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B-290600

July 10, 2002

The Honorable Bill Young
Chairman
Committee on Appropriations
House of Representatives

Subject: Apportionment of Budget Authority for America West Airlines

Dear Mr. Chairman:

This responds to your letter dated May 20, 2002. You requested that we determine whether the Office of Management and Budget (OMB) violated the Antideficiency Act in apportioning \$172 million of budget authority for airline loan guarantees authorized under Title I of the Air Transportation Safety and System Stabilization Act, Public Law 107-42, 115 Stat. 230 (2001). As explained in further detail below, both OMB and the Air Transportation Stabilization Board (ATSB), in January 2002, violated the Antideficiency Act. Four months later, in May 2002, the Administration corrected the violations. On June 25, 2002, ATSB reported to the Congress and the President that ATSB and OMB violated the Act, and that OMB had implemented procedures expected to ensure that a violation of this type does not occur again.

Congress established the ATSB to review and decide on applications for federal credit instruments to air carriers. It is composed of the Secretary of Transportation, the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of the Treasury, and the Comptroller General of the United States (a nonvoting member), or their designees. Pub. L. No. 107-42, § 102(b), 115 Stat. 231. The Comptroller General does not “participate in the review, operations, or deliberations of the Board in connection with individual loan guarantees, or otherwise participate in the Board’s exercise of any executive power.” 14 C.F.R. § 1300.2.

The Air Transportation Safety and System Stabilization Act authorized the President to issue up to \$10 billion in federal credit instruments in the form of loan guarantees, and to provide the subsidy amounts necessary for such instruments,¹ to assist air

¹ Pursuant to the Federal Credit Reform Act, agencies are required to have budget authority in advance to cover the long-term costs of direct loans and loan guarantees. 2 U.S.C. § 661c(b). The cost of a loan guarantee (the subsidy cost) is the net present
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carriers who incurred losses resulting from the September 11, 2001, terrorist attacks on the United States. Pub. L. No. 107-42, Title I, § 101(a)(1), 115 Stat. 230. The Act designated “the amount of new budget authority and outlays in all fiscal years resulting from this title as an emergency requirement pursuant to section 252(e) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. § 901(e)).” Id. at § 101(b). The Act further provided that budget authority “shall be available only to the extent that a request, that includes designation of such amount as an emergency requirement as defined in such Act, is transmitted by the President to Congress.” Id.

At issue here is the subsidy amount for a loan guarantee for America West Airlines. ATSB approved America West’s application for a loan guarantee on December 28, 2001. Shortly thereafter, on January 18, 2002, OMB apportioned \$172,067,610 to support the subsidy cost associated with the loan guarantee. Standard Form 132, Apportionment and Reapportionment Schedule, 20X0122 Air Transportation Stabilization Program Account, Jan. 18, 2002. On that same day, the ATSB signed the loan guarantee for America West.² However, it was not until May 15, 2002, after a letter of that same date from the Director, OMB, to the President, that the President transmitted to the Congress the request, required by section 101(b), designating the \$172 million in subsidy budget authority as an emergency requirement pursuant to section 252(e) of the Balanced Budget and Emergency Deficit Control Act of 1985. Letters from the President to the Speaker of the House and to the President of the Senate, May 15, 2002.

In January, when OMB apportioned and ATSB obligated the \$172 million at issue here, there was no budget authority available for apportionment and obligation. The Stabilization Act clearly makes the budget authority enacted therein available “only to the extent that” the President transmits a request to the Congress designating the amount identified in the request as an emergency requirement as defined in the Balanced Budget and Emergency Deficit Control Act of 1985. Pub. L. No. 107-42, § 101(b), 115 Stat. 230. Even though the Stabilization Act envisions no further congressional action in response to the President’s request, the availability of the budget authority provided in the Act is expressly contingent upon transmission of the request. As a result, the \$172 million at issue only became available on May 15, almost four months after OMB apportioned and ATSB obligated it.

value of estimated payments by the government to cover defaults and delinquencies, interest subsidies, or other payments and fees. 2 U.S.C. § 661a(5)(C). The Stabilization Act requires that subsidy amounts for the Stabilization Act loan guarantees be provided in accordance with the Federal Credit Reform Act. Pub. L. No. 107-42, § 101(a)(1), 115 Stat. 230.

² For purposes of the Antideficiency Act, when an agency signs a loan guarantee, the obligation arises to cover the subsidy cost. 2 U.S.C. § 661c(d)(1).

The Antideficiency Act prohibits both the making or the authorizing of obligations or expenditures in advance of, or in excess of, available appropriations. 31 U.S.C. § 1341. An agency may obligate an appropriation only after OMB has apportioned it to the agency.³ 31 U.S.C. §§ 1512(1), 1513(b); Exec. Order No. 6166, § 16 (June 10, 1933). OMB apportioned the \$172 million on January 18, 2002, authorizing ATSB to obligate the amount, in advance of its availability, and thus in excess of available amounts. Apparently in reliance on OMB's apportionment, ATSB obligated the amount in advance of its availability, and thereby incurred an obligation in excess of available amounts. We conclude, therefore, that both OMB and ATSB violated the Antideficiency Act. The President, on May 15, satisfied the section 101(b) request transmittal requirement, thereby curing OMB's and ATSB's January violations.

The Antideficiency Act requires that if an officer or employee of an executive agency violates the Act, the agency head "shall report immediately to the President and Congress all relevant facts and a statement of actions taken." 31 U.S.C. § 1351. OMB provides further instructions for preparing the reports in OMB Circular A-34, section 40, "Requirements for Reporting Antideficiency Act Violations" (2000).

In accordance with OMB Circular A-34, on June 25, 2002, ATSB reported "a violation of the Antideficiency Act by the Air Transportation Stabilization Board ... and the Office of Management and Budget (OMB)." ATSB stated that "OMB's official signed the apportionment before the materials necessary for Presidential designation of emergency spending had been signed and transmitted to Congress." ATSB stated that it violated the Act when it obligated the budget authority "because the Presidential designation had not occurred before the funds were obligated." ATSB explained that "The requisite papers were not timely requested, prepared and presented to the President for his designation of the budget authority as 'emergency requirements' as is required by OMB Circular A-11, section 111 (2001)." ATSB noted that "Both OMB and the Board erroneously assumed that all necessary steps to make the funds available had been completed." ATSB said that when OMB realized the error, "OMB prepared a request to Congress designating \$172 million in subsidy budget authority for the \$429 million America West loan guarantee as an emergency requirement."

ATSB stated that, in its future requests to OMB for apportionments related to loan guarantees, it will include a copy of the executed presidential emergency designation letter. ATSB also reported that OMB will modify Circular A-34 to include instructions for all agencies and OMB representatives for processing presidential designation packages. The instructions will include a notice that "Agencies may obligate contingent emergency funds only after the President formally designates the funds as an emergency requirement."

³ An apportionment is "The action by which OMB distributes amounts available for obligation ... in an appropriation or fund account." *A Glossary of Terms Used in the Federal Budget Process: Exposure Draft*, GAO/AFMD-2.1.1 at 15 (1993). The Act permits apportioning by activities and projects, as well as time periods. 31 U.S.C. § 1512(b)(1).

We trust that this is responsive to your request. If you have any questions, please contact Susan Poling, Managing Associate General Counsel (202-512-2667), of my staff.

Sincerely yours,

Anthony H. Gamboa
General Counsel

cc: The Honorable J. Dennis Hastert, Speaker of the House of Representatives
The Honorable Richard Cheney, President of the Senate
The Honorable David R. Obey, Ranking Minority Member, House Appropriations
Committee
The Honorable Robert Byrd, Chairman, Senate Appropriations Committee
The Honorable Ted Stevens, Ranking Member, Senate Appropriations Committee
The Honorable Joseph Lieberman, Chairman, Senate Governmental Affairs
Committee
The Honorable Dan Burton, Chairman, House Government Reform Committee

DIGEST

The Antideficiency Act prohibits both the making or the authorizing of obligations or expenditures in advance of, or in excess of, available appropriations. 31 U.S.C. § 1341. When the Office of Management and Budget (OMB) apportioned, and the Air Transportation Stabilization Board (ATSB) obligated, \$172 million in budget authority for the subsidy cost of a loan guarantee for America West Airlines, authorized pursuant to Title I of the Air Transportation Safety and System Stabilization Act, Public Law 107-42, 115 Stat. 230 (2001), prior to the availability of the budget authority, both OMB and ATSB violated the Antideficiency Act.