anti-Deficiency Act prohibits any government officer or employee from:
  - Obligating, expending, or authorizing an obligation or expenditure of funds in excess of the amount available in an appropriation, an apportionment, or a formal subdivision of funds.
  - Incurring an obligation in advance of an appropriation, unless authorized by law.
  - Accepting voluntary services, unless otherwise authorized by law.

# Subdivision of Funds

- Formal subdivisions of funds are subdivisions of appropriations by the executive branch departments and agencies. These formal limits are referred to as apportionments, allocations, and allotments.
- Informal subdivisions are subdivisions of appropriations by agencies at lower levels, *e.g.*, within an installation, without creating an absolute limitation on obligational authority. These subdivisions are considered funding targets, or “allowances.” These limits are **not** formal subdivisions of funds, and incurring obligations in excess of an allowance is not necessarily an ADA violation. If a formal subdivision is breached, however, an ADA violation occurs and the person responsible for exceeding the target may be held liable for the violation.

# Availability of Appropriations as to Purpose

## Constitutional, Statutory and Other Background

- U.S. Constitution
  - Art. I, § 9 provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” This establishes Congress has having the “power of the purse.” As a result, Congress must annually pass and the President must sign Appropriations Acts before agencies can expend any money.
  - In applying this provision of the constitution, the Supreme Court has said, “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.” *US v. MacCollom*, 426 U.S. 317 (1976). In other words, we must look for specific congressional authority prior to the expenditure of public funds.

# Constitutional, Statutory and Other Background

- The Purpose Statute
  - 31 U.S.C. § 1301(a) provides: “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”

# Constitutional, Statutory and Other Background

- The “Necessary Expense Doctrine” (a.k.a. The 3-part Purpose Test)
- The purpose statute does not require every expenditure to be specified in an appropriation act. That is not possible or feasible. “The spending agency has reasonable discretion in determining how to carry out the objects of the appropriation.” Where a particular expenditure is not specifically provided for in the appropriation act, it is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation.

# Constitutional, Statutory and Other Background

- The Government Accountability Office (GAO) applies a three-part test to determine whether an expenditure is a “necessary expense” of a particular appropriation:
  - 1. The expenditure must be necessary and incident to the purposes of the appropriation. In other words, the expenditure must bear a logical relationship to the appropriation sought to be charged, and it must make a direct contribution to carry out either a specific appropriation or an authorized agency function for which more general appropriations are available.
  - 2. The expenditure must not be prohibited by law.
  - 3. The expenditure must not be otherwise provided for; that is, it must not be an item that falls within the scope of some other, more specific appropriation or statutory funding scheme.
    - a. What if you have two equally available appropriations to fund an acquisition? I.e., neither appropriation is more specific?
    - b. The GAO’s Election Doctrine states that if two or more appropriations are equally available, then the agency may choose which appropriation to use. *Once the agency chooses a certain appropriation for that type of acquisition, however, the agency must continue to use the same appropriations for all acquisitions of that type* – i.e., once the agency makes its choice of appropriation, they are bound by that choice.

# Appropriation Acts

An appropriation is a statutory authorization “to incur obligations and make payments out of the Treasury for specified purposes.” Generally, an “obligation” is a legal liability that arises from a mutual exchange of promises, or consideration (usually a government promise to pay money in exchange for goods and/or services), between the U.S. Government (USG) and a contractor.

Normally, Congress has, on an annual basis, passed thirteen appropriations acts. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies.

# Appropriation Acts

Optimally, each appropriation act is enacted by the President prior to the end of the preceding fiscal year. When the fiscal year begins, if there is no appropriation act for an agency, then the agency may have to stop (or “shut down”) its operations because there is a “funding gap,” or a period of time when it does not have any appropriated funds to obligate. Congress and the President, however, normally avoid this agency “shut down” by passing and enacting a Continuing Resolution Authority (CRA), which authorizes the agency to continue obligating funds – under certain conditions – until the President can enact the fiscal year’s appropriation act.

# Authorization Act

- An authorization act is a statute, passed annually by Congress that authorizes the appropriation of funds for programs and activities.
- There is no general requirement to have an authorization in order for an appropriation to occur.
- An authorization act does not provide budget authority. That authority stems from the appropriations act.
  - However, Congress may choose to place limits in the authorization act on the amount of appropriations it may subsequently provide.
  - In the alternative, Congress may also authorize the appropriation of “such sums as may be necessary” for a particular program or function.

# Miscellaneous Statutory Provisions

- Congress often enacts statutes that expressly allow, prohibit, or place restrictions upon the usage of appropriated funds.
  - Example of 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.
  - Example of Authorization: 10 U.S.C. § 2261 permits DOD to use its appropriated funds “to procure recognition items of nominal or modest value for the recruitment or retention purposes.”

# Legislative History

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. Legislative history can be useful for resolving ambiguities or confirming the intent of Congress. However, Congress's authoritative statement is the statutory text, not the legislative history. If the underlying statute clearly conveys Congress' intent, however, agencies will not be further restricted by what is included in legislative history.

# Budget Request Documentation

Agencies are required to justify their budget requests. The document is prepared by the actual end user of the funds and is filtered through agency command channels until it is ultimately reviewed by the Office of Management and Budget and submitted by the President as part of the federal government's overall budget request. 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.

# Agency Regulations

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. If an agency, in creating a regulation, interprets a statute, that interpretation is granted a great deal of deference. Thus, if an agency regulation determines appropriated funds may be utilized for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous. Agency-level regulations may also place restrictions on the use of appropriated funds.

# Necessary Expense

- The Purpose Statute, 31 U.S.C. § 1301, does not require Congress to specify every item of expenditure in an appropriations act. Congress, by implication, authorizes an agency to incur expenses that are necessary and incident to the accomplishment of an appropriations purpose. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. In some instances, Congress has specifically authorized expenditures as “necessary expenses” of an existing appropriation.

# Necessary Expense

- The concept of “necessary expense” is a relative one. The GAO has never established a precise formula for determining the application of the necessary expense rule. In view of the vast differences among agencies, any such formula would almost certainly be unworkable. Rather, the determination must be made essentially on a fact/agency/purpose/appropriation specific case-by-case basis.
- A necessary expense does not have to be the only way, or even the best way, to accomplish the object of an appropriation. However, a necessary expense must be more than merely desirable.
- Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. An agency’s determination that a given item is reasonably necessary to accomplishing an authorized purpose is given considerable deference. In reviewing an expenditure, the GAO looks at whether the expenditure 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.

# Typical Questionable Expenses

- Clothing
- Food
- Bottled Water
- Workplace Food Storage and Preparation Equipment
- Personal Office Furniture and Equipment
- Entertainment
- Decorations

# Typical Questionable Expenses

- Business cards
- Telephones
- Fines and Penalties
- Licenses and Certificates
- Awards

# Augmentation and Miscellaneous Receipts

- General Rule - Augmentation of Appropriations Is Not Permitted.
- 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.
- Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:
  - U.S. Constitution, Article I, section 9, clause 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."
  - 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."
  - 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 practicable without any deduction for any charge or claim."

## Types of Augmentation

- 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).
- Augmenting an appropriation by retaining government funds received from another source. This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b).

# Exceptions to Miscellaneous Receipts Statute

- Economy Act
- Revolving Funds
- Damage to Real Property
- Government Credit Card and Travel Refunds
- Conference Fees
- Replacement Contracts
- Refunds
- Non-reimbursable Personnel Details

# Availability of Appropriations as to Time

- The various time limits on availability of appropriated funds
- The *Bona Fide* Needs Rule and some common exceptions to that rule
- The rules concerning availability of funds for funding replacement contracts
- The general rules concerning use of expired appropriations

# Key Definitions

- **Appropriation or Appropriations Act.** An appropriations act is the most common form of budget authority. It is a statutory authorization to incur obligations and make payments out of the U.S. Treasury for specified purposes.
- **Authorizing Legislation.** Authorizing Legislation (called “authorization acts”) provides the legal basis for actual appropriations that are passed later. It establishes and continues the operation of federal programs or agencies either indefinitely or for a specific period, or sanctions a particular type of obligation or expenditure within a program. Authorizing legislation does not provide budget authority, which stems only from the appropriations act itself.
- **Fiscal Year.** The Federal Government’s fiscal year runs from 1 October through 30 September.

# Period of Availability

- The period of time for which appropriations are available for obligation. If funds are not obligated during their period of availability, then the funds expire and are generally unavailable for new obligations.
- Most funds are available for obligation only for a specific period of time, presumed to be only during the fiscal year in which they are appropriated.
- The appropriations act language supersedes other general statutory provisions.
- Multiple year appropriations expressly provide that they remain available for obligation for a definite period in excess of one fiscal year.

# Period of Availability

<b>Appropriation</b>	<b>Period of Availability</b>
• Operations and Maintenance (O&M)	1 Year
• Personnel	1 Year
• Research, Development, Test, and Evaluation (RDT&E)	2 Years
• Overseas Humanitarian, Disaster, and Civic Aid (10 U.S.C. § 401)	2 Years
• Procurement	3 Years
• Military Construction	5 Years
• Shipbuilding and Conversion, Navy	5 Years
• “Available until expended” or “X-year” funds	No expiration date

# Commitment

An administrative reservation of allotted funds, or of other funds, in anticipation of their obligation. Commitments are usually based upon firm procurement requests, unaccepted customer orders, directives, and equivalent instruments. An obligation equal to or less than the commitment may be incurred without further approval of a certifying officer.

# Obligation

A definite act that creates a legal liability on the part 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.

# General Rules

- An obligation must be definite and certain. Generally, the type of contract involved determines the specific rules governing the amount of an obligation and when to record it.
- Obligate funds only for the purposes for which they were appropriated.
- Obligate funds only if there is a genuine intent to allow the contractor to start work promptly and to proceed without unnecessary delay.
- Generally, obligate current funds when the government incurs an obligation (incurs a liability). Some exceptions include: Protests; Replacement contracts for contracts that have been terminated for default and “in-scope” contract changes.
- Do not obligate funds in excess of (or in advance of) an appropriation, or in excess of an apportionment or a formal subdivision of funds.
- Government agencies may not obligate funds prior to signature of the appropriations act **and** receipt of the funds from the Office of Management and Budget through higher headquarters.
- Agencies must avoid situations that require "coercive deficiency" appropriations. A coercive deficiency is an instance in which an agency legally or morally commits the United States to make good on a promise without an appropriation to do so. This act then “coerces” Congress into appropriating funds to cover the commitment.

## Subject to the Availability of Funds

If the agency needs to enter into a contract before the proper funds become available, usually to ensure timely delivery of goods or services, they must execute contracts “subject to the availability of funds” (SAF). If a SAF clause is used, the Government shall not accept supplies or services until the contracting officer has given the contractor written notice that funds are available.

# Bona Fide Needs Rule

- The *bona fide* needs rule is a timing rule that requires **both the timing of the obligation and the *bona fide* need to be within the fund's period of availability.**
- The *bona fide* need is the point in time recognized as **the moment when a government agency becomes authorized to obligate funds** to acquire a particular good or service based on a currently existing requirement.
- The basic principle is that payment is chargeable to the fiscal year in which the obligation is incurred as long as the need arose, or continued to exist in, that year.
- The *Bona Fide* Needs Rule applies only to appropriations with limited periods of availability for obligation.
- Appropriated funds may only be used for a requirement that represents the *bona fide* need of the requiring activity arising during the period of availability of the funds proposed to be used for the acquisition.

## Bona Fide Needs Rule

- Generally, the time limitations apply to the obligation of funds, not the disbursement, or payment, of them.
- Absent express statutory authority in the appropriations act itself, agencies may not obligate funds after their period of availability expires.

# Supplies

- Generally, the *bona fide* need for a supply is determined by when the government actually requires (will be able to use or consume to fulfill a requirement) the supplies being acquired. Accordingly, agencies generally must obligate funds from the fiscal year in which the supplies will be used.
- Supply needs of a future fiscal year are the *bona fide* need of the subsequent fiscal year, unless an exception applies.
- Two GAO recognized exceptions are the lead-time exception (for both delivery and production) and the stock-level exception.

# Services

- The *Bona Fide* Need for services does not arise until the services are rendered.
- There are two categories of service contracts. The *bona fide* needs rule is applied differently depending on the category. The nature of the work determines whether a service is repeatable or singular. For purposes of the *Bona Fide* Needs Rule, services fall into two broad categories:
  - Non-severable service contracts
  - Severable service contracts

# Bona Fide Needs Rule

- Training
- Construction
- Leases
- Multiple Year Appropriations
- Revolving Funds
- Interagency Acquisitions

# Use of Expired/Closed Appropriations

- **Current Appropriation.** An appropriation that is still available for new obligations under the terms of the applicable appropriations act.
- **Expired Appropriation.** An appropriation whose period of availability has ended and is no longer available for new obligations. It retains its fiscal identity and is available to adjust and liquidate previously incurred obligations for five years.
- **Closed Appropriation.** An appropriation that is no longer available for any purpose. An appropriation becomes "closed" five years after the end of its period of availability as defined by the applicable appropriations act.

# Expired Appropriations

- Some adjustments are possible after the end of the period of availability, but before an account closes.
- Appropriations retain their complete accounting classification identifiers throughout the entire five-year “expired” period.
- Appropriations remain available for recording, adjusting, and liquidating prior obligations properly chargeable to the account

# Expired Appropriations

There are four important exceptions to the general prohibition on obligating funds after the period of availability:

- Contract Modifications;
- Bid Protests
- Terminations for Default; and
- Terminations for Convenience (only in limited circumstances).

## Closed Appropriations

- On 30 September of the fifth year after the period of availability of a fixed appropriation ends:
  - The account is closed;
  - All remaining balances in the account, obligated and unobligated, are canceled; and
  - No funds from the closed account are available thereafter for obligation or expenditure for any purpose.

# Summary

- Most appropriations, or funds, have a period of availability during which an agency may obligate funds for needs that arise, or continue to exist, during that period. Only *bona fide* needs of that FY may be met by obligating funds current at that time.
- Supplies are a *bona fide* need of the fiscal year in which the supplies will be used. However, FY1 funds may be used for supplies that won't arrive until FY2 if the delivery or production lead-time exceptions apply. Also, stock items may be ordered and used into the next FY if the stock level exception applies.
- Services are a *bona fide* need of the year they are performed. Services are either severable (repeatable) or non-severable (singular). Non-severable services are funded all up-front. Severable services must be funded in the FY during which they are performed, unless 10 U.S.C. 2410a applies.
- Construction is a *bona fide* need of the year in which the construction must be contracted for in order to have the building completed when required. However, considerations like site availability and weather could push the *bona fide* need into the next FY.

# Summary

- Training is a *bona fide* need at the time the training is received. Individual courses are non-severable services; multiple repeated courses are severable from each other. Some training courses can be funded with FY1 funds even though they don't start until FY2 under some circumstances.
- Upon expiration of an appropriation, the remaining funds are not available for new obligations. However, they may be reached to adjust old obligations. Contract modifications that are within the scope of the original contract relate back to the original contract date and may be funded with expired funds.

# The Anti-Deficiency Act

- The ADA states that an “officer or employee of the U.S. government” **may not**:
  - “Make or authorize an expenditure or obligation *exceeding an amount available* in an appropriation,” unless authorized by law (emphasis added). “Involve” the government “in any contract or other obligation for the payment of money *before* an appropriation is made,” unless authorized by law.
  - “Make or authorize an expenditure or obligation *exceeding* an (1) apportionment or (2) the amount permitted by regulations.
  - “Accept voluntary services [for the United States] or employ personal services. . .except for emergencies involving the safety of human life or the protection of property,” or unless authorized by law.

# The Anti-Deficiency Act

- The ADA imposes prohibitions (or fiscal controls) at three levels:
  - (1) at the **appropriations** level,
  - (2) at the **apportionment** level, and
  - (3) at the **formal subdivision** level.

## Appropriations Level

- The ADA imposes two fiscal controls at the **appropriations** level. These controls prohibit obligating and expending appropriations “*in excess of*” the amount available in an appropriation or “*in advance of*” an appropriation being made.

# Apportionment Level

- An officer or employee of the United States may not make or authorize an obligation or expenditure that **exceeds** an amount available in an **apportionment**.
- An “apportionment” is a distribution by the OMB of amounts available in an appropriation into amounts available for specified time periods, activities, projects, or programs.
- The apportionment is OMB’s plan on how to spend the resources provided by law. The OMB apportions funds to prevent obligation at a rate that would create a need for a deficiency or supplemental appropriation. As a general rule, an agency may not request an apportionment that will create a need for a deficiency or supplemental appropriation.

# Administrative Subdivisions

- An officer or employee may not make or authorize an obligation or expenditure that **exceeds** the amount available in a **formal administrative subdivision** established by regulations.
- Agency heads to establish administrative controls that:
  - Restrict obligations or expenditures to the amount of apportionments; and
  - Enable the agency to fix responsibility for exceeding an apportionment.

# Purpose Statute Violations

- A violation of the Purpose Statute may also lead to a violation of the Anti-Deficiency Act, but all Purpose Statute violations are not ADA violations.
- Despite violating the Purpose Statute, officials can avoid an ADA violation if *both* of the following conditions are met:
  - **Proper funds** (the proper appropriation, the proper year, the proper amount) **were available at the time of the erroneous obligation**; and
  - **Proper funds were available** (the proper appropriation, the proper year, the proper amount) **at the time of correction for the agency to correct the erroneous obligation**.
- Funding Corrections

# Bona Fide Needs Violations

- A violation of the Bona Fide Needs Rule also may result in a violation of the Anti-Deficiency Act.
- Contract changes that are “within the scope” of the original contract must be funded with the appropriation *initially obligated by the contract*; this is true even if the contract change occurs in a fiscal year subsequent to the fiscal year the contract was awarded. Contract changes that are “outside the scope” of the original contract must be funded with the *appropriation that is current at the time the change is made*.
- Agencies may not expend *current* fiscal year funds for *future* fiscal year needs.

# Amount Violations

- Making or authorizing obligations or expenditures in excess of funds available in an appropriation, apportionment, or formal administrative subdivision violates the Anti-Deficiency Act.
- Exceeding the amount available in an informal subdivision, formal subdivision, apportionment, or appropriation. Remember that the ADA only applies at the following levels: formal subdivision, apportionment, and appropriation. Exceeding the amount available in an informal subdivision does not violate the ADA, however, this could lead to an ADA violation if it causes a formal subdivision, apportionment, or appropriation to be exceeded.
- Over obligations arising under expired and closed appropriations may not be paid from current appropriations. If an agency incurs such over obligations, it must report the over obligation to the President and to Congress, and Congress may enact a deficiency appropriation or authorize the agency to pay the over obligations out of current appropriations; absent Congressional authority, a deficiency will continue to exist in the account. Thus, an over obligation of a prior year appropriation is a reportable violation of the Anti-Deficiency Act

# Amount Violations

- Generally, the GAO and courts have ruled that “open-ended” indemnification provisions in contracts violates the Anti-Deficiency Act.
- A court or board of contract appeals may order a judgment in excess of an amount available in an appropriation or a subdivision of funds. While the “Judgment Fund” (a permanent appropriation allowing the prompt payment judgments) may be available to pay the judgment, the Contract Disputes Act requires agencies to reimburse the Judgment Fund. Reimbursement of the Judgment Fund must be paid from appropriations current at the time of the judgment against the agency. If the judgment exceeds the amount available in the appropriate current year appropriation, this deficiency is not an Anti-deficiency Act violation.
- An Anti-Deficiency Act violation may arise if an agency retains (aka “augments”) and spends funds received from outside sources, absent statutory authority.

# Limitation on Voluntary Services

- “Voluntary services” are those services rendered without a prior contract for compensation, or without an advance agreement that the services will be gratuitous
- 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. **Thus, absent specific statutory authority, the acceptance of voluntary services is a *per se* ADA violation.**
- It is not a violation of the Anti-Deficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation; in this instance, the “free services” constitute “gratuitous services.”

# Obligating Appropriated Funds

- The importance of accounting for commitments and obligations.
- Amounts to commit and obligate for various types of contract actions.
- Obligation rules for bid protests, contract changes, contract terminations, litigation, and miscellaneous other circumstances.

# Key Terms

- Certifying Officer. An individual authorized to certify the availability of funds on any documents or vouchers submitted for payment and/or indicates payment is proper. (S)he is responsible for the correctness of the facts and computations, and the legality of payment.
- Funds Certifying Officials. An individual responsible for the proper assignment of funding on a commitment or obligation document before the obligation is incurred.
- Fund Managers. Individuals who manage financial resources to include major activity, sub-activity directors, and their representatives who are delegated fund certification responsibility.
- Certification of Fund Availability. A certification by a funds-certifying official that funds are available in the proper subdivision of funds to cover the obligation to be incurred. This certification authorizes the obligating official to make the desired obligation. DFAS-DE, Procedures for Administrative Control, Definitions, p. X.
- Commitment. An administrative reservation of funds based upon firm procurement requests, orders, directives, and equivalent instruments. An obligation equal to or less than the commitment may be incurred without further approval of a certifying official.
- Initiation. An administrative reservation of funds based on procurement directives, requests, or equivalent instruments that authorize preliminary negotiations, but require that funds be certified by the official responsible for the administrative control of funds before incurrence of the obligation. Initiations help keep pre-commitment actions, such as approved procurement programs and procurement directives, within the available subdivision of funds.

## Key Terms

- Contingent liabilities. As a budgetary term, a contingent liability represents a variable that cannot be recorded as a valid obligation. Commit an amount that is **conservatively estimated to be sufficient** to cover the additional obligations that probably will materialize, based upon judgment and experience. Allowances may be made for the possibilities of downward price revisions and quantity underruns. The contingent liability shall be supported by sufficient detail to facilitate audit.

# Obligation of Funds

- Obligation. An act which creates a **legal liability** on the part of the Government for the payment of appropriated funds for goods and services ordered or received.
- The obligation takes place when the definite commitment is made, even though the actual payment may not take place until the following fiscal year.

# Obligation of Funds

- An obligation must be definite and certain.
- Obligate funds only for the purposes for which they were appropriated.
- Obligate funds only to satisfy the bona fide needs of the current fiscal year.
- Obligate funds only if there is a genuine intent to allow the contractor to start work promptly and to proceed without unnecessary delay.
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- Generally, obligate current funds when the government incurs an obligation (incurs a liability).
- An improper recording of funds does not create a contractual right.
- Do not obligate funds in excess of (or in advance of) an appropriation, or in excess of an apportionment or a formal subdivision of funds.
- Execute contracts “subject to the availability of funds” (SAF) if administrative lead-time requires contract award prior to the receipt of funds to ensure timely delivery of the goods or services. If a SAF clause is used, the Government shall not accept supplies or services until the contracting officer has given the contractor written notice that funds are available.

# Amounts to Obligate

- Obtain documentary evidence of the transaction before recording an obligation. Contracts, purchase orders, rental agreements, travel orders, bills of lading, civilian payrolls, and interdepartmental requisitions are common contractual documents supporting obligations.
- Generally, the type of contract involved determines the specific rules governing the amount of an obligation and when to record it.

# Adjusting Obligations

- For five years after the time an appropriation expires for incurring new obligations, both the obligated and unobligated balances of that appropriation shall be available for recording, adjusting, and liquidating obligations properly chargeable to that account.
- A contract change is one that requires the contractor to perform additional work. Identity of the appropriate fund for obligation purposes is dependent on whether the change is “in-scope” or “out-of-scope.” The contracting officer is primarily responsible for determining whether a change is within the scope of a contract.
- Current Funds otherwise chargeable to Cancelled Account.

# Fiscal Law Research

- Legislation and Statutes
- Agency Regulations
- Government Accountability Office and Advance Decisions
  - Principles of Federal Appropriations Law
  - GAO Policy and Procedures Manual
- Budget Requests
  - OMB Circular A-11

# Fiscal Law Research

- Principles of Fed. Appropriations Law, (commonly referred to as the “Red Book”) 3d ed., (January 2004), found at: <http://gao.gov/legal/index.html>.
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- A Glossary of Terms Used in the Federal Budget Process, (Sept. 2005) found at: <http://www.gao.gov/products/GAO-05-734SP>.
- OMB Cir. No. A-11, Preparing, Submitting, and Executing the Budget (August 2012), available at: [http://www.whitehouse.gov/sites/default/files/omb/assets/a11\\_current\\_year/a\\_11\\_2012.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a_11_2012.pdf)

# Fiscal Law Research

- The Purpose Statute, 31 U.S.C. § 1301.
- Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b)
- The Anti-Deficiency Act, 31 U.S.C. §§ 1341-42, 1511-19
  - 31 U.S.C. § 1341 (prohibiting obligations or expenditures in excess of appropriations and contracting in advance of an appropriation).
  - 31 U.S.C. § 1342 (prohibiting government employees from accepting voluntary services).
  - 31 U.S.C. §§ 1511-1517 (requiring apportionment/administrative subdivision of funds and prohibiting obligations or expenditures in excess of apportionment or administrative subdivision of funds).
  - 31 U.S.C. § 1501, Documentary evidence requirement for Government obligations (2013).