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The Honorable Robert C. Byrd
Chairman
The Honorable Thad Cochran
Ranking Minority Member
Committee on Appropriations
United States Senate

The Honorable David R. Obey
Chairman
The Honorable Jerry Lewis
Ranking Minority Member
Committee on Appropriations
House of Representatives

Subject: *Department of Homeland Security's Use of Shared Services within the
Preparedness Directorate*

This letter is in response to the conference report accompanying the Department of Homeland Security Appropriations Act for fiscal year 2007, Pub. L. No. 109-295, 120 Stat. 1355 (Oct. 4, 2006), directing the Government Accountability Office (GAO) to review the Department of Homeland Security's use of shared services within the Preparedness Directorate and its compliance with appropriations law and the proper use of the Economy Act. H.R. Rep. No. 109-699, at 150 (2006).

Our practice when rendering legal opinions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position in the matter.¹ In this case, we wrote to the Acting General Counsel of the Department of Homeland Security (DHS) to solicit the Department's views. Letter from Susan A. Poling, Managing Associate General Counsel, GAO, to Gus P. Coldebella, Acting General Counsel, DHS, Mar. 20, 2007. The DHS Office of General Counsel responded to our letter. Letter from Michael D. Russell, Deputy Associate General Counsel for General Law and Appropriations Counsel, DHS, to Susan A. Poling, Managing Associate General Counsel, GAO, May 22, 2007 (DHS Counsel Letter). We also submitted questions directly to Preparedness Directorate officials and met with

¹ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/congress.html.

Preparedness Directorate and other DHS officials to obtain factual information about the Preparedness Directorate's use of shared services.

As discussed below, the Preparedness Directorate developed a complex system whereby it pooled its appropriations to fund what it refers to as "shared services." Pooling funds across appropriations is a form of transfer, and, unless otherwise authorized by law, transfers of funds between agency appropriation accounts are prohibited by law. 31 U.S.C. § 1532. As explained below, the Preparedness Directorate had authority, pursuant either to the Economy Act or to 31 U.S.C. § 1534, referred to as the "account adjustment" statute, to pool appropriations to fund shared services. The directorate, however, did not enter into valid Economy Act agreements and thus could not rely on the Economy Act to justify the shared services transactions. In addition, it appears that the directorate did not properly record allocated charges against each of the benefiting appropriations, as required by the account adjustment statute. DHS should adjust the expired fiscal year 2006 directorate appropriations so that each benefiting appropriation is charged for the value received. If any of the appropriations that funded the directorate do not have available unobligated balances to cover the adjustments, the directorate should report an Antideficiency Act violation. 31 U.S.C. § 1351.

BACKGROUND

The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002), which created the Department of Homeland Security, brought together 22 federal agencies within a single department. The Act placed the 22 agencies in one of four major directorates: (1) Information Analysis and Infrastructure Protection (IAIP), (2) Science and Technology, (3) Border and Transportation Security, and (4) Emergency Preparedness and Response. During fiscal year 2005, DHS reviewed its policies, operations, and organizational structure in a process it called the "Second Stage Review." The Secretary of Homeland Security has the authority to establish, consolidate, alter, or discontinue organizational units within the department but must first submit a reorganization plan, or provide notice and an explanation of the rationale for the reorganization, to the appropriate congressional committees. Pub. L. No. 107-296, § 872.

In July 2005, the Secretary transmitted an organization restructuring plan to Congress. Because the President had already submitted his budget request for fiscal year 2006, the Administration submitted a revised fiscal year 2006 budget request amendment supporting the plan. Communication from the President of the United States, *Request for FY 2006 Budget Amendments for the Department of Homeland Security*, H.R. Doc. 109-50 (2005). In fiscal year 2006, DHS abolished IAIP and moved the programs within the IAIP Evaluation and Assessment appropriation into a new component—the Preparedness Directorate. DHS also transferred the DHS Grants and Training Program into this new directorate.² DHS established the Preparedness

² On March 30, 2007, DHS implemented a second reorganization in response to the Post-Katrina Emergency Management Reform Act of 2006, which is contained in

Directorate to consolidate and unify preparedness activities throughout DHS. Preparedness efforts included preparing for natural disasters as well as chemical, nuclear, biological, and radiological disasters and explosive attacks or accidents.

While DHS had intended to consolidate preparedness activities, DHS officials stated that it was difficult to integrate the various components of the directorate, which continued to be funded through separate appropriations. GAO Meeting with DHS Officials, Dec. 7, 2006 (December Meeting). In fiscal year 2006, the Preparedness Directorate was financed by eight separate appropriations: (1) Management and Administration (M&A), (2) Salaries and Expenses for the Office of Domestic Preparedness,³ (3) State and Local Programs, (4) Firefighter Assistance Grants, (5) Emergency Management Performance Grants, (6) Radiological Emergency Preparedness Program (REPP),⁴ (7) U.S. Fire Administration and Training (USFA), and (8) Infrastructure Protection and Information Security (IPIS).

In addition, the DHS congressional budget justification for fiscal year 2006, submitted prior to the completion of the Second Stage Review reorganization plan, was based on the structure of the department prior to its reorganization. While the Administration submitted an amended budget request, DHS officials stated that the funds the Congress appropriated to the directorate's M&A appropriation did not meet the directorate's actual post-Second Stage Review budget needs. December Meeting. Preparedness Directorate officials stated, for example, that the new directorate did not have adequate funds in its M&A appropriation to cover its salaries, Working Capital Fund charges, and other administrative expenses. *Id.* When preparing its budget request for fiscal year 2007, the Preparedness Directorate calculated that for fiscal year 2007 it would need \$55,465,000 more appropriated to its M&A appropriation than it received in fiscal year 2006 in order to be able to fund all of the directorate-wide management and administration requirements. Preparedness

title VI of the DHS Appropriations Act for fiscal year 2007. Pub. L. No. 109-295, title VI, subtitle A. This act, among other things, restructured the Federal Emergency Management Agency (FEMA) and established it as a stand-alone agency within DHS. As part of this reorganization, DHS abolished the Preparedness Directorate and created a new directorate that combines some preparedness programs with the immigrant visitor tracking program. The new directorate is called the National Protection and Programs Directorate and consists of the Office of Cyber Security and Communications, the Office of Infrastructure Protection, the Office of Intergovernmental Programs, the Office of Risk Management and Analysis, and US-VISIT. See www.dhs.gov/xabout/structure/editorial_0794.shtm (last visited Sept. 6, 2007).

³ The Office of Domestic Preparedness administered the grant programs that DHS transferred into the Preparedness Directorate.

⁴ REPP is a self-sustaining fee-for-service program.

Directorate, *Briefing for Appropriations Staff* (Sept. 6, 2006) (Directorate Briefing), attachment 6.

In fiscal year 2006, Congress provided the directorate with management and administration funds in two separate appropriations: the M&A and IPIS appropriations. It appropriated \$16,079,000 to the directorate's M&A appropriation for management and administration of the Preparedness Directorate. Pub. L. No. 109-90, 119 Stat. 2064, 2075 (Oct. 18, 2005). The conference report accompanying the DHS fiscal year 2006 appropriation directed the Preparedness Directorate to use \$13,187,000 of this for the Office of the Under Secretary for Preparedness, which provided management, administrative, and business operations support to all of the components within the directorate. H.R. Rep. No. 109-241, at 63 (2005). The conferees also directed the Preparedness Directorate to use \$83,342,000 of the IPIS appropriation (which totaled \$625,499,000) for management and administration of IPIS programs and activities. H.R. Rep. No. 109-241, at 70.

DHS and Preparedness Directorate officials stated that because the directorate did not have adequate management and administrative funds in the M&A appropriation to cover its directorate-wide requirements, the directorate "pooled" Programs, Projects, and Activities (PPA)⁵ from different appropriations throughout the directorate to fund contracts and interagency agreements for services that were common across the directorate. December Meeting. These crosscutting services included human capital management, budget justification preparation, budget execution, program review and analysis, guard services, facilities management, systems maintenance and development, security certification and accreditation, system re-engineering, and rental cost of directorate facilities.⁶ Preparedness Directorate, *Answers to Appropriations Committee Staff, Questions on DHS Preparedness Shared Services Costs* (Sept. 14, 2006) (Directorate Answers to Committee).

While the Preparedness Directorate obtained most of its crosscutting services by directly contracting for these services, it also used the DHS Working Capital Fund (WCF) for this purpose. The DHS WCF is available to DHS "for expenses and

⁵ Programs, Projects, and Activities refer to elements within an appropriation account that generally are identified in committee reports and agency budget justifications, but not in the appropriation act itself. See GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington: D.C.: Sept. 2005), at 80.

⁶ The directorate paid part of its rent through the DHS Working Capital Fund (WCF), and the General Services Administration directly billed the directorate for the remainder of its rent. Directorate Answers to Committee.

equipment necessary for maintenance and operations of such administrative services as the Secretary of Homeland Security determines may be performed more advantageously as central services.” Pub. L. No. 108-90, § 506, 117 Stat. 1137, 1153 (Oct. 1, 2003); DHS Office of the Chief Financial Officer, Directorate for Management, *DHS WCF Charter* (Dec. 1, 2003).

A directorate official stated that the directorate contracted directly for certain crosscutting services instead of using the WCF because the WCF was unable to meet the specific internal needs and requirements of the directorate. GAO Meeting with Director of Administration, Business Operations, Preparedness Directorate, DHS, Feb. 21, 2007. For example, the Preparedness Directorate’s local area network (LAN) had its own architectural requirements that differed from the DHS LAN. *Id.* A directorate official also stated that because Congress directs DHS to report on its proposed use of the WCF in the department’s budget justification up to 18 months prior to the year in which the funds will be used, it was difficult for the directorate to plan for all of its WCF needs months in advance.⁷ *Id.*

This opinion only addresses the contracts and interagency agreements for crosscutting services that the Preparedness Directorate entered into directly. We also note that information we obtained based on our review of relevant documents and discussions with agency officials was not always consistent. Despite numerous efforts, we were unable to reconcile all the inconsistencies.⁸ The Preparedness Directorate no longer exists.

Shared Services

The Preparedness Directorate Office of the Under Secretary (OUS), which was funded by the M&A appropriation, provided leadership, management, information technology, and business operations support to all components within the

⁷ The conference report accompanying the DHS appropriations act for fiscal year 2005 directed DHS to provide a detailed report to the Appropriations Committees on all of the activities supported through the WCF for fiscal years 2004 and 2005, and to identify any crosscutting initiatives or activities that benefited more than one organization that were not acquired through the WCF for those fiscal years and explain the omission. The report required DHS to provide this same information for fiscal year 2006 in its fiscal year 2006 budget justification. H.R. Rep. No. 108-774, at 32 (2004). Agencies generally begin to prepare their budget justifications 18 months in advance of the budget year. *See* GAO-05-734SP, at 103–04.

In addition, the DHS Appropriations Act for fiscal year 2006 required that DHS use the WCF only for activities and amounts that it had reported using the WCF for in fiscal year 2005, unless the Appropriations Committees approved additional activities and amounts 30 days in advance of obligation. Pub. L. No. 109-90, § 504.

⁸ For purposes of this opinion, we did not audit the information DHS provided to us. Accordingly, we are not able to verify the accuracy of this information.

directorate. DHS, *Fiscal Year 2007 Congressional Budget Justification, Preparedness Directorate, OUS*, at 1; Preparedness Directorate Response to GAO Questions, Feb. 9, 2007 (Directorate Response to GAO). The directorate provided some of this support through government employees; however, it provided most of this support through contractors.⁹ DHS Response to Questions from GAO, Feb. 2, 2007 (DHS Response to GAO).

According to directorate officials, in order to fund all of its management and administrative requirements, the Preparedness Directorate pooled PPAs from various appropriations throughout the directorate to fund contracts and interagency agreements for crosscutting services for its components. December Meeting. DHS Counsel explained that “in order for Preparedness to fulfill its missions, it was required to leverage the funds of the PPAs together in order to provide required services. Only by sharing the services, and sharing the costs of the services, was Preparedness able to fund the services.” DHS Counsel Letter. The directorate also used the pooled funds to pay for certain management and administrative support that OUS federal employees provided directly to the directorate. Directorate Answers to Committee.

The Preparedness Directorate referred to the charges for crosscutting services as “Program Administration Costs” in a briefing it provided to Appropriations Committee staff. Directorate Briefing, attachment 3. However, DHS personnel generally refer to these allocated costs as “shared services assessments.” See Memorandum from Michael D. Russell, Appropriations Counsel and Acting Associate General Counsel for General Law, DHS, to Sharon Hardie, Chief of Staff, Preparedness Directorate, *Taxes, Fees, and Administrative Costs*, Aug. 23, 2006 (Russell Memorandum).

The Preparedness Directorate provided detailed information to Appropriations Committee staff on how it used the shared services assessments. Directorate Answers to Committee. The directorate, through OUS, used most of the shared services assessments to provide support to the IPIS appropriation, but at the same time that it provided support to IPIS, it also provided support efforts across the directorate. For example, the directorate used \$18,529,380 to provide contractor services to support the directorate’s Chief Information Officer (CIO) operations: 75 percent of the CIO’s operations supported IPIS, while 25 percent supported other directorate appropriations. *Id.* In addition, the directorate used \$12,842,445 for contract administrative support and procurement of basic information technology equipment and furniture necessary to occupy directorate facilities: 85 percent of these facilities build-out requirements were in support of IPIS, while 15 percent supported other directorate appropriations. The directorate also used \$3,303,877 to fund general operations of OUS in management support of directorate programs:

⁹ The Preparedness Directorate reported to us that in fiscal year 2006, OUS had 56 authorized full-time equivalent (FTE) federal positions. In addition, 128 contractor staff supported the directorate. Directorate Response to GAO.

75 percent of this effort supported IPIS, while 25 percent supported other directorate appropriations. *Id.*

The directorate, however, did not provide Appropriations Committee staff with the associated costs charged against all of the appropriations. *Id.* The directorate instead provided Appropriations Committee staff material stating that the directorate obligated all of the shared services assessments—\$59,199,000—against PPAs in the IPIS appropriation.¹⁰ Directorate Briefing, attachment 3.

In response to our questions, directorate officials stated that the directorate allocated the shared services costs to the benefiting PPAs within the directorate appropriations using the same methodology used by the DHS WCF to allocate the WCF costs to the various DHS components. Directorate Response to GAO. Directorate officials also stated that six directorate appropriations received benefits from the program assessments, and that only two PPAs that received benefits were not charged a shared services assessment fee.¹¹ *Id.* The requirements of these two PPAs “were so diminutive, that they did not warrant the expense of capturing the costs.” *Id.*

In contrast, the Head of Finance of the Preparedness Directorate Finance Branch stated to us that only PPAs in the IPIS and M&A appropriations were assessed a shared services fee. GAO Meeting with Head of Finance Branch, Preparedness Directorate, Feb. 28, 2007 (Finance Branch Meeting). He stated that other directorate appropriations may have minimally benefited from the contract services but they were not assessed a shared services fee. *Id.* As stated above, however, directorate officials provided information to us and to Appropriations Committee staff indicating that the directorate provided measurable and more than nominal benefits to the other directorate appropriations. Directorate Response to GAO; Directorate Answers to Committee.

The Head of Finance explained that the Preparedness Directorate financed the contracts for shared services by directly committing funds from only two appropriations, the directorate’s IPIS and M&A appropriations, using multiple lines of accounting from each contract to the various PPAs within the IPIS and M&A appropriations. (Finance Branch Meeting). For example, one line of accounting from a contract might identify, among other things, an appropriation, a PPA, a funding

¹⁰ While the directorate reported to Appropriations Committee staff and stated to us that it obligated the contracts only against the IPIS appropriation, based on the contracts the directorate provided to us, the directorate also obligated a small portion of at least one of the contracts against the M&A appropriation.

¹¹ Preparedness Directorate officials stated that the following six appropriations received benefits and were charged shared services assessments: IPIS, Radiological Emergency Preparedness Program, Firefighter Assistance Grants, State and Local Programs, United States Fire Administration, Management and Administration (Office of the Under Secretary). Directorate Response to GAO.

organization code, and a budget project code. Preparedness Directorate, *Account Classification Code Structure, Fiscal Year 2006 Quick Reference Card* (as of March 6, 2006). A second line of accounting from the same contract might identify the same appropriation, but a different PPA than that identified above. *Id.*

The Head of Finance explained that as part of the Second Stage Review DHS consolidated three separate accounting systems to support the new Preparedness Directorate: (1) the Federal Financial Management System (FFMS), which supported the IPIS and M&A appropriations, (2) the Justice Department Accounting System, which supported the State and Local Programs, and Firefighter Assistance Grants, and (3) FEMA's accounting system, which supported the USFA, Chemical Stockpile Emergency Preparedness Program and REPP appropriations. Finance Branch Meeting. The appropriations covered by Justice's and FEMA's accounting systems were not completely incorporated into the Preparedness Directorate in fiscal year 2006, and the Finance Branch had access only to FFMS and the IPIS and M&A appropriations. *Id.* Accordingly, the Finance Office allocated and obligated the shared services only against PPAs within the IPIS and M&A appropriations. *Id.*

DHS officials stated that the Preparedness Directorate stopped using this method of sharing services in response to the language in the conference report directing GAO to examine the Preparedness Directorate's use of shared services. December Meeting.

DISCUSSION

While the facts involved are complex, convoluted, and sometimes inconsistent, the legal principles are clear. Preparedness Directorate officials stated that the directorate pooled funds from programs within its various appropriations to fund crosscutting services benefiting the directorate as a whole. This sharing of funds across appropriation accounts, in effect, constitutes a transfer between appropriations. 70 Comp. Gen. 592 (1991). In general, unless authorized by law, transfers of funds between agency appropriation accounts are prohibited by law. 31 U.S.C. § 1532. We have previously considered joint financing arrangements in which an agency drew on multiple appropriations of a department or agency component to support projects benefiting a department or agency component as a whole. *See, e.g.*, 70 Comp. Gen. 592 (Department of Labor purchased equipment for an Executive Computer Network in order to facilitate communication between the Secretary and the Department's Executive Staff and funded the purchase by initiating obligations against appropriation accounts of Labor Department's various agencies); 60 Comp. Gen. 686 (1981) (Treasury Department charged various bureaus and offices within the department to implement the legal division's executive development program on an agencywide basis); B-195775, Sept. 10, 1979 (to implement a merit pay system on an agencywide basis, the Office of Personnel Management used funds set aside by agency heads in a common fund). Those decisions recognized that such "pooling" arrangements, as they were referred to, required statutory authority to overcome the limitation on transfers between appropriation accounts.

Transfer authority may be specific to an agency, or more generally available to the government as a whole. *See, e.g.*, 70 Comp. Gen. 592. Congress has established some general transfer authority to promote economy and efficiency. For example, the Economy Act, 31 U.S.C. § 1535, provides that if amounts are available and it is in the best interest of the government, an agency may place an order with another agency for goods or services that the other agency can provide, or can procure by contract, more conveniently or economically than through direct commercial acquisition by the ordering agency. 31 U.S.C. § 1535(1). The Economy Act also applies to transfers between appropriations within an agency. 70 Comp. Gen. 592.

Another provision that authorizes agencies to pool resources between appropriations is 31 U.S.C. § 1534, the so-called “account adjustment statute.” This statute was intended to facilitate “common service” activities. *See generally* S. Rep. No. 89-1284 (1966). An agency generally has the discretion to use either the Economy Act or the account adjustment statute to share resources across appropriations. 70 Comp. Gen. 592.

The account adjustment statute allows an agency to temporarily charge one appropriation for an expenditure benefiting other appropriations within the same agency, as long as (1) amounts are available in both appropriations and (2) the accounts are adjusted to reimburse the appropriation initially charged during or as of the close of the same fiscal year. 31 U.S.C. § 1534. In addition, an agency must charge the benefiting appropriations an amount that is commensurate with the value received. 70 Comp. Gen. at 596.

Working capital fund authorities also authorize agencies to pool resources across appropriations. Working capital funds are a type of revolving fund. GAO-05-734SP, at 101. Revolving funds are authorized to receive advances and reimbursements from other agencies’ appropriation accounts and use these receipts to finance the operation of the revolving fund. *Id.* at 88.

And, of course, an agency also may transfer funds using transfer authority specific to that agency. Congress has provided DHS with limited transfer authority in the DHS annual appropriations acts. *See, e.g.*, Pub. L. No. 109-90, § 503(c). DHS components have authority to transfer up to five percent of an appropriation to another DHS appropriation, but the transfer may not increase the receiving appropriation by more than ten percent. *Id.* This funding flexibility is limited by a strict statutory notification requirement for both reprogrammings and transfers.¹² For example,

¹² A reprogramming is the movement of funds within a single appropriation between different budget items that does not typically require statutory authority; a transfer is the movement of funds between separate appropriations that does require statutory authority. 70 Comp. Gen. 592 (1991); B-206668, Mar. 15, 1982. The statutory limitations that Congress has placed on DHS’s transfer and reprogramming authorities essentially require DHS to treat transfers between appropriations and reprogrammings between PPAs in the same manner. *See, e.g.*, Pub. L. No. 109-90, §§ 503(a) & (b). DHS, consequently, often uses these terms interchangeably.

pursuant to section 503(c) of the DHS Appropriations Act for fiscal year 2006, transferred funds were not available for obligation unless the Appropriations Committees were notified 15 days in advance of the transfer.¹³ *Id.* These limitations do not apply to transfers DHS makes under a separate transfer authority, for example, the account adjustment statute or the Economy Act. *See, e.g.*, B-239031, June 22, 1990 (advance notification requirements and percentage limits in section 103 of the Treasury, Postal Service, and General Government Appropriations Act for fiscal year 1990 applied only to transfer authority granted by section 103).

As explained above, the Preparedness Directorate chose not to use the DHS WCF to provide shared services across the directorate because the WCF was unable to meet the specific internal needs and requirements of the directorate. The DHS Counsel advised us that:

“The administrative services that Preparedness obtained through contracts were not covered under the umbrella of DHS’ Working Capital Fund. The services provided were for direct support of Preparedness programs. Moreover, the lead time required to utilize the DHS Working Capital Fund, particularly as it relates to adding new programs, precludes the use of the DHS Working Capital Fund as a traditional Working Capital Fund.”

DHS Counsel Letter.

The directorate also did not use its own specific transfer authority to pool resources across the directorate, which would have required it to notify the Appropriations Committees prior to transferring funds. As explained above, transferred funds are not available for obligations unless a DHS component has notified the Appropriations Committees of the proposed transfer. *See, e.g.*, Pub. L. No. 109-90, § 503(c).

¹³ Section 503(c) of the DHS Appropriations Act for fiscal year 2006 provided that:

“Not to exceed 5 percent of any appropriation made available for the current fiscal year for the Department of Homeland Security by this Act or provided by previous appropriations Acts may be transferred between such appropriations, but no such appropriations, except as otherwise specifically provided, shall be increased by more than 10 percent by such transfers: *Provided*, That any transfer under this section shall be treated as a reprogramming of funds under subsection (b) of this section and shall not be available for obligation unless the Committees on Appropriations of the Senate and the House of Representatives are notified 15 days in advance of such transfer.”

Pub L. No. 109-90, § 503(c).

DHS relied instead on what it called Economy Act principles as authority to allocate the costs of the shared services across various appropriations in the directorate. DHS Counsel stated that the directorate carried out the shared services transactions pursuant to Economy Act principles; thus the amounts paid by the benefiting PPAs for services received were not assessments but payments for benefits received. *See Russell Memorandum.*

Pursuant to an Economy Act agreement, one appropriation account orders goods or services from another appropriation account. 31 U.S.C. § 1535(a)(1). The appropriation providing the services, the “performing” appropriation, can provide the goods or services directly, or it can procure the goods or service by contract, if it can do so more conveniently or economically than through direct commercial acquisition by the ordering agency. *Id.* If the performing appropriation fills the ordering appropriation’s requirement through a contract, the performing appropriation may obligate the contract directly against the ordering agency’s appropriation. B-301561, June 14, 2004. DHS Counsel stated that “There was no direct ordering entity and performing entity. However, the Preparedness Business Office, much like a performing entity provided the services. . . . By analogy [to the Economy Act], the [OUS] Business Office provided the services to the programs that provided the funding.” DHS Counsel Letter. Accordingly, DHS treated the M&A appropriation as the performing appropriation and the appropriations receiving the services as the ordering appropriations.

The Preparedness Directorate, however, did not actually enter into Economy Act agreements. DHS instead used what it called “*de facto* Economy Act” agreements as authority to carry out the shared services transactions.¹⁴ DHS Counsel Letter; Russell Memorandum. DHS Counsel stated that the directorate pooled the resources of the various PPAs but was able to track on a *pro rata* basis the amounts contributed by the PPAs for the services received. Russell Memorandum. According to DHS, this resulted in the creation of “*de facto* Economy Act agreements.” *Id.* In response to our questions regarding the meaning of the term *de facto* Economy Act agreement, DHS Counsel stated:

“An official (de jure) Economy Act agreement is set forth in writing. The Preparedness Directorate did not reduce any of the shared services arrangements into official Economy Act agreements. Rather, the intra-directorate arrangements were based upon the principles of the Economy Act and care was taken to ensure that no PPA augmented any other PPA.”

DHS Counsel Letter.

¹⁴ The term *de facto* is a Latin phrase meaning having effect even though not formally or legally recognized. *Black’s Law Dictionary* 448 (8th ed. 2004). In contrast, the term *de jure* means “as a matter of law.” *Id.* at 458.

The use of Economy Act principles, in lieu of valid Economy Act agreements, is not adequate to establish a valid intra-agency agreement. Documentary evidence of a binding agreement is necessary in order to record an obligation under 31 U.S.C. § 1501(a) (the recording statute). In addition, the Economy Act requires the head of the ordering agency or unit to determine that the order is in the best interest of the United States government and that the goods or services cannot be provided by contract as conveniently or economically by a commercial enterprise. 31 U.S.C. § 1535(a). The Federal Acquisition Regulation requires agencies to prepare a written Determinations and Finding (D&F) supporting these determinations. 48 C.F.R. § 17.503. If the performing unit enters into a contract to provide the services, the D&F also must include an additional statement supporting the use of the contract.¹⁵ The Preparedness Directorate did not execute any official documents to justify the use of the Economy Act. Directorate Answers to Committee. It is important that agencies adhere to the discipline imposed by preparing a D&F and documenting the intra-agency agreement. These controls ensure that an agency reviews and justifies transfers of funds between appropriations and is able to accurately record and track these obligations in its system of financial controls.

The Preparedness Directorate, however, did have authority pursuant to 31 U.S.C. § 1534, the account adjustment statute, to obligate the contracts and interagency agreements for the shared services directly against one appropriation and adjust the accounts of the benefiting appropriations before the end of the fiscal year based on the benefiting appropriations' use of the services. As explained above, the account adjustment statute allows an agency to temporarily charge one appropriation for an

¹⁵ Subsection (b) of 48 C.F.R. §17.503 states that

“If the Economy Act order requires contract action by the servicing agency, the D&F must also include a statement that at least one of the following circumstances applies:

“(1) The acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of the servicing agency for the same or similar supplies or services;

“(2) The servicing agency has capabilities or expertise to enter into a contract for such supplies or services which is not available within the requesting agency; or

“(3) The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies.”

expenditure benefiting other appropriations within the same agency, as long as (1) amounts are available in both appropriations and (2) the accounts are adjusted to reimburse the appropriation initially charged during or as of the close of the same fiscal year. 31 U.S.C. § 1534. In addition, the agency must charge the benefiting appropriations an amount commensurate with the value each appropriation received. 70 Comp. Gen. at 596. The directorate, however, did not provide us with documentation showing that it either obligated shared services assessments against or adjusted the accounts of all the directorate appropriations that received benefits.

Pursuant to the account adjustment statute, the directorate had authority to choose against which appropriation to temporarily obligate the contracts, as long as the appropriation had amounts available to cover these costs. 31 U.S.C. § 1534(a)(1). As stated above, Congress appropriated only \$16,079,000 to the directorate's M&A appropriation in fiscal year 2006, while the shared services assessments totaled \$59,199,000. Accordingly, the directorate could not obligate the full cost of the contracts against the M&A appropriation. In contrast, Congress appropriated \$625,499,000 to the IPIS appropriation (of which \$83,342,000 was to be used for management and administration of IPIS programs). The directorate could, therefore, initially obligate the full cost of the contracts against the IPIS appropriation, as long as the directorate adjusted the accounts of the benefiting appropriations to reimburse the IPIS appropriation. 31 U.S.C. § 1534(b).

Directorate officials stated, however, that in order to reduce the administrative workload, the directorate obligated the shared services only against PPAs within the IPIS appropriation. Directorate Response to GAO. Directorate officials stated that while the directorate obligated the shared services only against PPAs in the IPIS appropriation: "Preparedness could have recorded the shared service obligations against all of Preparedness appropriations on a prorate basis. This would have resulted in up to 13 lines of accounting on each contract or obligation. For the sake of efficiency we did not use multiple account strings to every contract." *Id.*

These directorate officials appear to be saying that while the directorate did not obligate the contract costs against all of the benefiting PPAs, it was able to track on a *pro rata* basis the estimated assessments that it could have obligated against each benefiting PPA. This notwithstanding, the directorate did not have authority to charge all of the costs to one appropriation without subsequently allocating the costs to the other benefiting appropriations. The directorate improperly augmented the benefiting appropriations to the extent it did not record an obligation against each appropriation for the estimated value of the services each appropriation received. Agencies are generally prohibited from augmenting their appropriations with other funds without statutory authority to do so. An appropriation "establishes a maximum authorized program level, meaning that an agency cannot, absent statutory

authorization, operate beyond the level that can be paid for by its appropriations.” B-300248, Jan. 15, 2004.¹⁶ While the directorate had authority to initially use one appropriation to fund the contracts and interagency agreements for shared services, it was required to adjust the account of each benefiting appropriation prior to the end of the fiscal year based on value received. 31 U.S.C. § 1534. Accordingly, to the extent the directorate provided more than nominal benefits to other appropriations without recording an obligation against those appropriations, it must adjust its accounts to reflect the actual value of the benefits received.

DHS should adjust the Preparedness Directorate’s fiscal year 2006 appropriation accounts such that each appropriation which received contractor services reflects the amount of the services received. If any of the appropriations that funded the directorate do not have available unobligated balances to cover the adjustments, the directorate should report an Antideficiency Act violation. 31 U.S.C. § 1351. The Antideficiency Act prohibits an officer or employee of the government from making or authorizing an obligation or expenditure “exceeding an amount available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. § 1341(a).

CONCLUSION

While the Preparedness Directorate did not enter into valid Economy Act agreements, the directorate had authority pursuant to 31 U.S.C. § 1534, the account adjustment statute, to initially obligate the contracts against one appropriation and then adjust the account of each benefiting appropriation based on the value each appropriation received. It appears, however, based on the information that the Head of the Preparedness Directorate Finance Branch provided us, that the directorate did not properly record allocated charges against each of the benefiting appropriations, as required by the statute. DHS should adjust the expired fiscal year 2006 directorate appropriations to correct these errors. If any of the appropriations that funded the directorate do not have available unobligated balances to cover the adjustments, the directorate should report an Antideficiency Act violation as required by 31 U.S.C. § 1351.

¹⁶ See, e.g., 70 Comp. Gen. 592. In that case, the Department of Labor used an improper cost allocation method to allocate the cost of an Executive Computer Network among the Department of Labor’s various agencies. The department overcharged eight agencies and effectively transferred the amount of the overcharges to the benefit of other agencies. These overcharges constituted improper augmentations.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Kepplinger
General Counsel

DIGEST

The conference report accompanying the Department of Homeland Security Appropriations Act for fiscal year 2007 directed the Government Accountability Office (GAO) to review the Department of Homeland Security's (DHS) use of shared services within the Preparedness Directorate and its compliance with appropriations law and the proper use of the Economy Act.

In a legal opinion in response to this directive, GAO found that the Preparedness Directorate pooled its appropriations to fund what it refers to as shared services. Pooling funds across appropriations is a form of transfer, and, unless otherwise authorized by law, transfers of funds between agency appropriation accounts are prohibited by law. The Preparedness Directorate had authority, pursuant either to the Economy Act or to the "account adjustment" statute, to pool appropriations to fund shared services. The directorate, however, did not enter into valid Economy Act agreements. In addition, it appears that the directorate did not properly record allocated charges against each of the benefiting appropriations, as required by the account adjustment statute. DHS should adjust the expired fiscal year 2006 directorate appropriations so that each benefiting appropriation is charged for the value received. If any of the appropriations that funded the directorate do not have available unobligated balances to cover the adjustments, the directorate should report an Antideficiency Act violation.