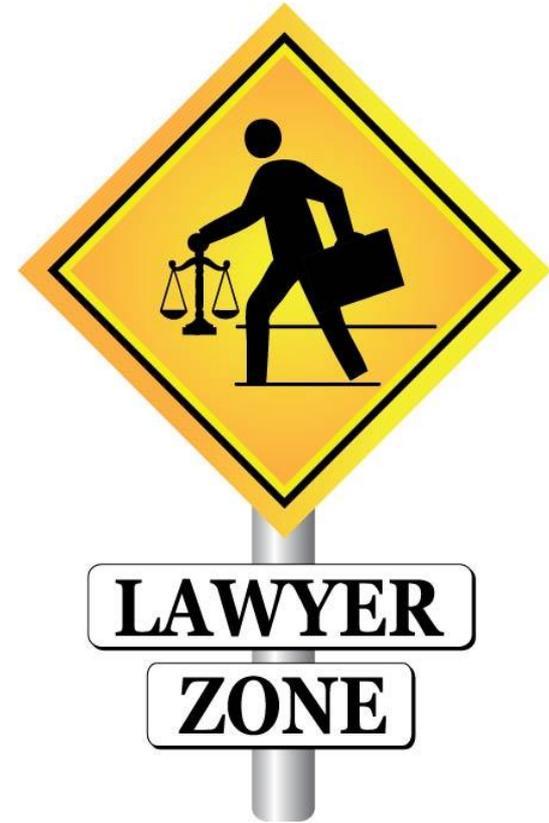


# Current & Recurring Issues in Fiscal Law

Keith M. Dunn  
Associate Counsel  
Office of Counsel for the Assistant Secretary  
of the Navy  
(Financial Management & Comptroller)

June 3, 2016



# Statutory Construction - Student Loan Repayment Agreements, B-327922, May 12, 2016

- Senate appropriations are not available to extend current employee service agreements under the Senate's student loan repayment program for a period of less than one year for the employees of the personal offices of senators who are not seeking reelection or are retiring
- The statute governing the program requires that an employee agree to work for the employing office for one year in exchange for benefit. When a senator's remaining term is less than one year because of a decision not to seek reelection or to retire, the employee could not meet the required period of service

Department of Commerce – Disposable Cups, Plates, and Cutlery  
B-326021, December 23, 2014; Reconsideration, B-327146, August 6,  
2015

- An agency may not use appropriated funds to purchase items considered personal expenses without specific statutory authority, unless:
  - the provision of the item directly advances the agency’s statutory mission; and,
  - the benefit to the agency clearly outweighs the benefit to the employee.



# Bottled Water

- Appropriated funds may be used only upon a showing of necessity; i.e., there is no potable water available.
  - 2 Comp. Gen. 776 (1923) *and many other cases!*
- Navy v. FLRA, 665 F.3d 1339 (D.C.Cir. 2012)
  - Navy did not have a duty to bargain with unions before ceasing to provide bottled water to its employees.



# Publicity/Propaganda

- Appropriated funds may not be used to hire publicity experts
  - 5 USC 3107
- “No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress”
  - DoD Appropriations Act sec. 8001 (recurring General Provision)

# What is Permissible?

No:

- “publicity of a nature tending to emphasize the importance of the agency or the activity in question”
- self-aggrandizement
- covert propaganda

Yes:

- clear communications by an agency, identified as such, designed to communicate with the public about activities and policies

## HHS – Use of Appropriated Funds for Medicare Brochure, B-319834, Sept. 9, 2010

- Brochure distributed to Medicare beneficiaries did not violate the publicity or propaganda prohibition because it did not constitute communications that are purely partisan, self-aggrandizing, or covert
- See also Department of Health and Human Services – Use of Appropriated Funds for *HealthReform.gov* Web site and *State Your Support* Web page, B-319075, April 23, 2010

# “No Child Left Behind”

- The Department of Education violated the publicity or propaganda prohibition when it use of appropriated funds to produce and distribute a prepackaged news story regarding programs No Child Left Behind Act because it did not identify the Government was the source of the information dissemination.
- Also violated the ADA, because no appropriation was available to produce such materials
  - B-304228, September 30, 2005

## EPA--Application of Publicity or Propaganda and Anti-Lobbying Provisions, B-326944, December 14, 2015

EPA violated the publicity or propaganda prohibition in connection with a rulemaking through its use of a platform known as Thunderclap that allows a single message to be shared across multiple Facebook, Twitter, and Tumblr accounts at the same time. EPA engaged in covert propaganda when the agency did not identify EPA's role as the creator of the Thunderclap message to the target audience.

## CPSC – Voluntary Use of Personally-Owned Equipment to Conduct Government Business, B-327376, February 19, 2016

- BYOD program whereby employees, without reimbursement for costs, voluntarily use their own devices to conduct government business, would not result in an improper augmentation of CPSC's appropriation nor constitute a gift from to the agency
- CPSC may use its appropriation to support the program
- Lots and lots and lots of issues involved

## Prohibition on the Use of Appropriations for the Painting of Portraits, B-327671, February 19, 2016

- Section 736 of the Financial Services and General Government Appropriations Act, 2016, which prohibits the use of appropriations to pay for the painting of a portrait, does not prohibit the Commission from using appropriations to cover costs necessary and incident to accepting a donated portrait where the Commission is relying on its gift acceptance authority.
- “The prohibition is unambiguous in terms of what is being prescribed—payment for the act of creating pictures using paint.”

# Voluntary Services

- An agency may not accept voluntary services except in emergencies involving human life and property. 31 USC 1342
- An agency may accept unpaid services if a person executes an advance written agreement (1) stating that the services are offered without expectation of payment, and (2) expressly waives any future claims against the government. B-324214, January 27, 2014
- The Denali Commission may not accept waivers of compensation from nonfederal commissioners because the rate of compensation is fixed by statute. B-322832, March 30, 2012

# Bona Fide Need/Interagency Orders



- GSA may accept no-year appropriations from a customer agency to fund the increased cost resulting from a modification to an interagency order, even where those funds were appropriated in a fiscal year after the customer agency incurred the initial liability.
- Bona fide needs rule does not apply to no-year appropriations
  - B-326945, September 28, 2015

# Obligations

- Any conduct creating a legal liability, enforceable against the Government, to pay now or in the future.
- An “obligation” arises when the definite legal liability occurs, even though the liquidation of that obligation may not take place until later.
- There can be no “expenditure” without a corresponding obligation because an expenditure is a disbursement to liquidate the obligation.
- True “obligations” reduce available budget authority, even in the absence of an expenditure or proper recordation.

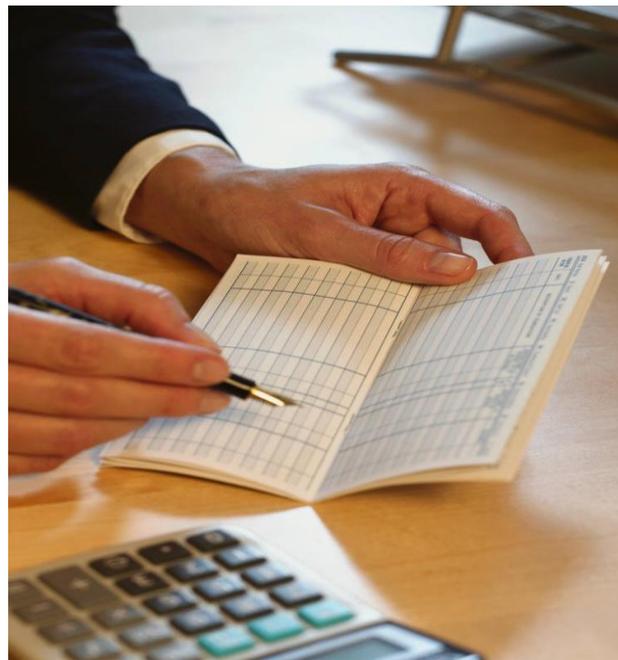
# When Is an Obligation Incurred?

When you:

- place an order,
- sign a contract,
- award a grant,
- purchase a service, or
- take other actions that require the Government to make payments to the public or from one Government account to another.

# Recording Obligations

- 31 U.S.C. 1501
- An obligation is “recorded” when it is made to ensure that adequate funds are available to liquidate the obligation
- Enacted to ensure consistency among agencies in recording as obligations only those transactions which meet specific criteria



# Must I Record an Obligation?

- Recording provides evidence of the obligation, but does not create it
- If a transaction doesn't meet one of the previous criteria, recording will not make it valid
- Failing to record a valid obligation does not diminish its validity or change the FY to which it is properly chargeable

# Analysis of Obligation

- Analyze the nature of each transaction
- Determine from that analysis what liability to the Government is created in that transaction
- Quantify the liability and record that amount as the obligation
- If the terms of the transaction limit the Government's liability, record only that limited amount as the obligation
- Record the precise amount of the liability if known
- Record the agency's "best estimate" of the liability if the precise amount is unknown
- Show the basis for the agency's "best estimate" on the obligating document
- National Mediation Board, B-305484, June 2, 2006

# Recording of Obligations and the Antideficiency Act

- Absent statutory authority to do otherwise, amount recorded under a multiple-year lease is the full lease amount (10 USC 1501(a)(1))
- SEC's failure to record the full amount of its lease liability is a violation of the ADA
  - Securities and Exchange Commission – Recording of Obligations for Multiple-Year Contract, B-322160, Oct 3, 2011



# Multiple-year Leases, Take II

- CFTC's failure to record an obligation equal to the government's total liability over the term of a multiple-year lease resulted in a violation of 31 U.S.C. § 1501(a)(1)
- CFTC should determine whether it properly provided written notice to its contractors to begin performance before accepting services. If it failed to do so, it should report a violation of the voluntary services prohibition of the Antideficiency Act