OPINIONS

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OF THE

UNITED STATES DEPARTMENT OF JUSTICE

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ADVISING THE

PRESIDENT OF THE UNITED STATES,

THE ATTORNEY GENERAL,

AND OTHER EXECUTIVE
OFFICERS OF THE FEDERAL
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FOREWORD

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As always, the Office expresses its gratitude for the efforts of its paralegal and administrative staff—Elizabeth Farris, Melissa Golden, Richard Hughes, Marchelle Moore, Natalie Palmer, Joanna Ranelli, Dyone Mitchell, and Lawan Robinson—in shepherding the opinions of the Office from memorandum form to online publication to final production in these bound volumes.

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OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Certification of Peace Corps Response Volunteers for Noncompetitive Eligibility for Federal Employment Under Executive Order 11103

Under Executive Order 11103, which describes a "full term of service" as "approximately two years" for purposes of noncompetitive eligibility for federal employment, the Director of the Peace Corps may not issue certificates of satisfactory service to volunteers in the Peace Corps Response program ("PCRVs") who serve between three and twelve months.

The Director may not issue certificates of satisfactory service to PCRVs under the exception in Executive Order 11103 for those who do not complete a full term "due to circumstances beyond their control."

January 9, 2013

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
PEACE CORPS

In Executive Order 11103, the President authorized the Director of the Peace Corps ("Director") to issue certificates of satisfactory service to returning Peace Corps volunteers. These certificates provide volunteers with one year of noncompetitive eligibility for civil service appointments in the Executive Branch. *See* Exec. Order No. 11103, 3 C.F.R. 173 (1963 Supp.) ("Order"); 5 U.S.C. § 3301 (2006) ("The President may . . . prescribe . . . regulations for the admission of individuals into the civil service[.]"); *id.* § 3302 ("The President may prescribe rules governing the competitive service."). The Order provides that only those volunteers "who have completed a full term of service (approximately two years)" are eligible for these certificates, but also allows the Director to issue certificates to volunteers who complete "a lesser period of satisfactory service if, in the judgment of the Director . . . their service was of sufficient duration to demonstrate their capability to complete satisfactorily a full term, and . . . their failure to complete a full term was due to circumstances beyond their control." Order § 3.

You asked whether the Director may issue certificates of satisfactory service not only to traditional Peace Corps volunteers, who serve terms of approximately 27 months, but also to volunteers in the Peace Corps Response program, a program in which volunteers complete shorter terms, typically between three and twelve months.[1] Specifically, you asked whether Peace Corps Response Volunteers ("PCRVs") complete the required "full term of service" under the Order by fulfilling a three-to-twelve-month service obligation, notwithstanding the parenthetical in the Order describing a "full term of service" as "approximately two years." *Id.* If not, you requested that we also consider whether the Director could issue certificates to PCRVs based on the Order's exception for those who do not complete a full term "due to circumstances beyond their control." *Id.* We conclude that, under the terms of the Executive Order, the Director may not issue certificates to PCRVs under either the full term of service requirement or the circumstances beyond their control exception.

I.

The Peace Corps Response program began in 1996 as a short-term volunteer program for those who had previously served as traditional Peace Corps volunteers. Peace Corps Letter at 2. The Peace Corps has since opened the program to qualified individuals with no prior Peace Corps experience, but the other features of the program have remained the same. *Id.* PCRVs complete assignments that are more specialized than those given to traditional volunteers. Their assignments "can be as short as three months and generally do not exceed 12 months." *Id.* at 2. Aside from the shorter length of service and specialized work assignments, however, both the terms of PCRVs' service and the benefits they receive are comparable to those of traditional volunteers. The only benefit that traditional volunteers currently receive that PCRVs do not is the certificate of satisfactory service for noncompetitive eligibility issued by the Director under Executive Order 11103.

Executive Order 11103 states that "the head of any agency in the Executive Branch may appoint in the competitive service" (and, if the agency

[1] *See* Memorandum for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, from Bill Rubin, General Counsel, Peace Corps (June 19, 2012) ("Peace Corps Letter"). We also received the views of the Office of Personnel Management ("OPM") regarding the issues addressed in this opinion. *See* Memorandum for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Elaine Kaplan, General Counsel, Office of Personnel Management (Oct. 16, 2012) ("OPM Letter").

has "an established merit system in the excepted service," may appoint in the excepted service) "any person who is certified by the Director of the Peace Corps as having served satisfactorily as a Volunteer or Volunteer Leader under the Peace Corps Act" and who passes whatever examination is prescribed. Order §§ 1, 2. For "a period of one year after" certified volunteers complete their service (subject to extension under certain conditions), *id.* § 4, they are eligible to attain employment in the Executive Branch "outside of the competitive examining process," OPM Letter at 3. This certification provides recipient volunteers a "significant" advantage in the federal hiring process. *Id.*

Section 3 of the Order defines persons whom the Director may certify for a noncompetitive appointment:

> Certificates of satisfactory service for the purposes of this Order shall be issued only to persons who have completed a full term of service (approximately two years) under the Peace Corps Act: *Provided,* That such certificates may be issued to persons who have completed a lesser period of satisfactory service if, in the judgment of the Director of the Peace Corps, (1) their service was of sufficient duration to demonstrate their capability to complete satisfactorily a full term, and (2) their failure to complete a full term was due to circumstances beyond their control.

Order § 3.

II.

The first issue is whether PCRVs qualify for a certificate of satisfactory service under the Order because they have completed "full term[s] of service under the Peace Corps Act" by virtue of completing their three-to-twelve-month assignments as PCRVs, even though PCRVs' terms are considerably shorter than the approximately 27-month terms served by traditional Peace Corps volunteers.[2] Based on both the text and the con-

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[2] OPM concluded that PCRVs cannot receive certificates of satisfactory service based in part on its view that PCRVs are not "volunteers" as the term is used in the Order. OPM Letter at 2. You responded that the Peace Corps considers PCRVs "volunteers" under the Peace Corps Act and noted that "the Executive Order . . . [does not] distinguish[] between

text of Executive Order 11103, we conclude that the Peace Corps Response program's three-to-twelve-month term does not qualify as a "full term of service" as the Order uses that phrase.

To begin with, the text of the Order indicates that the President expected that volunteers receiving noncompetitive eligibility would have completed terms of service more substantial than the three-to-twelve-month assignments PCRVs typically receive. The parenthetical immediately following the full term of service requirement states that a full term runs "approximately two years." Order § 3. We recognize, as you suggest, that this language could be read as either prescriptive (requiring that a full term of service be approximately two years) or descriptive (noting that the average term of service for a volunteer at the time of the Order was approximately two years). *See* Peace Corps Letter at 2. But we do not think characterizing the parenthetical as descriptive changes the analysis. Even if the parenthetical simply describes President Kennedy's understanding of the length of a full term of service when he signed the Order, it nonetheless indicates that the President intended to confer noncompetitive eligibility on those Peace Corps volunteers who serve approximately two years (or who otherwise qualify through the circumstances beyond their control exception). In light of this parenthetical, it is unclear that the President would have extended noncompetitive eligibility to PCRVs had that short-term program existed in 1963. We believe that a "full term of service" under the Order is best read to mean approximately two years of service.

The context of the issuance of the Order provides considerable support for this interpretation. When President Kennedy signed the Order, he would have understood a full term of service to run approximately two years. Before the Peace Corps was established, a report prepared for the President described the proposed volunteer program as having a "usual length of service . . . [of] at least one year, preferably two, and perhaps in some cases three or more years." Sargent Shriver, *Report to the Presi-*

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categories of Volunteers." E-mail for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Jan Miller, Peace Corps, *Re: Response to OPM opinion* (Nov. 26, 2012). Because our analysis does not turn on whether PCRVs are volunteers within the meaning of the Order, we need not resolve this definitional issue and assume for purposes of this opinion that PCRVs are "volunteers."

dent on the Peace Corps at 10 (Feb. 22, 1961), http://www.jfklibrary.org (folder title "Peace Corps: Shriver report and recommendations, February 1961"; digital identifier JFKPOF-085-014-p0037). By the time the Peace Corps issued its first annual report in July 1962, the idea that volunteers would serve a two-year term had become reality. The report explains that when the Peace Corps was first established, "it was decided" that "[v]olunteers would serve for two years, without salary or draft exemption." *See Peace Corps: 1st Annual Report to Congress for the Fiscal Year Ended June 30, 1962* at 8 (July 1962), http://www.jfklibrary.org (folder title "Peace Corps: First annual report, July 1962"; digital identifier JFKPOF-086-003-p0009). Thus, a two-year term was standard by the time President Kennedy signed the Order in April 1963.

Background documentation about the Order itself also supports our conclusion that the President contemplated that a full term of service under the Order would be approximately two years. When the Director of the Bureau of the Budget[3] transmitted the proposed Order to the Attorney General for review in March 1963, he described the Order as "permit[ting] the Peace Corps to issue certificates of satisfactory service *only to persons who had completed a full term of 24 months of service*," unless the exception for circumstances beyond the volunteer's control applied. Letter for Robert F. Kennedy, Attorney General, from Arthur B. Focke, General Counsel, Bureau of the Budget at 2 (Mar. 12, 1963) (emphasis added). This reflects an understanding within the Kennedy Administration that noncompetitive eligibility depended on two years of service. We believe the Order is best interpreted in a manner consistent with its text and these indications of President Kennedy's understanding of the Order at the time he signed it, particularly in light of the President's authority to revise this executive order at any time. *See* Memorandum for Kenneth A. Lazarus, Associate Counsel to the President, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 3 C.F.R. Part 100 to the President and Vice President* (Dec. 19, 1974) (interpreting an executive order in a manner consistent with public state-

[3] The Bureau of the Budget was the predecessor agency of the Office of Management and Budget. *See* Reorg. Plan No. 2 of 1970, 35 Fed. Reg. 7959, *reprinted in* 5 U.S.C. app. 640 (2006).

ments President Johnson made at the time of the Order); *cf. John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) ("*stare decisis* in respect to statutory interpretation has special force, for Congress remains free to alter what we have done" (internal quotation marks omitted)).

Finally, we note that this interpretation of the Order would make its service commitment similar to that required in other Executive Branch programs that confer noncompetitive eligibility (typically at least a year, if not more). *See, e.g.*, 5 C.F.R. § 315.607 (2012) (providing that Peace Corps personnel (not volunteers) may be eligible for a noncompetitive appointment if they complete "no less than 36 months of continuous service"); *id.* § 315.610 (2012) (providing that certain National Guard technicians may be eligible if they have served "at least 3 years as a technician"); Exec. Order No. 11219, § 1(c), 3 C.F.R. 127, 127 (1965 Supp.) (providing that present or former career officers or employees of the Foreign Service may be eligible upon completing "at least one year of continuous service"); 5 C.F.R. § 315.606 (2012) (same); *id.* § 315.609(b) (2012) (providing that career employees of the Panama Canal Commission may be eligible if they "served continuously for at least 1 year"); *id.* § 315.608 (2012) (providing that certain family members of federal employees officially assigned to an overseas area may be eligible after their sponsoring federal employees complete "52 weeks of creditable overseas service" (except in extraordinary circumstances)).

To be sure, the President has delegated to the Director broad authority to prescribe the "terms and conditions of the service of volunteers," *see* 22 U.S.C. § 2504(a) (2006); *see also* Exec. Order No. 12137, 3 C.F.R. 389 (1979 Comp.), and nothing in the Peace Corps Act or the Order would prevent the Director from changing the length of service for both traditional volunteers and PCRVs. Peace Corps Letter at 1. We do not think, however, that the Director's general authority to change the length of volunteers' service also includes the authority to modify a presidential understanding, conveyed by the Order, of the length of service that is necessary to earn noncompetitive eligibility.

For these reasons, we conclude that that the Order is best read to permit the Director to confer noncompetitive eligibility only on those volunteers who complete approximately two years of service or who satisfy the terms of the circumstances beyond their control exception.

III.

You also asked us to consider whether the Director may certify PCRVs for noncompetitive eligibility based on the exception for volunteers who complete "a lesser period of satisfactory service," but who, "in the judgment of the Director of the Peace Corps," (1) have provided "service . . . of sufficient duration to demonstrate their capability to complete satisfactorily a full term," and (2) have failed to complete a full term "due to circumstances beyond their control." Order § 3.

In our view, this exception should not be read as a general rule that PCRVs who complete their entire assignments receive noncompetitive eligibility. The text of the language authorizes the Director to make exceptions in "circumstances beyond [the] control" of the volunteer, indicating that this authority is to be used on an individualized basis when unanticipated events require volunteers to truncate service otherwise expected to last "full terms" of approximately two years. That text does not fit the circumstances presented here. By agency design, a PCRV's service lasts between three and twelve months; and a PCRV's service does not terminate prematurely based on circumstances beyond his or her control. Moreover, certifying the entire class of PCRVs for noncompetitive eligibility under this exception would be inconsistent with agency practice. You have informed us that the Peace Corps has long implemented this exception on a case-by-case basis, for example, where a changed political climate makes a volunteer's assigned country unsafe, where a volunteer has been a victim of sexual assault, or where some similarly grave, unforeseen circumstance arises. This consistent practice comports with the best reading of this exception.[4] For these reasons, we conclude that the

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[4] Under the Peace Corps' established practice, PCRVs also would not satisfy the exception's first requirement—that volunteers complete service of "sufficient duration to demonstrate their capability to complete . . . a full term" as the Order uses that phrase (i.e., approximately two years). Order § 3. Although nothing in the Order limits the Director's discretion to determine what constitutes service of "sufficient duration," you have informed us that the Peace Corps has long used one year of service—the upper limit of a Peace Corps Response term—as a benchmark to qualify for the exception. We understand that, until two years ago, the Peace Corps required volunteers to serve at least twelve months before they could be considered for a certificate under the exception. You explained that the Peace Corps will now consider volunteers with less than a year of

exception does not provide a basis for the Director to confer noncompetitive eligibility on PCRVs.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

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service in certain extraordinary circumstances, but that, as your guidelines note, "normally at least twelve consecutive months, including training," will be required to qualify. *See* MS 285 Volunteer Description of Service and Certificate of Group Health Coverage § 5.3 (Aug. 26, 2011), http://files.peacecorps.gov/manuals/manual/200_Volunteers/280-289_Volunteer_Transfers_Completions_of_Service_Termination/MS_285/Volunteer_Description_of_Service_and_Certificate_of_Group_Health_Coverage.pdf (last visited Sept. 11, 2014).

Expiration of Authorizations of Appropriations for Social Security Administration Grant Programs

Notwithstanding the expiration of the specific authorizations of appropriations for the Work Incentives Planning and Assistance program and the Protection and Advocacy for Beneficiaries of Social Security program, the appropriation for administrative expenses of the Social Security Administration remains available to fund those two grant programs. When an agency has legal authority to administer a program and appropriated funds are available for that purpose, the absence or expiration of an authorization of appropriations does not prevent the agency from expending funds on the program unless such a restriction is imposed by statute.

February 4, 2013

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
SOCIAL SECURITY ADMINISTRATION

Work Incentives Planning and Assistance ("WIPA") and Protection and Advocacy for Beneficiaries of Social Security ("PABSS") are grant programs administered by the Social Security Administration ("SSA") under sections 1149 and 1150 of the Social Security Act, 42 U.S.C. §§ 1320b-20, 1320b-21. These sections provide the SSA with permanent statutory authority to conduct both programs, as well as directions that the programs be funded out of the SSA's annual appropriations for administrative expenses. They also contain provisions authorizing appropriations specifically for such programs only through fiscal year 2011. Citing the expiration of these authorizations of appropriations, the SSA concluded that it could not spend any funds from its 2012 appropriation on the programs and so informed Congress. The Government Accountability Office ("GAO") reached the contrary conclusion, explaining that the "SSA ha[d] adequate authority to continue both programs" "[b]ecause the program authority in the enabling statutes has not expired, and SSA has an appropriation that is available to cover the costs of these programs." *Social Security Administration—Work Incentives Planning and Assistance Program (WIPA) and Protection and Advocacy for Beneficiaries of Social Security Program (PABSS)*, B-323433, at 6 (Aug. 14, 2012) ("GAO Opinion"), http://www.gao.gov/assets/600/593739.pdf.

In light of the conflict between the positions of the SSA and the GAO, you have asked us whether, notwithstanding the expiration of the specific authorizations of appropriations, the SSA's appropriation for administrative expenses remains available to fund these grant programs. *See* Letter for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from David F. Black, General Counsel, SSA, *Re: (B-323433) Availability of Appropriations for Social Security Administration's Work Incentives Planning and Assistance Program (WIPA) and Protection and Advocacy for Beneficiaries of Social Security Program (PABSS)* (Sept. 28, 2012). We conclude that it does. When an agency has legal authority to administer a program and appropriated funds are available for that purpose, the absence or expiration of an authorization of appropriations does not prevent the agency from expending funds on the program unless such a restriction is imposed by statute.

I.

A.

In 1999, Congress found that "financial disincentives to work and earn income and lack of adequate employment training and placement services" were barriers to employment for disabled Social Security beneficiaries. Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, § 2(a)(9), 113 Stat. 1860, 1863 ("Ticket to Work Act"). It passed the Ticket to Work Act to help beneficiaries overcome these barriers and enter the workforce. *See id.* § 2(b)(1), (4) (listing among the purposes of the Act "[t]o provide . . . employment preparation and placement services to individuals with disabilities that will enable those individuals to reduce their dependency on cash benefit programs" and "[t]o establish a return to work ticket program that will allow individuals with disabilities to seek the services necessary to obtain and retain employment and reduce their dependency on cash benefit programs").

Among other changes, Congress amended the Social Security Act to create authority for two new grant programs to be administered by the SSA. These programs are now known as WIPA and PABSS. WIPA is a mandatory program established under section 1149, which provides that "[t]he Commissioner [of Social Security] . . . shall establish a community-based work incentives planning and assistance program for the purpose of disseminating accurate information to disabled beneficiaries on work incentives programs and issues related to such programs." 42

U.S.C. § 1320b-20(a)(1). As part of this program, the Commissioner is further required to "establish a competitive program of grants, cooperative agreements, or contracts to provide benefits planning and assistance, including information on the availability of protection and advocacy services, to disabled beneficiaries." *Id.* § 1320b-20(a)(2)(A). Unlike WIPA, PABSS is a discretionary program: section 1150 provides that "the Commissioner may make payments in each State to the protection and advocacy system . . . for the purpose of providing services to disabled beneficiaries." *Id.* § 1320b-21(a). Such services may include "information and advice about obtaining vocational rehabilitation and employment services" and "advocacy or other services that a disabled beneficiary may need to secure, maintain, or regain gainful employment." *Id.* § 1320b-21(b).

Parallel provisions in sections 1149 and 1150 address the sources of funding for these programs. These provisions direct that the costs of WIPA and payments under PABSS "shall be [drawn] from amounts made available for the administration of subchapter II of this chapter [i.e., title II of the Social Security Act] and amounts made available for the administration of subchapter XVI of this chapter [i.e., title XVI]." *Id.* §§ 1320b-20(b)(4)(A), 1320b-21(f)(1). As the Comptroller General has explained, "SSA receives its operating appropriations in the form of an annual lump-sum 'Limitation on Administrative Expenses' (LAE), SSA's equivalent of a 'Salaries and Expenses' appropriation." *Refreshments at Award Ceremony*, 65 Comp. Gen. 738, 739 (1986). Through the LAE, "Congress prescribes . . . the total amount in all the trust funds that is available during the fiscal year for the purpose of administering various SSA programs." *District of Columbia's Reporting and Recording Obligations for Disability Determination Services*, 60 Comp. Gen. 452, 453 (1981).

The LAE typically provides that "[f]or necessary expenses, . . . not more than [a specified amount] may be expended, as authorized by section 201(g)(1) of the Social Security Act, from any one or all of the trust funds referred to" in that section. *See, e.g.*, Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. F, tit. IV, 125 Stat. 786, 1108 (2011) ("2012 LAE"); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, div. D, tit. IV, 123 Stat. 3034, 3277–78 (2009); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, tit. IV, 119

Stat. 2833, 2877 (2005); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, app. D, tit. IV, 113 Stat. 1501, 1501A-271 (1999).[1] Section 201(g)(1), in sum,

> authorized to be made available for expenditure, out of any or all of the Trust Funds, such amounts as the Congress may deem appropriate to pay the costs of the part of the administration of this subchapter [i.e., title II of the Social Security Act] . . . [and] subchapter XVI of this chapter [i.e., title XVI] . . . for which the Commissioner of Social Security is responsible.

42 U.S.C. § 401(g). The incorporation of section 201(g) in the LAE makes funds covered by that appropriation available for the administration of titles II and XVI. The funding provisions in sections 1149 and 1150 therefore direct that WIPA and PABSS be funded out of the LAE. *See* GAO Opinion at 2.

In addition to directing the SSA to draw funds for the programs from the appropriation authorized by section 201(g), sections 1149 and 1150 include specific authorizations of appropriations. 42 U.S.C. §§ 1320b-20(e), 1320b-21(h).[2] When Congress first passed the Ticket to Work

[1] On September 28, 2012, Congress passed a joint resolution making continuing appropriations for fiscal year 2013. Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, 126 Stat. 1313 (2012). This continuing resolution ("CR") provided funding "at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2012 and under the authority and conditions provided in such Acts, for continuing projects or activities . . . that are not otherwise specifically provided for in [the CR], that were conducted in fiscal year 2012, and for which appropriations, funds, or other authority were made available" in these acts. *Id.* § 101(a). One of the applicable appropriations acts contained the 2012 LAE. *Id.* § 101(a)(8). Because the CR continued the 2012 LAE, our analysis applies equally to funds available under the CR. For the sake of clarity, we will refer throughout this opinion to the 2012 LAE, as it was the year in which this issue first arose, and both SSA's and the GAO's analyses address that year's appropriation.

[2] As the Congressional Budget Office ("CBO") has explained, "[t]he term 'authorization' is used to describe two types of laws. One is an 'organic,' or 'enabling' statute, which creates a federal agency, establishes a federal program, prescribes a federal function, or allows a particular federal obligation or expenditure within a program." CBO, *Unauthorized Appropriations and Expiring Authorizations* at 5 (Jan. 2012) ("*Unauthorized Appropriations*"), http://www.cbo.gov/sites/default/files/cbofiles/attachments/01-13-UAEA_Appropriations.pdf. The second is "a specific provision that authorizes the appropriation of funds . . . to carry out the program or function established in the enabling

Act, it authorized appropriations for WIPA ($23,000,000) and PABSS ($7,000,000) for five years, from 2000 to 2004. Pub. L. No. 106-170, §§ 121, 122, 113 Stat. at 1890–91. In 2004, Congress extended these specific authorizations of appropriations for another five years; and in 2009 and 2010, it enacted one-year extensions. WIPA and PABSS Extension Act of 2010, Pub. L. No. 111-280, § 2, 124 Stat. 2903, 2903; WIPA and PABSS Reauthorization Act of 2009, Pub. L. No. 111-63, § 2, 123 Stat. 2001, 2001; Social Security Protection Act of 2004, Pub. L. No. 108-203, § 407, 118 Stat. 493, 527. The most recent extension expired in 2011.

B.

Faced with the expiration of these specific authorizations of appropriations, the SSA concluded that it could not continue WIPA and PABSS with funds from the 2012 LAE. The SSA read the Comptroller General's decision in *Authority to Continue Domestic Food Programs*, 55 Comp. Gen. 289 (1975) ("*Domestic Food Programs*"), and related guidance from the GAO to instruct that "if an agency's authorization of appropriations for a program expires, the agency can continue the program only if the subsequent appropriation (or continuing resolution) specifically provides for the program, or if congressional intent to continue the program is clear in the appropriation's legislative history." Letter for Julia C. Matta, Assistant General Counsel for Appropriations and Budget, GAO, from David F. Black, General Counsel, SSA, *Re: (B-323433) Availability of Appropriations for Social Security Administration's Work Incentives Planning and Assistance Program (WIPA) and Protection and Advocacy for Beneficiaries of Social Security Program (PABSS)* at 7 (July 27, 2012) ("SSA Opinion"). In this case, the SSA observed, Congress had "deviated from its historic practice of reauthorizing appropriations for the WIPA and PABSS programs," and neither the 2012 LAE nor its legislative history mentioned

statute. Such a provision constitutes guidance to the Congress regarding the amount of funding that will be necessary to implement the enabling statute." *Id.*; *see also* 1 Government Accountability Office, *Principles of Federal Appropriations Law* 2-40 (3d ed. 2004) (distinguishing between "'enabling' or 'organic legislation' and 'appropriation authorization' legislation"). For the purposes of this opinion, we, like the CBO and the GAO, use the term authorization in the latter sense, and will usually refer to "authorization of appropriations" for clarity. Some of the sources we draw on, however, may use the term in the former sense.

them. *Id.* at 7–8. Moreover, the SSA thought that the legislative history of the prior reauthorizations was '"particularly clear' that Congress repeatedly contemplated that the . . . programs would lapse without reauthorization of appropriations." *Id.* at 8.[3] Applying to these facts the test it gleaned from *Domestic Food Programs* and GAO guidance, the SSA concluded that the 2012 LAE was not available for WIPA and PABSS. *Id.*

The Commissioner informed the Subcommittee on Social Security of the House Ways and Means Committee that it was operating the programs under grants initiated in fiscal year 2011 and planned to stop the programs when those grants expired. *See* Letter for Sam Johnson, Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives, from Michael J. Astrue, Commissioner, SSA (Mar. 9, 2012); *see also Work Incentives in Social Security Disability Programs: J. Hearing Before the Subcomm. on Soc. Sec. & Subcomm. on Human Resources of the H. Comm. on Ways & Means*, 112th Cong. 10, 19 (2011) (statement of Robert W. Williams, Associate Comm'r, SSA) ("Unless we receive reauthorization, the money for the WIPA and PABSS programs will effectively run out on June 30, 2012 and September 29, 2012, respectively."). The Chairman of the Subcommittee sought the legal opinion of the GAO.

The GAO responded with an opinion dated August 14, 2012, concluding that SSA could, in fact, continue WIPA and PABSS using the 2012 LAE. *See* GAO Opinion. The GAO first noted that "although the authorizations of appropriations have expired, [the] SSA has enabling legislation, that has not expired, and it has an appropriation legally available to cover program costs." *Id.* at 5. Next, because "there is no general requirement that an authorization of appropriations precede an appropriation," the GAO "d[id] not read the absence of an authorization of appropriations to defeat clearly established program authorities set out in the enabling legislation." *Id.* In sum, "[b]ecause the program authority in the enabling

[3] As an example, the SSA noted that the Senate managers of the bill that included the first reauthorization of appropriations had explained that the provision "extend[ing] the authorization to appropriate funding for these programs" was needed because the "SSA cannot continue to fund the BPAO [now WIPA] and PABSS programs beyond fiscal year 2004 without an extension of authorization." 149 Cong. Rec. 32,371 (2003). The other evidence cited by the SSA consists of similar statements by individual members of Congress regarding the 2009 and 2010 extensions. *See* SSA Opinion at 3–4.

statutes ha[d] not expired, and [the] SSA ha[d] an appropriation that is available to cover the costs of these programs, [the GAO] conclude[d] that [the] SSA ha[d] adequate authority to continue both programs." *Id.* at 6.[4]

The GAO also considered arguments that a contrary conclusion was compelled by the legislative history of the acts that had previously extended the authorizations of appropriations and by the Comptroller General's decision in *Domestic Food Programs*. The previous extensions, it explained, "provided Members [of Congress with] opportunit[ies] to exercise program oversight and to express the need to continue the programs," and their legislative histories must be read in that context. GAO Opinion at 5. Further, legislative history could not "override the existing statutory program authorities and an appropriation legally available to cover program costs." *Id.* With respect to *Domestic Food Programs*, the GAO acknowledged that the Comptroller General had concluded that "the specific inclusion of the School Breakfast Program in a continuing resolution provided sufficient authority for the Department of Agriculture to continue the program despite the expiration of the authorization of appropriations." *Id.* But the GAO explained that the earlier decision "did not establish a requirement . . . that only a specific program reference in an appropriation act would override the expiration of an authorization of appropriation." *Id.* at 5–6.

II.

A.

We begin with several well-established principles. First, "[i]t is axiomatic that an agency must have legal authority to perform its functions and, if it is to spend public monies, appropriated funds." *Funding for the*

[4] This conclusion appears to be consistent with the views of the CBO, another office in the Legislative Branch. The CBO is required by statute to provide a report to Congress every January detailing "[a]ll programs and activities funded for the current fiscal year for which authorizations of appropriations have expired." CBO, *Unauthorized Appropriations* at 5 (citing section 203(e) of the Congressional Budget and Impoundment Control Act of 1974). In its most recent report, the CBO "lists the programs and activities funded by an appropriation for fiscal year 2012 whose authorization of appropriations has expired." *Id.* at 7. That list includes both WIPA and PABSS, *id.* app. A, at 53, suggesting that the CBO viewed the SSA's 2012 appropriation as available to fund the programs during that fiscal year.

Critical Technologies Institute, 16 Op. O.L.C. 77, 79 (1992). An agency's legal authority "typically derives from its 'organic' or 'enabling' statute," and its appropriated funds "must have been drawn from the Treasury pursuant to a duly enacted statute in accordance with Article I, Section 9 of the Constitution, which provides that '[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by law.'" *Id.* (quoting U.S. Const. art. I, § 9, cl. 7); *see also* Memorandum for General Brent Scowcroft, Assistant to the President for National Security Affairs, from J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel, *Re: Expenditure of Appropriated Funds in the Absence of the Intelligence Authorization Act for FY 1991* at 3 (Nov. 16, 1990) ("Luttig Opinion") ("As a general matter, . . . the legal power to perform governmental functions and an appropriation from Congress are each a necessary condition, and together are a sufficient condition, for lawful spending.").

Second, "[a] lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan* ("*UAW*"), 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.); *see also Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is [an] administrative decision traditionally regarded as committed to agency discretion."). Hence our repeated advice that, "if the activity or function is one which Congress has elsewhere given the agency authority to perform, its funding does not depend upon its being singled out for specific mention each year in the appropriation process." *Funding for the Critical Technologies Institute*, 16 Op. O.L.C. at 80 (internal quotation marks and brackets omitted).

Third, an agency with sufficient legal authority in its enabling legislation generally is "legally authorized to expend funds in accordance with the appropriation Act even if an authorization bill is not enacted," but it may not do so if Congress has imposed restrictions on the agency's spending authority "in the appropriation Act itself or in some other law." Memorandum for Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Effect of Lack of an Act Authorizing Appropriations* at 1 (Sept. 12, 1978) ("Harmon

Opinion"); *see also* Luttig Opinion at 2–3.[5] While there is "no constitutional requirement that an appropriation Act must be preceded by an Act authorizing sums to be appropriated," this Office has recognized that "Congress could act by statute to require that appropriations not be spent by Executive agencies in the absence of authorization." Harmon Opinion at 2–3; *see also* 1 Government Accountability Office, *Principles of Federal Appropriations Law* 2-41 (3d ed. 2004) ("*Federal Appropriations Law*") ("There is no general requirement, either constitutional or statutory, that an appropriation act be preceded by a specific authorization act."). Such "an express statutory authorization requirement," Luttig Opinion at 4, might limit an agency's ability to spend appropriated funds, but the precise language of the relevant statute must be carefully examined to determine whether it restricts spending in the absence of an authorization of appropriations. *See, e.g.*, *id.* at 21–24 (suggesting that one such provision was intended "to enforce specific funding allocations in annual authorization acts" and did not itself "require an annual authorization for the lawful expenditure of appropriated funds"); Harmon Opinion at 6 (concluding that "the statute was to be determinative whether sums were authorized for Department appropriations, but was to impose no legal duties or responsibilities on its own"); *see also Nat'l Ctr. for Mfg. Scis. v. Dep't of Def.*, 199 F.3d 507, 510 (D.C. Cir. 2000) ("Because 10 U.S.C. § 114(a)(2) requires authorization of these funds before they become available [for obligation], appropriation alone is insufficient.").

Applying these principles here, we conclude that the 2012 LAE was available to the SSA to fund WIPA and PABSS. First, the SSA has both legal authority and appropriated funds for both programs. Sections 1149 and 1150 of the Social Security Act expressly authorize (and section 1149 requires) the Commissioner to establish programs along the lines of WIPA and PABSS. And Congress provided the SSA with "operating

[5] "Authorization legislation is not ordinarily essential for the lawful obligation or expenditure of appropriated funds and, in practice, some agencies operate without budget authorization legislation." Luttig Opinion at 3. Indeed, the CBO reported last year that "[s]everal large agencies or programs ha[d] expired authorizations, including the National Institutes of Health (with appropriations of $31 billion for 2012), the Coast Guard (with appropriations of $10 billion for 2012) and the Community Development Block Grant program (with appropriations of $3 billion for 2012)." CBO, *Unauthorized Appropriations* at 7.

appropriations" in the 2012 LAE. Second, the lump-sum nature of the 2012 LAE provided the SSA with discretion to allocate the provided funds "among . . . permissible objects." *UAW*, 746 F.2d at 861. The only restriction in the text of the appropriation was that the funds be spent on the administration of certain titles of the Social Security Act, including titles II and XVI. Because sections 1149 and 1150 expressly require that programs established thereunder be paid for out of funds dedicated to the administration of titles II and XVI, these programs are "permissible objects" for the lump-sum appropriation. Third, we are aware of no statute that would forbid the expenditure of otherwise available appropriated funds on WIPA and PABSS without specific authorizations of appropriations. Because there is no such prohibition, and because the SSA has statutory authority to administer the programs and appropriated funds are available for them, we conclude that the SSA was legally authorized to continue WIPA and PABSS using the 2012 LAE appropriation.

B.

This is, concededly, not a case in which Congress has granted an agency authority to carry out a program in its organic act and then simply appropriated funds for that program without ever enacting legislation expressly authorizing those appropriations. Here, Congress included specific authorizations of appropriations for WIPA and PABSS in the Ticket to Work Act, extended those authorizations several times, and then permitted them to expire. The question therefore arises whether this sequence of events—the enactment and expiration of legislation authorizing appropriations for particular programs—somehow changes the application of the general rules described in Part II.A above. Our view is that the guiding principles set out in Part II.A govern whether an authorization of appropriations has expired (as here) or never existed at all.

Authorizations of appropriations, in and of themselves, are primarily of importance to Congress. Congressional rules prohibit appropriations not previously authorized by law, *see* House Rule XXI(2), Rules of the House of Representatives, H.R. Res. 5, 113th Cong. (2013); Senate Rule XVI(1), Standing Rules of the Senate, in Senate Manual, S. Doc. No. 112-1, at 14 (2011), and the responsibilities for authorization and appropriation are assigned to different committees. Authorizing, or legislative, committees are "charged with making substantive policy as well as recommending spending levels to fund programs in their jurisdiction," while appropriation committees are "responsible for determining how much money will be allocated to those programs." Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. Rev. 637, 649–50 (2012); *see also* 1 *Federal Appropriations Law* at 2-40 to 2-41 ("Like the organic legislation, authorization legislation is considered and reported by the committees with legislative jurisdiction over the particular subject matter, whereas the appropriation bills are exclusively within the jurisdiction of the appropriations committees"). Thus, authorizations of appropriations are "usually internal congressional tools to ensure that the allocation of decisional responsibility among the congressional committees is respected." Luttig Opinion at 3. As then-Assistant Attorney General Scalia explained, "[w]hile th[e] rule is binding as to internal . . . procedure, we find no basis for concluding that it has any legal effect after passage of an appropriation." Memorandum for W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Status of DEA Appropriation Pending Final Action on Authorization Measure* at 2 (Oct. 9, 1974) ("Scalia Opinion"); *see also* Luttig Opinion at 3 n.4 ("[T]he only effect of these rules is internal to Congress: the offending appropriation is subject to a point of order."). We believe it follows that, if an agency has legislative authority to conduct a program and an appropriation available to fund it, it should not matter whether Congress had, at some point in the past, enacted and let lapse an authorization of appropriations that, from the agency's perspective, had never been required. *See* Luttig Opinion at 3 ("An agency's authority to function and spend, which derives from substantive legislation or the Constitution, . . . must be distinguished from authorization legislation through which Congress authorizes itself to appropriate funds. The former, but not the latter, is essential for an agency to lawfully obligate or expend public monies."); *see also* 1 *Federal Appropriations Law* at 2-41 ("An authorization act is basically a directive to Congress itself, which Congress is free to follow or alter (up or down) in the subsequent appropriation act."). Here, as described above, the SSA has authority to conduct the programs, a direction for their funding, and an available appropriation; thus the expiration of the authorizations has no "legal effect" on the SSA's ability to conduct those programs. Scalia Opinion at 2.

In some situations, provisions that authorize appropriations are not solely of relevance to Congress because they also provide an agency with necessary substantive authority to carry out a program. In those circumstances, the agency's authority with respect to the program would be the same whether such an authorization had expired or never existed at all—either way, the agency would have none. "As a general rule, most activities carried out by an agency are permanently authorized by that agency's organic legislation or other statutes that do not have expiration dates." *Continuation of Agency Activities During a Lapse in Both Authorization and Appropriation*, 6 Op. O.L.C. 555, 555 n.1 (1982) ("*Continuation of Agency Activities*"). But if legislative authority "for an agency's activities . . . [is provided] in bills traditionally adopted annually which authorize both specific activities and appropriations for a particular fiscal year, then the authority to engage in those activities expires unless authority to continue them can be derived from other statutes." *Id.*; *see also* Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Legal and Practical Effect of the Lack of an Act Authorizing Appropriations for the Department of Justice* at 1 (Mar. 8, 1982) ("The absence of an authorization act . . . has legal implications to the extent that provisions in an authorization act would authorize expenditure of appropriated funds where no existing authority is in force."). When the provision authorizing appropriations constitutes the exclusive legal authority for the program, the expiration of the provision puts the agency in the same position it was in before the provision was enacted. The agency has no authority, and it is the absence of authority, not the reason for that absence, that matters. In this case, the SSA has permanent legislative authority to carry out WIPA and PABSS. The specific authorizations of appropriations conferred no unique authority on the SSA (to the extent they conferred any authority at all), and their expiration therefore did not result in any diminution of the SSA's authority with respect to the programs. *Cf. Continuation of Agency Activities*, 6 Op. O.L.C. at 555 ("The general rule relating to a lapse in an agency's authorization [i.e., legislative authority] is that activities continue to be authorized, notwithstanding the lapse of a specific authorization, to the extent that they were authorized prior to the enactment of the specific authorization.").

Finally, our opinions support the conclusion that the expiration of an authorization of appropriations has no unique consequence for an agency's ability to spend appropriated funds on a program for which it has sufficient legal authority. In 1974, this Office was asked if appropriations for the Drug Enforcement Administration ("DEA") could be expended "notwithstanding Congressional inaction on a renewed authorization for this appropriation, the prior authorization for which expired on June 30, 1974." Scalia Opinion at 1. We found no authority to suggest "that the propriety of expenditures of an enacted appropriation is affected in any manner by the fact that the appropriation was not authorized." *Id.* at 2. Nor, of special relevance here, "d[id] we find it legally significant that DEA appropriations had previously been authorized." *Id.* We concluded instead that "the DEA appropriation, once enacted, can be expended, notwithstanding the absence of an authorization for that appropriation." *Id.*

More recently, we considered "whether the Central Intelligence Agency [("CIA")] and the other agencies that perform intelligence and intelligence-related activities may obligate and expend appropriated funds for these activities, in the absence of the Intelligence Authorization Act" for that year. Luttig Opinion at 1. The question arose, we specifically noted, "because Congress has permitted the CIA's authorization to lapse." *Id.* Our opinion began with an analysis very similar to that laid out in Part II.A: we confirmed that "the CIA has appropriated funds" available and that its "organic legislation and the Constitution . . . provide ample power for the CIA to perform its intelligence duties," and we concluded that "[t]he CIA accordingly may draw upon any available appropriated monies to fund its various intelligence activities, absent an express statutory authorization requirement." *Id.* at 2, 4.[6]

C.

Our conclusion in this matter is consistent with the views of the GAO.[7] Indeed, that office issued an opinion that not only reached the conclusion

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[6] We went on to reason that, "on the assumption" that such a requirement did exist for the CIA, it was satisfied by a standing authorization to appropriate funds "necessary and appropriate to carry out" the National Security Act of 1947. Luttig Opinion at 5, 25.

[7] The GAO is part of the Legislative Branch, and the Comptroller General is an officer thereof. *See Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986). While we are not obligated to follow their opinions, *see Prioritizing Programs to Exempt Small Businesses from Competition in Federal Contracts*, 33 Op. O.L.C. 284, 302–03 (2009), we nevertheless

that the 2012 LAE was available to fund WIPA and PABSS, but did so through reasoning quite similar to ours. The GAO found that the "SSA has enabling legislation that has not expired" in section 1149, which "requires [the] SSA to administer a work incentives planning and assistance program," and section 1150, which "authorizes it to administer an employment services program for disabled beneficiaries." GAO Opinion at 5 (punctuation omitted). It also found that the SSA "has an appropriation that is legally available to cover the costs of these programs" because "[t]he enabling statutes for both programs provide that their costs be paid out of [the] SSA's administrative funds, and Congress provided [the] SSA with an LAE appropriation for fiscal year 2012." *Id.* Noting that "there is no general requirement that an authorization of appropriations precede an appropriation," the GAO concluded that the SSA "has adequate authority to continue the two programs at issue." *Id.*

The SSA and the GAO disagree on the question whether this outcome is consistent with earlier decisions of the Comptroller General and related portions of the GAO's treatise on appropriations law. They focus most heavily on the Comptroller General's decision in *Domestic Food Programs*. As an initial matter, we are uncertain that *Domestic Food Programs* is on point. In that case, the Comptroller General set out a rule for determining when "the appropriation of funds for a program whose authorization is due to expire . . . confers the necessary authority to continue the program." 55 Comp. Gen. at 292. In other words, we understand *Domestic Food Programs* to address a situation in which the expiring "authorization" provided not only an instruction to Congress but also the agency's substantive authority to carry out the program. *See supra* Part II.B (discussing situations in which provisions authorizing appropriations also confer substantive authority).[8] Subsequent Comptroller General

have repeatedly recognized that "[t]he opinions and legal interpretations of the General Accounting Office and the Comptroller General often provide helpful guidance on appropriations matters and related issues," *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments*, 36 Op. O.L.C. 77, 89 n.8 (2012) (internal quotation marks omitted).

[8] The three programs at issue in *Domestic Food Programs* were the School Breakfast Program, the Special Food Service Program for Children, and the Special Supplemental Food Program. 55 Comp. Gen. at 290. To take one example, the original authority for the

opinions support this understanding. *See, e.g.*, *In re Railroad Rehabilitation and Improvement Fund*, 65 Comp. Gen. 524, 527 (1986) (explaining that, in *Domestic Food Programs*, "[t]he enabling act for the School Breakfast Program expired on June 30, 1975," but the program could "continue for as long as the continuing resolution was in effect").[9]

Moreover, even if the expiring "authorization" in *Domestic Food Programs* were solely an authorization of appropriations, the situation that the SSA confronts here would be different to the extent that there are applicable appropriations authorizations that have not expired. The specific authorizations of appropriations in sections 1149(d) and 1150(h) have

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School Breakfast Program was created by section 4(a) of the Child Nutrition Act of 1966, which read:

> There is hereby authorized to be appropriated for the fiscal year ending June 30, 1967, not to exceed $7,500,000; and for the fiscal year ending June 30, 1968, not to exceed $10,000,000, to enable the Secretary to formulate and carry out . . . a pilot program to assist States . . . to initiate, maintain, or expand nonprofit breakfast programs in schools.

Pub. L. No. 89-642, § 4(a), 80 Stat. 885, 886. The statute was amended several times before 1975 to authorize funds for additional years, but because no other provision independently granted the Secretary authority to carry out this program, that authority remained temporary. *Cf.* S. Rep. No. 94-259, at 15 (1975) ("The legal authority for the school breakfast program, the special food service program for children, and the special supplemental food program for women, infants, and children (WIC) is scheduled to expire this year."). Shortly after *Domestic Food Programs* was decided, Congress amended section 4(a) to make the authorization of appropriations, and with it the Secretary's substantive authority, permanent. *See* National School Lunch Act and Child Nutrition Act of 1966 Amendments of 1975, Pub. L. No. 94-105, § 2, 89 Stat. 511, 511 (1975).

[9] In its recent opinion, the GAO distinguished *Lite Industries, Inc.*, 65 Comp. Gen. 318 (1986), another Comptroller General decision relied upon by the SSA, as "not applicable here because that decision involved the expiration of program authority." GAO Opinion at 5 n.7. We also find *Lite Industries* to be distinguishable on that basis. As explained in text, we think *Domestic Food Programs* can be distinguished on the same ground, although the GAO does not do so. *See* GAO Opinion at 5; *see also* 2 *Federal Appropriations Law* at 8-32 (describing *Domestic Food Programs* as involving "the expiration of the appropriation authorization legislation"). As explained above, however, the GAO has concluded that the SSA has both program authority and available appropriations here, and that the expired authorizations of appropriations do not eliminate the SSA's ability to spend to carry out those programs. *See supra* Part I.B (summarizing the GAO Opinion); *see also* GAO Opinion at 6 ("Where an agency has statutory authority or a statutory requirement to carry out a particular activity, the presence or absence of an authorization of appropriations is not determinative.").

lapsed, but section 201(g)(1) continues to authorize Congress to make funds available for "the costs of . . . the administration" of titles II and XVI (among others). And because sections 1149(b)(4) and 1150(f)(1) designate "amounts made available for the administration of [title] II . . . and [title] XVI" as the source of funding for WIPA and PABSS, these programs appear to fall within the scope of the permanent authorization in section 201(g)(1).[10] Prior GAO guidance also suggests that the substantive provisions of sections 1149 and 1150 could provide their own authorization of appropriations. *See* 1 *Federal Appropriations Law* at 2-41 ("The existence of a statute (organic legislation) imposing substantive functions upon an agency that require funding for their performance is itself sufficient authorization for the necessary appropriations."). Either way, it would appear that appropriations for "[b]oth programs are permanently authorized," as Representative Xavier Becerra (one of the co-sponsors of the Ticket to Work Act) declared in 2012. *See* 158 Cong. Rec. E1186 (daily ed. June 29, 2012).[11]

Finally, even assuming that *Domestic Food Programs* applies to situations where only an authorization of appropriations has expired (and

[10] Indeed, if WIPA and PABSS were not covered by the authorization of appropriations in section 201(g)(1), it would appear that using any LAE to fund them would violate the terms of the appropriation. *See supra* Part I.A (explaining that the LAE typically provides that funds "may be expended, as authorized by section 201(g)(1) of the Social Security Act").

[11] Construing another provision to permanently authorize appropriations for WIPA and PABSS would not necessarily render the specific authorizations in sections 1149 and 1150 superfluous. The more specific provisions might have served to signal to (i) the appropriations committee how much to adjust the LAE to account for the programs, *see supra* Part II.B (discussing the functions of authorizations of appropriations within Congress), and (ii) the SSA how much of the LAE to spend on them, *cf.* 1 *Federal Appropriations Law* at 2-50 to 2-51 ("Applying the principle that an appropriation must be expended in accordance with the related authorization unless the appropriation act provides otherwise, [the] GAO has concluded that the agency must observe [an] earmark [specified in the authorization]."). The Luttig Opinion appears to address another situation in which Congress enacted both a general permanent authorization and more specific annual authorizations. *Id.* at 2, 5 (noting that the CIA did "not have an annual intelligence authorization bill currently in force" because the most recent one had expired, but concluding that Congress had "authorized the appropriation of funds for those activities [the CIA would undertake in 1991] through the permanent authorization in . . . 50 U.S.C. § 411").

statutory authority for the program remains in place), and that the relevant authorizations of appropriations for WIPA and PABSS have expired, we do not find sufficient "indication of contrary [congressional] intent" to overcome the presumption that the 2012 LAE "confers the necessary authority to continue the program[s]." *Domestic Food Programs*, 55 Comp. Gen. at 292 (explaining that, "in the absence of [such] indication," "the appropriation of funds for a program whose authorization is due to expire during the period of availability of the funds confers the necessary authority to continue the program during that period of availability"). Rather, we view the interplay of the 2012 LAE and pre-existing statutes to reflect congressional intent that the programs continue.

The SSA points to several pieces of legislative history relating to previous extensions of the authorizations of appropriations in which legislators warn that the programs would end if the reauthorizations were not enacted. *See, e.g.*, *supra* note 3. This prior legislative history has limited value in assessing congressional intent with respect to the 2012 LAE. Moreover, more recent evidence suggests that members of Congress did not view an additional extension of the authorizations of appropriations in sections 1149 and 1150 as necessary to continue the programs. For example, when introducing a bill to ensure continuation of WIPA and PABSS, Representative Becerra explained that the prior "legislation . . . to extend SSA's specific authorization to use already-appropriated operating budget funds" was passed "[t]o reinforce and clarify the underlying law" that already "permanently authorized" the programs. 158 Cong. Rec. E1186 (daily ed. June 29, 2012). His proposed bill would have addressed the "problem" of the expiring authorizations of appropriations in sections 1149 and 1150 by removing these provisions altogether. *Id.* Similarly, Representative Sam Johnson, the Chair of the Subcommittee on Social Security of the House Ways and Means Committee, warned in 2009 that "these programs would expire . . . and the funding would end" if the authorizations of appropriations were not extended, 155 Cong. Rec. 19,579 (2009), but then criticized the SSA in 2012 for making a "decision to shut these programs down [that] was both yours alone and wrong." Letter for Michael J. Astrue, Commissioner of Social Security, SSA, from Sam Johnson, Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives (Aug. 15, 2012).

Regardless, we find the most persuasive evidence of Congress's intent with respect to the LAE in the appropriation itself. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) ("[T]he best evidence of Congress's intent is the statutory text."). The 2012 LAE provided the SSA with authority to "expen[d] [funds] as authorized by section 201(g)(1)" of the Social Security Act. Through this incorporation, as explained above, the 2012 LAE "made available . . . amounts . . . [for] the administration of" parts of the Social Security Act, including titles II and XVI. *See* 42 U.S.C. § 401(g)(l) (authorizing Congress to make such funds available for expenditure). Meanwhile, other sections of the Social Security Act provided the SSA with permanent authority to administer PABSS, a permanent requirement to administer a program such as WIPA, and an instruction that these programs be funded out of "amounts made available for the administration of" titles II and XVI. We view the enactment of an appropriation providing such amounts as a sufficiently "clear indication of the intent of Congress that th[ese] programs continue under the [LAE]," 55 Comp. Gen. at 292, to satisfy the rule of *Domestic Food Programs* and its progeny.[12]

III.

For the foregoing reasons, we conclude that the 2012 LAE was available to the SSA to fund WIPA and PABSS.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

[12] As the SSA observes, the Comptroller General and the GAO have previously explained that evidence of congressional intent to continue a program can be found in a specific program reference in the language of a continuing resolution or in "particularly clear" legislative history. *See* SSA Opinion at 7 (citing *Domestic Food Programs* and 2 *Federal Appropriations Law* at 8-32). We understand those authorities to establish that such conditions are sufficient to satisfy the rule of *Domestic Food Programs*, not that they are necessary to do so. *See* GAO Opinion at 5–6 (rejecting the argument that *Domestic Food Programs* "establish[ed] a requirement . . . that only a specific program reference in an appropriation act would override the expiration of an authorization of appropriation").

Whether the Millennium Challenge Corporation Is Subject to the Open Meeting Requirements of the Sunshine Act

The Millennium Challenge Corporation is not an "agency" for purposes of the open meeting requirements of the Sunshine Act.

May 3, 2013

MEMORANDUM OPINION FOR THE
VICE PRESIDENT AND GENERAL COUNSEL
MILLENNIUM CHALLENGE CORPORATION

Section 552b of the Government in the Sunshine Act (the "Sunshine Act" or "Act") provides that, with certain exceptions, "every portion of every meeting of an agency shall be open to public observation." Pub. L. No. 94-409, sec. 3(a), § 552b(b), 90 Stat. 1241, 1241 (1976) (codified at 5 U.S.C. § 552b(b) (2006)).[1] You have asked whether the Millennium Challenge Corporation ("MCC"), a government corporation established "to provide United States assistance for global development," 22 U.S.C. § 7701(1) (2006), is exempt from the open meeting requirements of the Sunshine Act on the ground that it is not an "agency" within the meaning of the Act. Letter for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from Melvin F. Williams, Jr., Vice President and General Counsel, Millennium Challenge Corporation, *Re: Request for Formal Opinion—Applicability of Sunshine Act to Millennium Challenge Corporation* at 1 (Apr. 9, 2013) ("MCC Letter"). Under the Act, an "agency" is "any agency, as defined in [5 U.S.C. § 552(f)[2]], headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate." 5 U.S.C. § 552b(a)(1). As you acknowledge, all nine members of the MCC Board of Directors are

[1] These and the other requirements in section 552b we refer to collectively in this memorandum as the open meeting requirements of the Sunshine Act.

[2] The text of 5 U.S.C. § 552b(a)(1) says "as defined in section 552(e) of this title," but section 552(e) was redesignated section 552(f) by section 1802(b) of Public Law 99-570, 100 Stat. 3207, 3207-49 (1986). *See* 5 U.S.C. § 552b note (2006).

PAS[3] appointees. In your view, however, the MCC should not be considered an "agency" because five of the nine directors are not appointed directly to the Board, but rather serve as members of the Board ex officio. MCC Letter at 6.

We agree that the MCC is not an agency for purposes of the Sunshine Act. Our longstanding position has been that an ex officio board member is not "appointed *to such position* by the President with the advice and consent of the Senate" under the Sunshine Act.[4] 5 U.S.C. § 552b(a)(1) (emphasis added). Although an argument could be made that an ex officio board member is appointed "to such position" when he is appointed to the underlying position, we have thought that the more natural reading of the statute requires a direct PAS appointment to a board or other "collegial body." Here, under 22 U.S.C. § 7703(c)(3) (2006), five of the nine directors are members of the Board by virtue of their appointments to other federal offices: the Secretary of State (appointed PAS pursuant

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[3] We use the shorthand "PAS" to refer to positions appointed by the President with the advice and consent of the Senate.

[4] *See, e.g.*, Letter for Harold D. Kessler, Acting Executive Director, Federal Labor Relations Council, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel at 2 (Oct. 27, 1976) ("Ulman Letter") ("Each of the three members of the [Federal Labor Relations] Council was appointed to his basic position by the President with the advice and consent of the Senate. . . . However, membership on the Council is an ex officio responsibility; and with respect to such membership, there is no 'appointment' subject to the advice and consent of the Senate. It follows that the Council is not an 'agency' within the meaning of 5 U.S.C.A. 552b(a)(1)."); Letter for Henry Rose, General Counsel, Pension Benefit Guaranty Corporation, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel at 2 (Dec. 28, 1976) ("The [Pension Benefit Guaranty Corporation] Board of Directors is made up of the Secretary of the Treasury, the Secretary of Labor and the Secretary of Commerce. . . . Each of those officials is appointed to his basic position by the President subject to confirmation by the Senate. However, membership on the Board of Directors is an ex officio responsibility, and with respect to such membership, there is not the requisite form of appointment."); Letter for Henry L. Judy, Vice President and General Counsel, Federal Home Loan Mortgage Corporation, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel at 1 (Feb. 15, 1977) ("Our office has considered application of the Sunshine Act to certain bodies composed of the heads of several separate agencies, i.e. persons appointed to their basic position by the President with Senate confirmation, but serving ex officio on the body in question. Regarding these bodies, we relied upon the 'appointed to such position' element of the Sunshine Act's definition and concluded that the ex officio bodies were not covered.").

to 22 U.S.C. § 2651a(a)(2) (2006)); the Secretary of the Treasury (PAS, 31 U.S.C. § 301(b) (2006)); the United States Trade Representative (PAS, 19 U.S.C. § 2171(b)(1) (2006)); the Administrator of the United States Agency for International Development (PAS, 22 U.S.C. §§ 2384(a), 6592 (2006)); and the Chief Executive Officer ("CEO") of the MCC (PAS, 22 U.S.C. § 7703(b)(2)(A)). The President appoints the remaining four members, with the advice and consent of the Senate, directly to the Board. 22 U.S.C. § 7703(c)(3)(B). Accordingly, a majority of the MCC directors have not been appointed "to such position[s]" by the President with the advice and consent of the Senate.

This interpretation is supported by the one published court of appeals decision on the subject, *Symons v. Chrysler Corporation Loan Guarantee Board*, 670 F.2d 238 (1981). In that case, the D.C. Circuit held that a government corporation with all five board members designated ex officio was not an "agency" under the Sunshine Act, notwithstanding the board members' PAS appointment to their respective underlying positions. The court concluded in *Symons* that the plain meaning of the phrase "appointed *to such position*" (emphasis added) excluded ex officio designees. *Id.* at 245. The court found no warrant in the legislative history to read the phrase "to such position" out of the statute; to the contrary, it noted that Congresswoman Bella Abzug, one of the sponsors of the Sunshine Act, had testified that "agencies whose members serve in an ex officio capacity would not be subject to the Sunshine Act." *Id.* at 242.[5] The court also cited advice given by this Office to the Federal Labor Relations Council, in which we stated that the Council was not an "agency" subject to the Sunshine Act, because all three of its members serve in that position ex officio. *Id.* at 243 & n.7 (citing Ulman Letter, *supra* note 4, at 2). Finally, the court noted that one agency had concluded in regulations implement-

[5] Specifically, Congresswoman Abzug testified that the National Security Council would not be covered by the Sunshine Act because its members are "not appointed to that position by the President"; rather, "they are appointed to other positions and . . . are ex officio members" of the Council. *Government in the Sunshine: Hearings on H.R. 11656 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 16 (1976).

ing the Sunshine Act that it was not covered by the Act because a majority of its board members occupied their positions ex officio. *Id.*[6]

One member of the panel in *Symons* dissented, pointing out that the phrase "to such position" could be read to refer to any position in which an individual will serve ex officio by virtue of an appointment, since at the time of appointment he would automatically assume the ex officio position as well. 670 F.2d at 246–47 (Wald, J., dissenting). Before *Symons*, the Comptroller General endorsed this same interpretation in determining that Amtrak, as then constituted, was an "agency" for purposes of the Sunshine Act. *See Printing by Government Printing Office for National Railroad Passenger Corporation*, 57 Comp. Gen. 773, 774–76 (1978). As the *Symons* majority held, however, this reading would render the phrase "to such position" "mere surplusage," "violat[ing] a fundamental rule of statutory interpretation—that in construing statutes courts should give effect, if possible, to every word used by Congress." 670 F.2d at 241–42 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). It is also worth noting that the committee reports on the Sunshine Act con-

[6] This agency was the Federal Open Market Committee ("FOMC") within the Federal Reserve Board. 42 Fed Reg. 13,300, 13,300 (Mar. 10, 1977) (codified at 12 C.F.R. § 281.2 (1978)) ("The FOMC's membership is composed of the seven members of the Board of Governors [of the Federal Reserve System] and five representatives of the Federal Reserve Banks who are selected annually in accordance with the procedures set forth in Section 12A of the Federal Reserve Act, 12 U.S.C. § 263(a). Members of the Board of Governors serve in an ex officio capacity on the FOMC by reason of their appointment as Members of the Board of Governors, not as a result of an appointment 'to such position' (the FOMC) by the President. Representatives of the Reserve Banks serve on the FOMC not as a result of an appointment 'to such position' by the President, but rather by virtue of their positions with the Reserve Banks and their selection pursuant to Section 12A of the Federal Reserve Act. It is clear therefore that the FOMC does not fall within the scope of an 'agency' or 'subdivision' as defined in the Sunshine Act and consequently is not subject to the provisions of the Act.").

A second agency, a review board within the Department of Defense, has also taken this position with respect to the Sunshine Act. DoD Directive 1000.20, 44 Fed. Reg. 11,220, 11,221, 11,223 (Feb. 28, 1979) (indicating that the Department of Defense Civilian/Military Service Review Board is not subject to the open meeting requirements of the Sunshine Act because its members—"one representative each from the Office of the Secretary of Defense and the Departments of the Army, Navy and Air Force, and the Department of Transportation when cases involve groups claiming active Coast Guard service"—might be PAS in their underlying positions but would not be appointed in that manner to the Review Board).

tained lists of agencies that were expected to be covered by the definition in the Act. Those lists, prepared in consultation with the Department of Justice, did not appear to include any agency that had a majority of its members designated ex officio. *See* H.R. Rep. No. 94-880, pt. 2, at 13–14 (1976); S. Rep. No. 94-354, at 15–16 (1975).

We have adhered to the interpretation adopted by the D.C. Circuit in *Symons* ever since the Sunshine Act was enacted. *See supra* note 4. *Symons* remains good law, and we are aware of no subsequent contrary authority. Following *Symons* and our prior advice, we conclude that the ex officio members of the MCC Board of Directors are not "appointed to such position" by the President with the advice and consent of the Senate and that the MCC therefore should not be considered an "agency" subject to the open meeting requirements of the Sunshine Act.

In reaching this conclusion, we have considered specifically whether the MCC should be distinguished from the entities considered by our prior advice, either because all of the directors who are appointed directly to the Board receive their appointment by the President, with the advice and consent of the Senate, or because the four private sector directors together with the CEO of the MCC constitute a majority of the Board. Neither of these features persuades us to reach a different conclusion. First, we believe that all members of the Board, including ex officio members, must be included when assessing whether a majority of the Board has been appointed "to such position" directly by the President, with the advice and consent of the Senate. As the Sunshine Act states, to be subject to the open meeting requirements of the Act, an agency must be "headed by a collegial body composed of two or more individual members, a majority *of whom* are appointed to such position by the President with the advice and consent of the Senate." 5 U.S.C. § 552b(a)(1) (emphasis added). "[W]hom" refers to the entirety of the collegial body. Thus, a majority of the members of the collegial body that heads the agency—and not just a majority of the members of the collegial body left over after the ex officio members are subtracted—must be PAS appointees. It does not matter here that a majority of the non-ex officio members (all four) of the MCC Board are PAS appointees. The denominator in the equation is the nine members of the Board as a whole, of whom only four are PAS appointees.

Second, we believe that the CEO of the MCC is properly regarded as one of these ex officio members, because by statute the CEO is appointed to a separate office and serves on the Board by virtue of that separate office. The MCC statute declares in one subparagraph (22 U.S.C. § 7703(b)(2)(A)) that "the Chief Executive Officer shall be appointed by the President, by and with the advice and consent of the Senate" and then declares in a separate subparagraph (*id.* § 7703(c)(3)(A)) that "[t]he Board shall consist of . . . the Secretary of State, the Secretary of the Treasury, the Administrator of the United States Agency for International Development, the Chief Executive Officer of the Corporation, and the United States Trade Representative." That the office of the CEO is distinct from the Board is underscored by the fact that the CEO "shall report to and be under the direct authority of the Board." *Id.* § 7703(b)(3).

For all these reasons, we agree with you that the MCC should not be considered an "agency" subject to the open meeting requirements of the Sunshine Act.

VIRGINIA A. SEITZ
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Office of Legal Counsel

Competitive Bidding Requirements Under the Federal-Aid Highway Program

The competitive bidding requirement of 23 U.S.C. § 112 imposes, in addition to procedural rules dictating the process by which bids are awarded, a substantive limitation on state or local bidding requirements that are unrelated to the bidder's performance of the necessary work.

Section 112's competitive bidding requirement does not preclude any and all state or local bidding or contractual restrictions that have the effect of reducing the pool of potential bidders for reasons unrelated to the performance of the necessary work. Rather, section 112 affords the Federal Highway Administration discretion to assess whether a particular state or local requirement unduly limits competition.

Generally, state or local government requirements that eliminate or disadvantage a class of potential responsible bidders to advance objectives unrelated to the efficient use of federal funds or the integrity of the bidding process are likely to unduly impede competition in contravention of the substantive component of section 112's competitive bidding requirement.

August 23, 2013

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
DEPARTMENT OF TRANSPORTATION

This memorandum responds to your office's request for an opinion regarding the requirement in 23 U.S.C. § 112 that state and local governments receiving federal-aid highway grant funds use competitive bidding in awarding highway construction contracts.[1]

Section 112 requires a state transportation department to award contracts using federal highway funds by "competitive bidding, unless the State transportation department demonstrates . . . that some other method is more cost effective." 23 U.S.C. § 112(b)(1) (2006); *see also id.* § 112(a) ("The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition."). For a bidding process to be "competitive," the state transportation department must award contracts for projects "only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria

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[1] *See* Letter for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, from Robert S. Rivkin, General Counsel, Department of Transportation (Oct. 3, 2012) ("DOT Letter").

of responsibility." *Id.* § 112(b)(1). A 1986 opinion of this Office concluded that section 112 obligated the Secretary of Transportation to withhold federal funding for highway construction contracts that were subject to a New York City law imposing disadvantages on a class of responsible bidders, where the city failed to demonstrate that its departure from competitive bidding requirements was justified by considerations of cost-effectiveness. *See Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements*, 10 Op. O.L.C. 101 (1986) ("*Competitive Bidding Requirements*"). Since the issuance of our 1986 opinion, the Federal Highway Administration ("FHWA"), the Department of Transportation ("DOT") agency that has been delegated authority to administer the Federal-Aid Highway Program, *see* 49 U.S.C. § 104 (2006); 49 C.F.R. § 1.85(a)(1) (2012), has taken the position that state or local bidding specifications or contract requirements that limit the pool of potential bidders violate section 112's competition requirement unless they directly relate to the bidder's performance of the necessary work in a competent and responsible manner. DOT Letter at 1, 3.

In connection with a reevaluation by DOT of FHWA's position, your office has asked whether section 112's competitive bidding requirement compels FHWA to adhere to this approach, or whether section 112 leaves room in some circumstances for state or local bidding requirements that may limit the pool of potential bidders for specific federal-aid highway construction contracts for reasons other than the bidder's ability to perform the work in a competent and responsible manner. *Id.* at 1, 7.[2] Answering your office's question involves resolving two related issues: (1) whether section 112(b)(1)'s requirement that contracts be awarded by "competitive bidding" imposes, in addition to procedural rules dictating the process by which bids are awarded,[3] any substantive limitation on state or local bidding requirements that are unrelated to the bidder's

[2] Although FHWA has promulgated regulations governing the policies, requirements, and procedures relating to federal-aid highway projects, *see* 23 C.F.R. pt. 635 (2012), your office has asked about, and we address, only the scope of the statutory requirements, *see* 23 U.S.C. § 112.

[3] Examples of such "procedural" rules are the process requirements that bids be solicited from a pool of potential responsible contractors based on specifications advertised in advance and that the contract be awarded to the lowest responsive bidder.

performance of the necessary work; and (2) if section 112(b)(1) imposes a substantive limitation, what the nature of that limitation is. As we explain in Part II below, in our view section 112's competitive bidding requirement has a "substantive" component. That is, even where a bidding process meets the procedural requirements of competitive bidding, it may nonetheless violate section 112's competitive bidding requirement in substance if responsive bidders are required to comply with state or local requirements that unduly limit the pool of potential bidders. However, we do not believe that the statute's competitive bidding requirement precludes any and all state or local bidding or contractual restrictions that have the effect of reducing the pool of potential bidders for reasons unrelated to the performance of the necessary work. Rather, we believe that section 112 affords the FHWA Administrator (as the Secretary's delegee) discretion to assess whether a particular state or local requirement unduly limits competition.

We address what unduly limiting competition entails in this context in Part III. A state or local requirement that has only an incidental effect on the pool of potential bidders or that imposes reasonable requirements related to the performance of the necessary work would not unduly limit competition. But a requirement that has more than an incidental effect on the pool of potential bidders and does not relate to the work's performance would unduly limit competition unless it promotes the efficient and effective use of federal funds. In assessing whether a requirement does so, FHWA may take into account both whether the requirement promotes such efficiency in connection with the letting of a particular contract and also whether it more generally furthers the efficient and effective use of federal funds in the long run or protects the integrity of the competitive bidding process itself. Where a state or local requirement serves these purposes, we believe the Administrator may reasonably determine, consistent with section 112, that the requirement does not unduly limit competition, even if it may have the effect of reducing the number of eligible bidders for a particular contract. Generally speaking, however, state or local government requirements that eliminate or disadvantage a class of potential responsible bidders (and thus have a non-trivial effect on the pool of such bidders) to advance objectives unrelated to the efficient use of federal funds or the integrity of the bidding process (or to the performance of the necessary work in a competent and responsible manner) are likely to unduly impede competition in contravention of the substantive component of section 112's competitive bidding requirement.

I.

Some background is necessary to place our reasoning in context. Pursuant to 23 U.S.C. §§ 104 and 302 (2006 & Supp. V 2011), FHWA disburses federal-aid highway funds to states, which administer those funds through their transportation departments. Section 112, on the letting of contracts, requires both (1) that federally funded highway construction projects performed or supervised by state transportation departments be awarded by contract through a competitive bidding process, unless an exception applies; and (2) that the Secretary of Transportation require whatever plans and specifications and methods of bidding as are necessary to be effective in securing competition. The section provides in relevant part:

> (a) In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.
>
> (b) *Bidding requirements.*—
>
> (1) *In general.*—Subject to paragraphs (2) and (3), construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

23 U.S.C. § 112(a), (b)(1). Section 112(d) bars state transportation departments and local subdivisions from entering into a contract awarded by competitive bidding pursuant to subsection (b) and subject to the provisions of section 112, "without compliance with the provisions of this section" and without "the prior concurrence" of the Secretary in the contract award. *Id.* § 112(d). In addition, Congress has delegated to the Secretary authority "to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions" of the title. *Id.* § 315 (2006).

In 1986, we considered the application of section 112 to a New York City law, Local Law 19, that authorized the city to impose disadvantages on bidders for city contracts who failed to sign an anti-apartheid certificate stating (1) that in the previous twelve months they had not conducted, and for the term of the impending contract they would not conduct, business with South Africa or Namibia; and (2) that in contracts to supply goods to the city, none of the goods originated in South Africa or Namibia. *Competitive Bidding Requirements*, 10 Op. O.L.C. at 101–02. Local Law 19 provided that if a bidder complying with the anti-apartheid certification requirement made a bid no more than five percent higher than a low bid submitted by a non-complying contractor, both bids were to be passed on to a city board. That board was authorized to determine that it was in the "public interest" to award the contract to a bidder other than the lowest responsible bidder. *Id.* at 102. New York City declared its intention to apply the law to federally funded projects. *Id.*

Our opinion concluded that section 112 required the Department of Transportation to withhold funding for highway construction projects subject to Local Law 19. We explained that section 112 "reflect[ed] a congressional judgment that the efficient use of federal funds afforded by competitive bidding is to be the overriding objective of all procurement rules for federally funded highway projects, superseding any local interest in using federal funds to advance a local objective." *Id.* at 103. We found that "[b]y imposing disadvantages on a class of responsible bidders," Local Law 19 "distort[ed] the process of competitive bidding" in order to advance a local objective "unrelated to the cost-effective use of federal funds." *Id.* In addition, the opinion emphasized, the 1983 amendment to section 112(b)(1)—which imposed the current requirement that departures from competitive bidding be justified by a demonstration that they are more cost-effective than the alternative—made clear that "the efficient use of federal funds is the touchstone by which the legality of state procurement rules for federally funded highway projects is to be tested." *Id.* at 105. By imposing disadvantages on a certain class of contractors (those who had not signed an anti-apartheid certificate), we concluded, the city may have discouraged responsible contractors from bidding and undermined the competitive bidding process without demonstrating that the requirement was cost-effective. *Id.* The opinion did not consider other types of bidding restrictions and did not address the legality of restrictions designed to protect the integrity of the competitive bidding process or to promote the efficient use of federal funds over the long term.

Your office has explained that, since the issuance of our 1986 opinion, FHWA has taken the position that, in the absence of federal statutory authorization, state or local requirements that restrict the pool of applicants available to bid on a federal-aid highway contract, or that otherwise favor certain potential bidders over others in ways unrelated to the capability of the bidder to perform the work, conflict with the competition requirements in section 112 and the agency's regulations implementing that section,[4] and therefore are not permitted. DOT Letter at 1–6. Consequently, FHWA has prohibited state and local grant recipients from adopting policy preferences restricting bidders' political contributions (so-called "pay-to-play" provisions), requiring equal benefits for domestic partners, or mandating the inclusion of local hiring preferences or project

[4] In this regard, FHWA's implementing regulations require, in part, that "[a]ctual construction work . . . be performed by contract awarded by competitive bidding," unless the state transportation department "demonstrates to the satisfaction of the Division Administrator that some other method is more cost effective or that an emergency exists," 23 C.F.R. § 635.104(a), and obligate the state transportation department to "assure opportunity for free, open, and competitive bidding." *Id.* To that end, the regulations prohibit approval of any "procedure or requirement for bonding, insurance, prequalification, qualification, or licensing of contractors" that, "in the judgment of the Division Administrator, may operate to restrict competition, to prevent submission of a bid by, or to prohibit the consideration of a bid submitted by, any responsible contractor, whether resident or non-resident of the State wherein the work is to be performed." *Id.* § 635.110(b). The regulations further provide that "[i]f any provisions of State laws, specifications, regulations, or policies may operate in any manner contrary to Federal requirements . . . to prevent submission of a bid, or prohibit consideration of a bid submitted by any responsible bidder appropriately qualified in accordance with § 635.110, such provisions shall not be applicable to Federal-aid projects." *Id.* § 635.112(d).

labor agreements, on the ground that these policy preferences violate section 112. *Id.* at 1, 4–6.

II.

We first address the threshold question of whether section 112(b)(1)'s requirement that federally aided construction projects be "performed by contract awarded by competitive bidding," 23 U.S.C. § 112(b)(1), contains a substantive component authorizing FHWA to examine bid specifications and conditions to determine whether they impede competition, or whether it requires only, as a matter of process, that the contract be awarded to the lowest responsive bidder, but otherwise leaves state and local governments free to impose on bidders whatever conditions they choose, including conditions that reduce the pool of potential bidders for reasons unrelated to the cost-effective use of federal funds.

In our 1986 opinion, we concluded that New York City's anti-apartheid certification requirement violated the procedural requirement of competitive bidding that contracts be awarded to the lowest responsible bidder and was therefore incompatible with the statute. *See Competitive Bidding Requirements*, 10 Op. O.L.C. at 104–07. However, our opinion also implicitly recognized that section 112's competitive bidding requirement has a substantive dimension that calls into question any state and local requirements that diminish the pool of eligible contractors, absent a showing of greater cost-effectiveness. *See, e.g.*, *id.* at 105 ("By imposing disadvantages on a certain class of contractors, New York City discourages responsible contractors from bidding and undermines the competitive bidding process."); *id.* ("The 1982 amendments . . . make clear that the efficient use of federal funds is the touchstone by which the legality of state procurement rules for federally funded highway projects is to be tested.").

We have reassessed our opinion in light of contrary dicta in a 2007 decision of the U.S. Court of Appeals for the Sixth Circuit, cited in the DOT Letter at page 5. In *City of Cleveland v. Ohio*, 508 F.3d 827 (6th Cir. 2007), the court sustained FHWA's withdrawal of federal funds from a Cleveland public works project on the ground that the city had incorporated a local hiring preference into the contract without advertising the preference in the bid specifications—a violation of section 112(b)(1), which prohibits the imposition of a requirement or obligation as a condition precedent to the award of a contract "unless such requirement or obligation . . . is specifically set forth in the advertised specifications." *Id.* at 843 (quoting 23 U.S.C. § 112(b)(1)). In dicta, the court added that the statute's reference to "competitive bidding" was intended to deal "*only* with the process of how bids are awarded—competitive bidding or 'some other method'—not the substance of the underlying contracts themselves." *Id.* at 841. The court rejected FHWA's argument that the public body awarding the contract was required to justify its "requirements or obligations" as "more cost effective" than competitive bidding, or necessitated by emergency. Instead, in the court's view, such conditions apply only when the body awarding the contract "seeks to depart from competitive bidding as the *method* for awarding a contract." *Id.* Thus, the court concluded that section 112(b) "by itself confers no authority upon the FHWA to evaluate substantive contract requirements to determine whether they might inhibit competition or disqualify otherwise qualified bidders." *Id.*[5]

Contrary to the Sixth Circuit's dicta, we continue to believe that section 112(b)(1) is best read to impose more than a procedural requirement that a state or local highway department accept the lowest responsive bid after soliciting bids from a pool of potential responsible bidders. Instead, section 112(b)(1) requires FHWA to evaluate state or local bidding specifications or contract requirements to determine whether they unduly inhibit competition. To explain how we reach this conclusion, we begin with the text of section 112, first examining the historical evolution of the statute and then describing the prevailing understanding of the concept of "competitive bidding" in 1954, when Congress enacted the express statu-

[5] Although *City of Cleveland* acknowledged that the Administrator would have discretion to disapprove of bidding specifications based on a judgment that they are not "consistent with the overall goals of the [Federal-Aid Highway Program]," 508 F.3d at 842, the court's dicta suggested that, consistent with section 112(b)(1), the Administrator could approve contract specifications that limit the pool of potential bidders for reasons unrelated to the performance of the contract, so long as the procedure of competitive bidding was followed. *Id.* at 841; *see also Bldg. & Constr. Trades Dep't v. Allbaugh*, 172 F. Supp. 2d 138, 161–62 (D.D.C. 2001) (in obligating the Secretary of Transportation to "require such plans and specifications and such methods of bidding as shall be effective in securing competition" in section 112(a), Congress was "clearly discussing the procedures for bid submission, and not the substantive requirements that a State may impose upon prospective bidders"; substantive requirements that bidders must fulfill are addressed in section 112(b)(1), and there "Congress explicitly *permitted* such requirements as long as they are lawful and bidders are given sufficient notice"), *rev'd on other grounds*, 295 F.3d 28 (D.C. Cir. 2002).

tory requirement that federally funded highway contracts be "awarded by competitive bidding." Finally, we address why language added to section 112(b) in 1968 to address the imposition of additional contract requirements after the end of the bidding process does not affect the meaning of "competitive bidding."

A.

In our view, the phrase "competitive bidding" in section 112(b)(1) is best read to impose both procedural and substantive requirements. Section 112(b)(1)'s requirement that contracts be "awarded by competitive bidding" must be read in the context of section 112 as a whole. The statute's text is focused on "securing competition," 23 U.S.C. § 112(a), on "cost effective[ness]," *id.* § 112(b), and on preventing "any action in restraint of free competitive bidding," *id.* § 112(c). It is difficult to reconcile section 112's evident and overriding focus on the efficient use of federal funds with a reading of its "competitive bidding" requirement that is purely procedural and thus indifferent to state or local restrictions that would shrink the pool of bidders for reasons unrelated to cost or efficiency.

The substantive dimension of the statute's competitive bidding requirement is particularly apparent when its text is considered in the context of its drafting history. Congress's commitment to competitive bidding for federally assisted highway construction projects—and Congress's understanding of what "competitive bidding" requires—can be discerned in the historical evolution of the statutory regime that culminated in 23 U.S.C. § 112, in substantially its current form, in the 1950s. In 1938, Congress amended the Federal-Aid Road Act of 1916, ch. 241, 39 Stat. 355, to adopt the precursor to what is now section 112(a). That statute required that the Secretary of Agriculture (then the agency head with authority to approve federally funded highway projects) approve, in connection with federally aided highway construction projects, "only such methods of bidding and such plans and specifications of highway construction for the type or types proposed as will be effective in securing competition and conducive to safety, durability, and economy of maintenance." Pub. L. No. 75-584, § 12, 52 Stat. 633, 636 (1938). As evidenced in the legislative history, Congress contemplated that this addition would promote "open competition in bidding." H.R. Rep. No. 75-2094, at 7 (1938) (using the heading "open competition in bidding" to describe the amendment); 83 Cong. Rec. 6385 (1938) (statement of Rep. Whittington) (the provision "says that there shall be competitive bidding" and that "all bids will be on an equal footing and that all bidders will be given equal treatment"). That history also suggests that Congress contemplated that the agency head with authority to approve federally funded highway projects would exercise a gate-keeping function in determining whether projects adequately provided for competitive bidding, with the result that "only plans, specifications, and methods that provide for competition will be approved." 83 Cong. Rec. 6385 (statement of Rep. Whittington).

Congress made those purposes even clearer in 1954, when it amended the statute to add the precursor to what is now section 112(b)(1). The new subsection provided:

> Highway construction work performed in pursuance of agreements between the Secretary of Commerce and any State highway department which requires approval by the Secretary of Commerce and which is financed in whole or in part by funds authorized under this or succeeding Acts, shall be performed by contract awarded by competitive bidding under such procedures as may by regulations be prescribed by the Secretary of Commerce, unless the Secretary of Commerce shall affirmatively find that, under the circumstances relating to a given project, some other method is in the public interest. All such findings shall be reported promptly in writing to the Committees on Public Works of the Senate and the House of Representatives.

Federal-Aid Highway Act of 1954, Pub. L. No. 83-350, § 17(a), 68 Stat. 70, 75 (1954). At the same time, Congress instructed that in any case in which the Secretary of Commerce approved highway construction work, the Secretary had to require as a condition precedent "a sworn statement," executed by or on behalf of the person or entity to which such contract is to be awarded, "certifying" that such person or entity "has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract." *Id.* § 17(b), 68 Stat. at 75 (codified at 23 U.S.C. § 112(c)).

The legislative history of the 1954 Act underlines that Congress adopted the more specific language requiring competitive bidding and the "sworn statement" requirement to eliminate collusion and obstacles to free competitive bidding. The Senate committee report accompanying the legislation, for example, explained that the committee adopted section 17 "to prohibit collusion or any other action in restraint of free competitive bidding in connection with any contract for highway construction work performed by cooperative agreements between the Secretary and any State highway department requiring approval by him and financed wholly or in part by funds authorized in this or succeeding acts." S. Rep. No. 83-1093, at 14 (1954); *see also* 100 Cong. Rec. 5124 (1954) (statement of Sen. Gore) (praising the provision as doing "a great deal to restrain what . . . amounts to a widespread practice of kickbacks of certain portions of the funds under highway contracts, collusion in restraint of free competitive bidding, and other malpractices"). Significantly, Congress also adopted section 17 to promote the most efficient use of federal funds. As the Chairman of the Senate Subcommittee on Public Roads emphasized in the floor debate: "The committee felt it was only proper that competitive bidding should be required in order to obtain the maximum number of roads in quality and quantity for the dollars spent." 100 Cong. Rec. 4671 (1954) (statement of Sen. Case).

In 1958, Congress amended and codified in 23 U.S.C. § 112(a) and (b) the above provisions from the 1938 and 1954 Acts. The revised subsections provided:

> (a) In all cases where the construction is to be performed by the State highway department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.
>
> (b) Construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the Secretary shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest. All such findings shall be reported promptly in writing to the Committees on Public Works of the Senate and the House of Representatives.

Pub. L. No. 85-767, § 112(a)–(b), 72 Stat. 885, 895 (1958). In addition, section 112(d) barred states and localities from entering into a contract awarded by competitive bidding pursuant to section 112(b) "without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof." *Id.* § 112(d), 72 Stat. at 895. Both the accompanying House and Senate committee reports clarified that the bill would place in one enactment "a clear, concise, up-to-date version of all the existing Federal highway laws in an orderly and logical arrangement," and that the bill was "not intended to change any of the fundamental and underlying concepts of existing Federal highway legislation or to make any changes of real substance." H.R. Rep. No. 85-1938, at 2 (1958); S. Rep. No. 85-1928, at 2 (1958); *see also* H.R. Rep. No. 85-1938, at 40 (confirming that the new section 112 derives from section 12 of the 1938 Act and section 17(a) of the 1954 Act); S. Rep. No. 85-1928, at 42 (same).

It is difficult to reconcile this history with a characterization of section 112's "competitive bidding" requirement as imposing a purely procedural constraint. Instead, Congress envisioned from the start that the head of the responsible federal agency (a designation that has changed over time) would ensure that state and local conditions on bidding would not impede competition and would decline to approve federally aided highway construction contract awards when federal competitive bidding requirements were not met. The current text of the statute supports this view. Section 112 mandates that the agency head, now the Secretary of Transportation, "require" "such plans and specifications and such methods of bidding as shall be effective in securing competition." 23 U.S.C. § 112(a). The statute further instructs that construction of each project "be performed by contract awarded by competitive bidding," unless the Secretary makes an exception. *Id.* § 112(b)(1); *see infra* note 14 (discussing the grounds for an exception). Finally, under the statute, the Secretary must concur in the decision to award any federally funded highway contract, 23 U.S.C. § 112(d), and must receive, as a condition precedent to that approval, a sworn statement certifying that the person or entity to whom a contract is to be awarded "has not . . . entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract," *id.* § 112(c). *See also Glasgow, Inc. v. FHWA*, 843 F.2d 130, 135 (3d Cir. 1988) (emphasizing the four instances in section 112 "in which Congress references the Secretary's obligation to ensure competitive bidding").

B.

Section 112(b)(1)'s requirement that federally funded highway contracts be "awarded by competitive bidding" must also be interpreted in light of the prevailing understanding of the concept of "competitive bidding" when Congress added that language to federal-aid highway requirements in 1954. "Competitive bidding" was not a novel concept when Congress enacted the Federal-Aid Highway Act of 1954. Instead, it was the subject of judicial rulings in federal and state courts, bid-protest decisions rendered by the Comptroller General, and widely cited treatises. These sources together confirm that the requirement of competitive bidding was understood then, as it is now, to have a substantive component, rendering invalid those bidding specifications that unduly restrict competition among potential responsible bidders.[6] Nothing in the legislative record suggests that in requiring competitive bidding in awards of federally aided highway construction contracts, Congress intended to depart from this general understanding.

A 1954 opinion of the U.S. Court of Appeals for the Ninth Circuit exemplifies this prevailing understanding. As the Ninth Circuit explained, "[t]he object of competitive bidding is to invite competition, by allowing all persons having the ability to furnish the supplies or materials or to perform the work to compete freely without any unreasonable restrictions." *Gamewell Co. v. City of Phoenix*, 216 F.2d 928, 933 (9th Cir. 1954), *amended on other grounds*, 219 F.2d 180 (9th Cir. 1955). Significantly, contract specifications "must be free of provisions, the effect of which would stifle competition." *Id.* at 934. Applying this rule, the court found a city contract invalid because the specifications called for certain

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[6] A responsible bidder is one who has "the ability to respond by the discharge of the contractor's obligation in accordance with what may be expected or demanded under terms of a contract. The lowest responsible bidder . . . must be held to imply skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability." 10 Eugene McQuillin, *The Law of Municipal Corporations* § 29.73, at 353 (3d ed. 1950) (internal quotation marks omitted); *see also* Henry A. Cohen, *Public Construction Contracts and the Law* 80 (1961) ("The expression 'lowest responsible bidder' . . . means the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work."); *Picone v. City of New York*, 29 N.Y.S.2d 539, 541 (N.Y. Sup. Ct. 1941) (the term "lowest responsible bidder" "implies skill, judgment and integrity as well as sufficient financial resources").

equipment manufactured by only one bidder, such that "real competitive bidding was impossible." *Id.* at 937.

Like *Gamewell*, state courts and the authors of widely cited treatises at that time also understood unduly restrictive requirements to be at odds with competitive bidding. *Gamewell* cited a leading treatise for the proposition that the object of competitive bidding was to invite competition without unreasonable restriction. *See Gamewell*, 216 F.2d at 933 (citing 10 Eugene McQuillin, *The Law of Municipal Corporations* § 29.44 (3d ed. 1950) ("McQuillin")). That treatise pronounced then, as it does now: "The request for bids must not unduly restrict competition." 10 McQuillin § 29.44, at 297; *accord* 10 McQuillin § 29:48, at 536 (3d rev. ed. 2009) (same); 43 Am. Jur. *Public Works and Contracts* § 51, at 794 (1942) ("The terms and conditions upon which bids may be asked are subject to the limitations that they must not be such as to prevent or restrict full and free competition[.]"); *see also id.* § 35, at 777 ("terms and conditions" "should contain nothing that would otherwise prevent or restrict full and free competition"). As McQuillin elaborated: "A law demanding competition in the letting of public work is intended to secure unrestricted competition among bidders, and hence, where the effect of an ordinance is to prevent or restrict competition and thus increase the cost of the work, it manifestly violates such law and is void[.]"). 10 McQuillin § 29.48, at 303–04 (3d ed. 1950). It was also well established in state courts by the 1950s that contracting authorities following competitive bidding principles must not impose restrictions that stifle competition. *See id.* at 297–98 (citing cases); *see also, e.g.*, *Prescott Courier, Inc. v. Moore*, 274 P. 163, 166 (Ariz. 1929); *Wilmington Parking Auth. v. Ranken*, 105 A.2d 614, 631–35 (Del. 1954); *Weiss v. Town of Woodbine*, 289 N.W. 469, 474–75 (Iowa 1940); *Miller v. City of Des Moines*, 122 N.W. 226, 230 (Iowa 1909); *Jackson v. Sullivan*, 124 S.W.2d 1019, 1021–22 (Ky. 1939); *Ledwith v. City of Lincoln*, 193 N.W. 763, 764–65 (Neb. 1923).[7]

[7] To be sure, McQuillin in 1950 recognized that the authorities "may, without violating the rule requiring freedom of competition, insert proper conditions in their proposals for bids, and the bidders are bound to observe them," 10 McQuillin § 29.44, at 298 (3d ed. 1950), but the examples provided related to the nature of the work to be performed and the bidder's capability of performing it, such as restrictions as to the kind and quality of the material to be used or requirements that a successful bidder have the requisite plants

Necessarily, of course, "[a]ll specifications restrict competition since they narrow the range of acceptable bids." 1B John Cosgrove McBride et al., *Government Contracts: Cyclopedic Guide to Law, Administration, Procedure* § 10.50[1], at 10-164 (2012). The question is whether a particular bidding specification "unduly" restricts competition. *Id.* at 10-166; *see also To the Elgin Sweeper Co.*, 43 Comp. Gen. 680, 682 (1964) (legal question is whether the specification was "unduly restrictive, i.e., restrictive to the point of preventing the pecuniary benefits which we believe to flow from free and open competition"). The notion that specifications that "unduly restrict" competition are inconsistent with competitive bidding requirements has long been a background principle informing government contracts law, as reflected in bid-protest decisions by the Comptroller General. In the 1950s (as is the case now), for example, the Comptroller General, in deciding bid protests under direct federal procurement laws, deemed it within his purview "to determine whether specifications as written are unduly restrictive of competition," while emphasizing that the inability or unwillingness of a particular bidder to meet the minimum requirements will not be a sufficient reason to conclude that specifications unduly limit competition. *To York Corp.*, 36 Comp. Gen. 251, 252 (1956); *see also To the Postmaster General*, 32 Comp. Gen. 384, 386 (1953) (questioning the restrictiveness of specifications that appeared to have been drawn with reference to a particular company's sweeper and "in such a manner as to preclude all other companies from submitting responsive

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and facilities for doing the job, rather than conditions unrelated to the project or the contractor's capability of performing it. *See id.*

We note that the consistency with state competitive bidding laws of specifications and conditions that promote social policy goals not directly related to the needs of the project has been the subject of considerable disagreement among state courts and federal courts applying state law. *Compare, e.g.*, *Domar Elec., Inc. v. City of Los Angeles*, 885 P.2d 934 (Cal. 1994) (city could require bidders to comply with subcontractor outreach program), *and Court St. Steak House, Inc. v. Cty. of Tazewell*, 643 N.E.2d 781 (Ill. 1994) (county jail food supply contract could be awarded to higher bidder who would provide food service training for mentally handicapped), *with Council of City of New York v. Bloomberg*, 846 N.E.2d 433 (N.Y. 2006) (city law requiring contractors to provide domestic partner benefits to employees violated competitive bidding requirements), *and Tex. Hwy. Comm'n v. Tex. Ass'n of Steel Importers, Inc.*, 372 S.W.2d 525 (Tex. 1963) (Texas Highway Commission order requiring construction contracts to require that materials be manufactured in the United States violated competitive bidding law); *see also infra* pp. 57–60 (citing additional cases).

bids thereunder").[8] To be sure, the Comptroller General bid protests tended to focus on whether bidding specifications were too rigid in technical respects—e.g., whether specifications requiring a desk with "sandwich construction" were too restrictive, *see To the Secretary of the Navy*, 48 Comp. Gen. 345, 346–49 (1968) (yes)—rather than on whether bidders were being excluded categorically on the basis of other legal requirements. That focus was attributable partly to the era, and partly to the fact that most bid protests addressed by the Comptroller General involve direct federal procurement, which is subject to detailed regulation. Moreover, Congress, unlike local governments subject to federal or state competitive bidding requirements, may enact legal restrictions on competitive bidding, and such restrictions will not be subject to challenge in bid protests before the Comptroller General. The key point, for present purposes, is that the Comptroller General, like federal and state courts, undertook a substantive review of whether bidding specifications were unduly restrictive.[9]

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[8] *Accord To Control Corp.*, 33 Comp. Gen. 586, 588 (1954) (observing that "the law requiring advertising for bids and award of contracts to the lowest responsible, *responsive* bidder . . . contemplates fair and unrestricted competition" but that the fact that a particular bidder may be unable or unwilling to meet the minimum requirements for supplying the needs "will not be sufficient to warrant the conclusion that the specifications are unduly restricted" (emphasis added)); *To the Secretary of the Interior*, 33 Comp. Gen. 567, 570 (1954) (because qualifying language of stated minimum requirements left bidders in doubt as to whether it would be permissible not to meet those minimums, the specifications were "legally defective" as being "unduly restrictive of competition"; proper course was to advertise "on the basis of specifications which will permit the broadest field of competition within the actual minimums required"); *To the Chairman, Atomic Energy Commission*, 30 Comp. Gen. 368, 370 (1951) (determining that the challenged specifications, while potentially eliminating particular bidders who might be unable to meet the minimum requirements for supplying an agency's needs, were not "unduly restrictive" to "the point of precluding free and open competition").

[9] We also note that regulations implementing the Federal-Aid Highway Program have long authorized the responsible agency head or delegee to disallow state or local procedures or requirements that restrict competition. *See, e.g.*, 23 C.F.R. § 635.110(b) (2012) ("No procedure or requirement for bonding, insurance, prequalification, qualification, or licensing of contractors shall be approved which, *in the judgment of the Division Administrator*, may operate to restrict competition, to prevent submission of a bid by, or to prohibit the consideration of a bid submitted by, any responsible contractor[.]" (emphasis added)); *see also supra* note 4. Nearly identical variations of this provision date back to at least 1951. *See* 25 Fed. Reg. 4162, 4163 (1960) (23 C.F.R. § 1.16); 22 Fed. Reg. 1063, 1065 (1957) (23 C.F.R. § 1.10(d)); 16 Fed. Reg. 387, 389 (1951) (23 C.F.R. § 1.10(d)).

C.

Finally, we explain our view that the language added to section 112(b) in 1968, and cited by the Sixth Circuit in *City of Cleveland*, does not show that section 112(b)'s competitive bidding requirement is merely procedural. The Sixth Circuit's conclusion in dicta to the contrary rested, in part, on the last sentence of section 112(b)(1): "No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications." 23 U.S.C. § 112(b)(1), *quoted in City of Cleveland*, 508 F.3d at 841. The court compared subsection (b)(1)'s reference to a "requirement or obligation" imposed upon contractors with the reference to competitive bidding as a "method" in its first sentence. Based on this contrast, the court concluded that the public body awarding a contract need not justify the "requirements or obligations" imposed on contractors as "more cost effective" than competitive bidding or as necessitated by an emergency, because the need for such showings is triggered only when the public body seeks to depart from competitive bidding as the "method" for awarding a contract. *Id.* Thus, the court reasoned, section 112(b) "confers no authority upon the FHWA to evaluate substantive contract requirements to determine whether they might inhibit competition or disqualify otherwise qualified bidders." *Id.*

This reading of the text of section 112(b)(1), however, overlooks that the last sentence of this provision was added in 1968—years after Congress enacted the requirements in 1938, 1954, and 1958 that the Secretary "require such plans and specifications and such methods of bidding as shall be effective in securing competition," 23 U.S.C. § 112(a), and that federally aided highway construction contracts be "performed by contract awarded by competitive bidding," *id.* § 112(b)(1). *See supra* Part II.A (quoting earlier versions of the Act).[10] Neither the text of the 1968

[10] The 1968 amendment added the following two sentences to what was then subsection (b):

> Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition prece-

amendment nor its legislative history supports the conclusion that by adding this language, Congress intended to inject into the statute a new distinction between the "method" or "process" of competitive bidding, on the one hand, and substantive "requirements or obligations" imposed on contractors, on the other. Nor did Congress add the last sentence to suggest that "any requirement or obligation" must be accepted by FHWA so long as it is "otherwise lawful" and "specifically set forth in the advertised specifications."

Apart from adding the last two sentences of what is now section 112(b)(1), the 1968 amendment did not amend the text of either section 112(a) or (b), leaving unchanged the pre-existing requirements that the Secretary "require such plans and specifications and such methods of bidding as shall be effective in securing competition" in subsection (a), and that federally assisted contracts be "awarded by competitive bidding" in subsection (b)(1). For the reasons discussed above in Part II.A–B, we think that Congress, in enacting these earlier provisions, intended the statute's competitive bidding requirement to have a substantive dimension empowering the responsible agency head (or delegee) to ensure that state and local bidding specifications and conditions adhere to competitive bidding principles and do not unduly restrict competition.

The 1968 amendments were not intended to alter this authority. Rather, the 1968 amendments are better understood to address only one particular axiom of competitive bidding—that a requirement or obligation not be imposed as a condition precedent to the award of a contract, or to the Secretary's concurrence in the award, "unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications." 23 U.S.C. § 112(b)(1). The legislative history reflects that this language, paraphrased from a Comptroller General

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> dent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, § 22(c), 82 Stat. 815, 827. The amendment also added a new section 140 (Equal employment opportunity), which obligated the Secretary to require that each state "include in the advertised specifications, notification of the specific equal employment opportunity responsibilities of the successful bidder." *Id.* § 22(a), 82 Stat. at 826 (codified at 23 U.S.C. § 140(a) (2006)).

opinion requested by a member of Congress, was added to the statute to address a specific problem. As the congressional committee reports explain, the two sentences were added in response to the Department of Labor's effort to compel contractor compliance with equal employment opportunity requirements imposed by Executive Order 11246 of September 24, 1965, 3 C.F.R. 167 (1965 Supp.), by negotiating such requirements with contractors *after* they had been determined to be the lowest responsive bidders but *before* the contracts were awarded.[11] Congress found the Department of Labor's approach problematic because it added "grave uncertainty about the exact nature of the legal obligation and requirements which may be imposed upon the low bidder on Federal-aid highway projects." S. Rep. No. 90-1340, at 16 (1968); *see also* H.R. Rep. No. 90-1584, at 13 (1968) ("No State can expect to conduct competitive bidding unless it is able to say, when it advertises for bids, what the requirements of the contract will be. No contractor can be expected to bid responsively unless he knows, when he prepares his bid, what the contract will require of him."). To address this concern, the 1968 amendments prohibited any requirements except those "specifically set forth in the advertised specifications," drawing on language from a Comptroller General letter describing the obligation to set forth the "specific and definite minimum requirements" of a contract in the invitation to bid.[12]

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[11] According to congressional committee reports, the Department of Labor was evaluating individual contractors' compliance with these requirements on a contract-by-contract basis for each highway project, after the low bidder on a federal-aid construction contract was determined but before the award to the low bidder was made. S. Rep. No. 90-1340, at 16 (1968); *see also* H.R. Rep. No. 90-1584, at 13 (1968); *id.* at 51 (minority views). The Labor Department required the low bidder to submit an "acceptable affirmative action program" for the employment of members of minority groups, but the advertised specifications contained no detailed description of what would be considered an acceptable program. Instead, the acceptability of the program was left to negotiation after the bids were opened but before the contract was awarded. H.R. Rep. No. 90-1584, at 51.

[12] Representative William Cramer asked the Comptroller General if the Department of Labor's approach violated the competitive bidding requirements of the federal-aid highway laws. In a letter opinion, the Comptroller General responded that

> the basic principles of competitive bidding require that bidders be assured that award will be made only on the basis of the low responsive bid submitted by a bidder meeting established criteria of responsibility, including any additional specific and definite requirements set forth in the invitation, and that award will not thereaf-

As both the statute's text and history show, Congress adopted the 1968 amendments to require that the Secretary comply with what Congress and the Comptroller General understood to be a basic principle of competitive bidding—that a contract award be made only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility, including any specific and definite requirements set forth in advance in the advertised specifications. With this amendment, Congress declared out of bounds the conditioning of a federally funded contract award on a requirement or obligation that has not been specifically set forth in the advertised specifications or is not otherwise lawful. But Congress did not amend and did not intend to significantly alter the meaning of the preexisting portions of section 112(b) to *permit* unduly restrictive state and local specifications so long as they are otherwise lawful and advertised in advance. Apart from codifying that one specific principle of competitive bidding, the 1968 amendment does not change FHWA's required determinations that the plans and specifications of the state or local contracting authority are "effective in securing competition" and comply with the requirements of "competitive bidding," 23 U.S.C. § 112(a), (b)(1).

> ter be dependent upon the low bidder's ability to successfully negotiate matters mentioned only vaguely before the bidding.

To Rep. William C. Cramer, 47 Comp. Gen. 666, 670 (1968), *quoted in* H.R. Rep. No. 90-1584, at 51, *and* 114 Cong. Rec. 19,398–99 (1968) (statement of Rep. Cramer); *see also* H.R. Rep. No. 90-1584, at 13 (citing Comptroller General opinion); S. Rep. No. 90-1340, at 17 (same). Consequently, the Comptroller General concluded that the Department of Labor could require bidders to submit affirmative action programs before contract awards were made only if the agency issued regulations that included a statement of definite minimum requirements to be met by the bidder's program and any other standards or criteria by which the acceptability of the program would be judged. 47 Comp. Gen. at 670. Concerned that the Department of Labor was not complying with the Comptroller General opinion, H.R. Rep. No. 90-1584, at 51, and believing that equal opportunity requirements should be "work[ed] out in advance," *id.* at 13, the House committee adopted an amendment to section 112 "to incorporate the effect of this ruling of the Comptroller General into the Federal-aid highway laws, to require resolution of the problem of equal employment programs before the bidding." *Id.* at 51 (minority views); *see also id.* at 13; H.R. Rep. No. 90-1799, at 34 (1968) (Conf. Rep.) (adopting House version of amendment).

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For these reasons, and consistent with our 1986 opinion, we believe that section 112(b)(1)'s requirement of "competitive bidding" for federally assisted highway construction contracts not only describes a procedural method for awarding contracts, but also contains a substantive component that would render some conditions imposed by state or local governments impermissible (even if the conditions are announced in advance and are otherwise lawful).

III.

There remains the question of the scope and nature of the substantive limitation that section 112(b)(1) imposes on state or local bidding restrictions unrelated to performance of the necessary work. As explained below, we do not think that the requirement that contracts be "awarded by competitive bidding" precludes any and all state and local bidding requirements that might reduce the pool of eligible, responsible bidders. In our view, FHWA retains some discretion under the statute to evaluate whether a particular state or local law or policy that has more than an incidental effect on the pool of potential bidders is nonetheless compatible with section 112(b)(1)'s competitive bidding requirement.[13] *See generally Rothrock v. United States*, 62 F.3d 196, 198–99 (7th Cir. 1995) (noting the Secretary's broad discretion in approving federal highway projects); *Glasgow*, 843 F.2d at 136 ("The Act, in general, indicates that the FHWA is to have discretion in its administration."). FHWA's exercise of that discretion, however, is constrained by the objectives of the statute: state or local bidding requirements that disadvantage or exclude a class of potential bidders from the pool of applicants for reasons not directly related to the contractors' capability of performing the work are compatible with section 112 only if such requirements advance the purposes of competitive bidding. Accordingly, FHWA may reasonably conclude that a state or local bidding requirement that constricts the pool of potential

[13] Thus, as discussed further below, the assessment of whether any particular state or local law or policy restricting the pool of potential bidders is compatible with section 112 properly belongs to FHWA and DOT. Consequently, we do not address here whether any particular state or local bidding restriction or requirement, including those discussed in the DOT Letter, would be consistent with section 112's competitive bidding mandate.

bidders is nonetheless consistent with section 112 because the requirement advances the purposes of competitive bidding and thus does not *unduly* limit competition. In making that judgment, FHWA may permissibly weigh whether the bidding requirement promotes the efficient and effective use of federal funds in the short or long run, or otherwise safeguards the integrity of the competitive bidding process. It is for FHWA and DOT to determine the regulatory approach the agency should take in exercising this discretion and in evaluating whether certain state and local requirements are consistent with the statutory mandates that "plans and specifications and [the] methods of bidding . . . be effective in securing competition" and that bidding be "competitive" unless some other method is "more cost effective" or "an emergency exists." 23 U.S.C. § 112(a), (b)(1).[14]

It is a truism that promoting the efficient use of federal funds is a central purpose of the competitive bidding requirement in section 112. Consequently, state or local bidding requirements that foster the efficient and

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[14] Section 112 authorizes the Secretary to approve federally assisted highway contracts that have been let through a method other than competitive bidding if "the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists." 23 U.S.C. § 112(b)(1). Thus, a process for letting a contract that includes state or local restrictions that are inconsistent with competitive bidding principles may nonetheless be approved as an alternative method if one of these conditions is met—at least in theory. *See, e.g.*, 23 C.F.R. §§ 635.201–635.205 (prescribing procedures for the performance of federally funded highway construction contracts by a method other than competitive bidding); *see also Competitive Bidding Requirements*, 10 Op. O.L.C. at 105–06 (New York City was required to justify its departure from competitive bidding principles by considerations of cost effectiveness). We find it difficult to envision a situation, however, where FHWA could determine that a process for letting a contract by competitive bidding is not consistent with the substantive requirements of competitive bidding because it includes a state or local restriction that imposes an "undue" limit on competition (reflecting a regulatory determination that the restriction does not promote the efficient use of federal funds or protect the integrity of the process), but where FHWA nonetheless could find that the process is "more cost effective" for purposes of determining that it qualifies for the exception. Instead, as FHWA's regulations recognize, the "cost effectiveness" exception is more meaningful in authorizing complete departures from the method of competitive bidding, such as negotiated contracts or the "force account" method of construction, in which a state transportation department, a county, a railroad, or a public utility company directly performs the highway construction work. *See* 23 C.F.R. § 635.203(b), (c) (defining the meaning of "*some other method* of construction" as used in 23 U.S.C. § 112(b), and of "*force account*").

effective use of federal funds, either in the short or long term, do not conflict with the competitive bidding requirement of section 112. Thus, we concluded in our 1986 opinion that "[s]ection 112 clearly reflects a congressional judgment that the efficient use of federal funds afforded by competitive bidding is to be the overriding objective of all procurement rules for federally funded highway projects, superseding any local interest in using federal funds to advance a local objective, however laudable, at the expense of efficiency." *Competitive Bidding Requirements*, 10 Op. O.L.C. at 103.[15] Although not addressed in our 1986 opinion, state or local bidding requirements that protect the integrity of the competitive bidding process, and therefore its ability to safeguard the public fisc in the long run, similarly would not conflict with the competitive bidding requirement in section 112.

As described above, over time Congress has adopted amendments to the Act to foster the efficient use of federal funds, as well as to eliminate collusion and other threats to the integrity of the competitive bidding process. *See supra* Part II.A; *see also Mahler v. United States*, 306 F.2d 713, 721 (3d Cir. 1962) (recounting the legislative history of federal-aid highway legislation, with the observation that "[t]he concern of Congress was to make sure that federal funds were effectively employed and not wasted"). One classic description recognizes that the requirements of

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[15] Our 1986 opinion relied in part on the 1983 amendment to section 112(b), which replaced the public interest exception ("unless the Secretary shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest") with the current requirement that departures from competitive bidding be justified by a demonstration that the alternative is more cost-effective ("unless the State highway department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective"). *See* Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 112, 96 Stat. 2097, 2106 (1983). Based in part on this amendment, our 1986 opinion reasoned that Congress had intended that "cost-effectiveness be the only criterion" for awarding contracts for highway projects funded by the federal government, and that Congress had made clear that "the efficient use of federal funds is the touchstone by which the legality of state procurement rules for federally funded highway projects is to be tested." *Competitive Bidding Requirements*, 10 Op. O.L.C. at 105 (citing Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. at 2106). Although we continue to believe that the efficient use of federal funds is central not only to the cost-effectiveness exception but also to the core requirements of competitive bidding itself, we now believe that the new language introduced in 1983 changed only the nature of the exceptions justifying a departure from competitive bidding, and not the nature of the competitive bidding requirement itself.

competitive bidding are "for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts, and to secure the best work or supplies at the lowest price practicable." 10 McQuillin § 29.29, at 266 (3d ed. 1950); *see also* 64 Am. Jur. 2d *Public Works and Contracts* § 28, at 648–49 (2011) ("The purpose of requiring governmental entities to conduct competitive bidding is to eliminate favoritism, fraud, and corruption; to avoid misuse of public funds; and to stimulate advantageous marketplace competition. Such competitive bidding statutes are intended not only to ensure that the awarding authority obtains the lowest price among responsible contractors but also to establish an open and honest procedure for competition for public contracts.").[16]

Case law construing competitive bidding requirements under state and local law is, of course, not binding on FHWA in implementing the competitive bidding mandate of 23 U.S.C. § 112 (and, indeed, courts in different jurisdictions often have reached different conclusions regarding the validity of similar bidding restrictions, *see supra* note 7). But this case law illustrates the kinds of analyses that courts use to determine whether state and local restrictions or contract conditions comply with competitive bidding requirements, as well as the background understanding of "competitive bidding." As discussed above, *see supra* Part II.B, courts have long set aside state and local specifications and contract conditions that they consider unduly restrictive under competitive bidding principles. What is particularly instructive are the reasons courts cite in rejecting or

[16] Before Congress added the explicit competitive bidding requirements to the statute in 1954, one treatise explained that honest and effective competition is the means by which the end of securing public contracts at a low cost may be achieved:

> The purposes of [competitive bidding] are to secure economy in the construction of public works and the expenditures of public funds for materials and supplies needed by public bodies, to protect the public from collusive contracts, to prevent favoritism, fraud, extravagance, and improvidence in the procurement of these things for the use of the state and its local self-governing subdivisions, and to promote actual, honest, and effective competition to the end that each proposal or bid received and considered for the construction of a public improvement, the supplying of material for public use, etc., may be in competition with all other bids upon the same basis, so that all such public contracts may be secured at the lowest cost to taxpayers.

43 Am. Jur. *Public Works and Contracts* § 26, at 767 (1942).

sustaining restrictions on eligible bidders unrelated to the capability of the bidder to perform the work in a competent and responsible manner.

For example, many courts have identified protection of the public fisc, by obtaining the best work at the lowest possible price, as one of chief objectives of their states' competitive bidding laws. These courts tend to invalidate state or local bidding restrictions that are not intended to safeguard public funds, even though the restrictions may serve other desirable public policy goals. *See, e.g.*, *Associated Gen. Contractors of Cal., Inc. v. City & Cty. of San Francisco*, 813 F.2d 922, 926 (9th Cir. 1987) (competitive bidding statutes are designed to protect against "a variety of ills," including "insufficient competition to assure that the government gets the most work for the least money"; invalidating San Francisco ordinance giving preferences to minority-owned, women-owned, and locally-owned business enterprises as inconsistent with city charter requiring contracts to be let "to the lowest reliable and responsible bidder"); *Council of City of New York v. Bloomberg*, 846 N.E.2d 433, 438–39 (N.Y. 2006) (ruling that exclusion of responsible bidders that do not provide domestic partner benefits violates competitive bidding requirements because the purpose and likely effect of the law was not "to make the City's contracts cheaper or their performance more efficient," and the law may open the door to "favoritism" by allowing the city to design its requirements to match the benefit structure of its preferred bidder); *Associated Builders & Contractors, Inc. v. City of Rochester*, 492 N.E.2d 781, 782–83 (N.Y. 1986) (holding city ordinance granting preference to contractors with apprenticeship training programs invalid given competitive bidding statute's "predominate purpose" of "protection of the public fisc"); *Am. Inst. for Imported Steel, Inc. v. Office of Gen. Servs.*, 365 N.Y.S.2d 56, 58 (N.Y. App. Div. 1975) (invalidating "Buy-American" policy as contrary to competitive bidding statute, the purpose of which is "to invite competition" and thereby furnish the state with "the best product at the lowest price practicable," and thus "conserve the taxpayers' money"; this purpose "could easily be neutralized if any group of responsible bidders is wrongfully eliminated"); *Clarkie's, Inc. v. City of Philadelphia*, 67 Pa. D. & C. 2d 68, 75, 77–91 (1973) ("Where competitive bidding is required, any ordinance which unduly limits the number of bidders, thus tending to increase the cost of the work, is void"; invalidating proof-of-competency specification requiring prior experience in a stadium, race track, or arena with seating capacity of at least 10,000, for Veterans' Stadium janitorial and maintenance services contract, as an "arbitrary" and "undue restriction on competitive bidding").

On the other hand, where state or local bidding restrictions or contract conditions are intended to promote the efficient use of government funds, courts are more likely to find them consistent with competitive bidding requirements. In *New York State Chapter, Inc. v. New York State Thruway Authority*, 666 N.E.2d 185 (N.Y. 1996), for example, the New York Court of Appeals considered whether public authorities governed by state competitive bidding laws may lawfully adopt prebid specifications known as project labor agreements ("PLAs") for construction projects, despite their "anticompetitive impact on the bidding process." *Id.* at 188.[17] Reading its past cases as identifying two central purposes of New York's competitive bidding statutes—protection of the public fisc by obtaining the best work at the lowest possible price, and prevention of favoritism, improvidence, fraud, and corruption in the awarding of public contracts—the court held that the public authority bears the burden of showing that a decision to enter into a PLA has "as its purpose and likely effect" the advancement of these interests. *Id.* at 190. Applying this test, the court sustained one PLA requirement in connection with a major bridge construction project, on the ground that the public authority's focus on "the public fisc—both cost savings and uninterrupted revenues" demonstrated that the PLA was adopted in conformity with competitive bidding statutes. *Id.* at 191. The court invalidated a second PLA, however, because of the absence of record evidence regarding projected "cost savings" or "labor unrest" threatening the project, even though the authority's goals of promoting women and minority hiring through the PLA were "surely laudable." *Id.* at 192–94; *accord John T. Callahan & Sons, Inc. v. City of Malden*, 713 N.E.2d 955, 964 (Mass. 1999) (upholding PLA where record reflected

[17] A PLA is a prebid contract between a construction project owner and a labor union establishing the union as the collective bargaining representative for all persons who will perform work on the project. The PLA provides that only contractors and subcontractors who sign the prenegotiated agreement with the union can perform project work. A PLA generally requires all bidders on the project to hire workers through the union hiring halls; follow specified dispute resolution procedures; and comply with union wage, benefits, and other rules. In return for a project owner's commitment to insist in its specifications that all successful bidders agree to be covered by the PLA, the union promises labor peace throughout the life of the contract. *Thruway*, 666 N.E.2d at 188.

that city sought to obtain "the lowest price for its work that the competition among responsible contractors can secure" and where the PLA served to "place[] all general contractors and subbidders on an equal footing in the competition to gain the contract" (internal quotation marks omitted)); *see also State ex rel. Associated Builders & Contractors v. Jefferson Cty. Bd. of Comm'rs*, 665 N.E.2d 723, 727 (Ohio Ct. App. 1995) (sustaining PLA as consistent with competitive bidding laws, the purpose of which is "to enable a public contracting authority to obtain the best work at the lowest possible price while guarding against favoritism and fraud"). *But see George Harms Constr. Co. v. N.J. Turnpike Auth.*, 644 A.2d 76, 79, 95 (N.J. 1994) (holding that PLAs may not be used by state agencies, given "paramount policy" of state's public-bidding laws to foster "unfettered competition" in public contracts).

Furthermore, courts have sustained bidding restrictions and contract conditions that are designed to protect the integrity of competitive bidding procedures itself—a process goal that helps ensure fairness to bidders, enhance participation of potential bidders, and ultimately achieve cost savings. To give an obvious example, contracting authorities may reject fraudulent bids. 10 McQuillin § 29.69, at 408 (3d rev. ed. 1966) (citing *People v. Stephens*, 71 N.Y. 527 (1878)). A city requirement that bidders list their subcontractors in their bid proposals has been upheld on the ground that it prevents "bid shopping," thus yielding "the lowest possible cost for the taxpayer, and fairness to bidders and subcontractors." *See C.R. Kirby Contractors, Inc. v. City of Lake Charles*, 606 So.2d 952, 955 (La. Ct. App. 1992). Under section 112 itself, a federally funded highway construction contract may not be approved in the absence of a sworn statement that the grantee has not participated in collusion. 23 U.S.C. § 112(c); *see also Glasgow*, 843 F.2d at 138 (upholding FHWA decision to withhold concurrence in highway contract award because the agency could have found that the state transportation department's renegotiation of the disadvantaged business enterprise participation goal "damaged the integrity of the bidding process" and "was not consistent with 'free, open and competitive bidding'" (quoting 23 C.F.R. § 635.104(a) (1987))). Courts have upheld restrictions designed to open up the competitive bidding process, maximizing the number of potential responsible bidders and thereby securing the best work at the lowest possible price. *See, e.g.*, *Domar Elec., Inc. v. City of*

Los Angeles, 885 P.2d 934, 940–41 (Cal. 1994) (upholding good-faith subcontractor outreach program as consistent with competitive bidding requirements, which "necessarily imply equal opportunities to all whose interests or inclinations may impel them to compete at the bidding" and because the city board "could reasonably have concluded that the program will assist the City in securing the best work at the lowest price practicable" (internal quotation marks omitted)). And, relevant to the validity of state or local restrictions on political contributions by potential bidders, a New York court, in a widely cited decision, upheld a city board decision to reject the lowest bid, in reliance on a mayoral executive order directing city agencies not to do business with a list of contractors (including the low bidder) who had given gifts to city officials. *Kayfield Constr. Corp. v. Morris*, 225 N.Y.S.2d 507 (N.Y. App. Div. 1962); *see also* 10 McQuillin § 29.69, at 408 (3d rev. ed. 1966) (citing *Kayfield*); 10 McQuillin § 29:76, at 620 (3d rev. ed. 2009) (same).[18]

Against the backdrop of these conventions in construing competitive bidding requirements, and consistent with the congressional purposes in requiring competitive bidding here, we conclude that section 112 authorizes FHWA to exercise discretion to approve federally funded highway construction contracts—notwithstanding state or local requirements that have more than an incidental impact on the pool of eligible bidders and are unrelated to the necessary work—so long as such requirements, in FHWA's judgment, advance the purposes of this statute and thus do not unduly limit competition. Restrictions that FHWA determines promote the short- or long-term efficient use of federal funds, or protect the integrity of the competitive bidding process itself, do not unduly inhibit competition and need not satisfy one of the exceptions under section 112(b)(1) (although the contract awards remain subject to FHWA's prior concurrence under section 112(d)). In light of the limits on the agency's discretion, however, we believe that FHWA will rarely, if ever, be in a position

[18] Federal law also prohibits any person who enters into a contract with the United States or a federal department or agency, at any time between the commencement of negotiations for, and the later of the completion of performance under or the termination of negotiations for, such contract, "directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use." 2 U.S.C. § 441c(a)(1) (2012).

to conclude that state or local requirements that eliminate or disadvantage a class of responsible bidders (for reasons unrelated to the necessary work) to advance objectives that neither enhance the efficient use of federal funds nor protect the fundamental integrity of the bidding process are compatible with the competitive bidding requirement of section 112.

DOT (and accordingly its delegee FHWA) must establish the process by which the agency will exercise its discretion under section 112. As explained above, in our view, section 112 does not compel FHWA's current position and permits FHWA to authorize state and local requirements that might diminish the pool of potential bidders for a particular contract, provided that the agency concludes that such requirements do not unduly limit competition. FHWA also has discretion to structure an appropriate regulatory process to reach such determinations. For example, the agency could initiate a rulemaking that would enable FHWA to make categorical determinations about the types of state and local bidding conditions that are permissible under the statute or, alternatively, it could initiate a rulemaking that would establish an administrative process through which the agency would make case-by-case assessments about the validity of particular restrictions, outlining the factors the agency would take into account in making such assessments.

IV.

In sum, we reaffirm the view expressed in our 1986 opinion that "the efficient use of federal funds is the touchstone by which the legality of state procurement rules for federally funded highway projects is to be tested," *Competitive Bidding Requirements*, 10 Op. O.L.C. at 105, but we do not understand section 112's competitive bidding requirement to compel FHWA to reject every state or local bidding specification or contract requirement that may have the effect of reducing the number of potential bidders for a particular contract. Rather, in our view, FHWA may reasonably conclude, consistent with 23 U.S.C. § 112, that certain state or local requirements promote the efficient and effective use of federal funds or protect the integrity of the competitive bidding process either in connection with the particular contract or when considered over the long term—even if the requirements may have the effect of constricting the pool of potential responsible bidders in particular instances. FHWA may establish a regulatory process to determine whether particular state or local bidding restrictions, whether considered as a class or case by case, satisfy the competitive bidding requirements of section 112.

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Sequestration of Public Company Accounting Oversight Board Funds

The operating funds of the Public Company Accounting Oversight Board are subject to sequestration under section 251A of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended, because the Board's funds have consistently been included in the President's budget, were not exempted from sequestration by Congress, and qualify as "budgetary resources" under the Act.

September 13, 2013

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

In March and April 2013, the President ordered the cancellation of budgetary resources, known as "sequestration," after Congress failed to enact a bill achieving $1.2 trillion in deficit reduction. *See* Balanced Budget and Emergency Deficit Control Act of 1985, as amended ("BBEDCA"), 2 U.S.C. § 901a (2012). Among the entities affected by these sequestration orders was the Public Company Accounting Oversight Board ("PCAOB" or "Board"), which Congress created "to oversee the audit of public companies" after a series of high-profile auditing scandals. 15 U.S.C. § 7211(a) (2006 & Supp. V 2012); *see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010). The Board's activities are funded through annual accounting support fees it levies on the companies it regulates, with the approval of the Securities and Exchange Commission. 15 U.S.C. § 7219(d). The Board draws no funds from the United States Treasury, and by statute its receipts are not "public monies of the United States." *Id.* § 7219(c)(1). Since its inception, however, the Board has been included in the list of accounts in the President's budget, and on that basis the Office of Management and Budget ("OMB") designated the Board's budget account as subject to the cancellations required by BBEDCA section 251A, codified at 2 U.S.C. § 901a.[1]

[1] *See OMB Report to the Congress on the Joint Committee Sequestration for Fiscal Year 2013* at 67 (Mar. 1, 2013), http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fy13ombjcsequestrationreport.pdf (last visited ca. Sept. 2013); *OMB Sequestration Preview Report to the President and Congress for Fiscal Year 2014 and OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2014* at 34 (Apr. 10, 2013, as corrected May 20, 2013), http://www.whitehouse.gov/

The Board has asked us whether OMB was correct to deem the Board's account subject to sequestration under BBEDCA section 251A. In the Board's view, it should not have been included in the President's budget, and therefore the statutory sequestration provisions should not apply to it, because it is a private, non-governmental entity that does not use U.S. Treasury funds.[2] OMB, which submitted a memorandum containing its views,[3] points out that BBEDCA subjects every account listed in the President's budget to sequestration except for those specifically exempted, and that Congress did not exempt the Board from sequestration. In any event, OMB counters that the Board has properly been included in the President's budget based on longstanding budgetary principles.

We conclude that OMB properly designated the Board's funds as subject to sequestration under BBEDCA section 251A, because Congress was aware that the list of accounts in the President's budget included the Board; Congress chose to impose sequestration on all accounts listed in the President's budget; and Congress decided not to include the Board among the dozens of accounts exempt from sequestration. We further conclude that the Board's account contains budgetary resources subject to cancellation under BBEDCA.

I.

Three different legal regimes are relevant background in understanding the Board's request for our opinion: (i) the provisions that prescribe sequestration, (ii) the organic statute that created the Board, and (iii) the principles governing the President's budget.

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sites/default/files/omb/assets/legislative_reports/fy14_preview_and_joint_committee_reductions_reports_05202013.pdf (last visited ca. Sept. 2013).

[2] *See* Memorandum for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, and Benjamin Mizer, Deputy Assistant Attorney General, Office of Legal Counsel, from J. Gordon Seymour, General Counsel, Public Company Accounting Oversight Board, *Re: Whether the Public Company Accounting Oversight Board Is Subject to Sequestration Under the Balanced Budget and Emergency Deficit Control Act of 1985, as Amended by the Budget Control Act of 2011* (Mar. 25, 2013) ("PCAOB Memorandum").

[3] *See* Memorandum for Benjamin Mizer, Deputy Assistant Attorney General, Office of Legal Counsel, from Thomas S. Lue, Acting General Counsel, Office of Management and Budget, *Re: Status of Public Company Accounting Oversight Board Under the Balanced Budget and Emergency Deficit Control Act, as Amended* (May 17, 2013) ("OMB Memorandum").

A.

In the Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240, Congress made various changes to BBEDCA, the most significant of which was to create a new sequestration trigger. This trigger, which became BBEDCA section 251A, required across-the-board cancellation of budgetary resources if a special joint committee failed to propose, and Congress failed to enact, legislation that reduced the budget deficit by $1.2 trillion by a statutory deadline. *See* 2 U.S.C. § 901a. Because Congress did not enact such legislation, the President ordered sequestration of fiscal year 2013 budgetary resources on March 1, 2013. *See Sequestration Order for Fiscal Year 2013 Pursuant to Section 251A of the Balanced Budget and Emergency Deficit Control Act, as Amended*, 78 Fed. Reg. 14,633 (Mar. 1, 2013). The President further ordered sequestration of fiscal year 2014 budgetary resources on April 10, 2013, as required by BBEDCA. *See Sequestration Order for Fiscal Year 2014 Pursuant to Section 251A of the Balanced Budget and Emergency Deficit Control Act, as Amended*, 78 Fed. Reg. 22,409 (Apr. 10, 2013).

Sequestration under BBEDCA section 251A requires "the cancellation of budgetary resources provided by discretionary appropriations or direct spending law." 2 U.S.C. § 900(c)(2) (definition of "sequestration"). The statute defines various terms. "Discretionary appropriations" are "budgetary resources provided in appropriation Acts," while "direct spending" refers to budget authority provided by other laws, including entitlement authority. *Id.* § 900(c)(7)–(8).[4] "Budgetary resources" means "new budget authority, unobligated balances, direct spending authority, and obligation limitations," *id.* § 900(c)(6), and "budget authority" means "the authority provided by Federal law to incur financial obligations . . . including the authority to obligate and expend the proceeds of offsetting receipts and collections," *id.* § 622(2); *see id.* § 900(c)(1) (incorporating definition of "budget authority" in 2 U.S.C. § 622(2)). Section 251A of BBEDCA provides that sequestration reductions must be applied to each "account" that is not included in a list of exempt accounts in 2 U.S.C. § 905 or

[4] "Entitlement authority" refers to programs "in which the Federal Government is legally obligated to make payments or provide aid to any person who, or State or local government that, meets the legal criteria for eligibility." OMB Circular No. A-11, at 20-5 (2013). Examples include Social Security, Medicare, Medicaid, and unemployment insurance. *See id.*

subject to a special sequestration rule set forth in 2 U.S.C. § 906. *See id.* § 901a(7)–(8).[5] An "account" is an item specified in an appropriations act or, when used to refer to items not provided for in appropriations acts (i.e., when referring to direct spending), "an item for which there is a designated budget account identification code number in the President's budget." *Id.* § 900(c)(11). The statute sets forth a process for OMB to use in determining the amount of funds that must be canceled in each non-exempt account. *See id.* § 901a(2)–(4), (7)–(8).

Section 905 lists several dozen budget accounts and activities exempt from sequestration. It identifies each exempt account by name and "the designated budget account identification code number set forth in the Budget of the United States Government 2010—Appendix, and an activity within an account is designated by the name of the activity and the identification code number of the account." *Id.* § 905(j). Congress revised the list of exempt programs most recently in the Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8. The Board has never been listed as exempt from sequestration.

B.

Congress established the Board in the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ("Sarbanes-Oxley"), to oversee public company audits "in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports." 15 U.S.C. § 7211(a). Sarbanes-Oxley gave the Board significant authority to carry out that function. Public accounting firms are required to register with the Board before they may conduct an audit of a public company. *Id.* § 7212(a). The Board promulgates binding rules governing the conduct of these registered public accounting firms. *Id.* § 7213. It is also empowered to inspect these firms for compliance with its rules and professional standards, *id.* § 7214; to investigate reports of noncompliance, *id.* § 7215(b); and to initiate disciplinary proceedings and sanction companies found to have violated its rules, *id.* § 7215(c). Penalties may include fines of up to

[5] To the extent that a budget account contains funds that fall into more than one of these four categories, OMB must apply the category with the highest percentage reduction to that account. *See* 2 U.S.C. § 906(k)(2)–(3).

$15,000,000 and temporary or permanent revocation of registration with the Board. *Id.* The Board's sanctions determinations are, however, subject to review by the Securities and Exchange Commission ("SEC" or "Commission"). *Id.* § 7217(c). The Commission may also censure the Board or relieve it of any of its authority if the SEC concludes that doing so is in the public interest. *Id.* § 7217(d).

The Board is part of the government for constitutional purposes, and its members are officers of the United States who exercise significant government authority. *See Free Enter. Fund*, 130 S. Ct. at 3148. Some provisions of Sarbanes-Oxley, however, reflect Congress's intent to confer a measure of independence on the Board. The statute provides that the "Board shall not be an agency or establishment of the United States government," and the Board is, except as otherwise provided, afforded the treatment of a nonprofit corporation chartered in the District of Columbia. 15 U.S.C. § 7211(b). Sarbanes-Oxley further states that "[n]o member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service." *Id.* Board members are appointed for five-year terms by the SEC. *Id.* § 7211(e)(5).[6] With the approval of the Commission, the Board may establish its own budget, *id.* § 7219(b), and establish and collect annual accounting support fees and registration fees that fund its activities, *id.* §§ 7212(f), 7219(d). These fees "and other receipts of the Board . . . shall not be considered public monies of the United States." *Id.* § 7219(c)(1). Finally, the Board is not "subject to procedures in Congress to authorize or appropriate public funds." *Id.* § 7219(i).

C.

Federal law requires the President to "submit a budget of the United States Government for the following fiscal year." 31 U.S.C. § 1105(a) (2006 & Supp. V 2012). Section 1105 contains a lengthy list of required elements of the President's budget, including "information on activities and functions of the Government," "information on costs and achievements of Government programs," and "other desirable classifications of information." *Id.* § 1105(a)(1)–(3). In practice, the determination whether

[6] Under the statute as enacted, Board members were removable before the expiration of their terms only for good cause, but the Supreme Court ruled the good-cause protection unconstitutional. *See Free Enter. Fund*, 130 S. Ct. at 3147.

to include an item in the budget "is made jointly" by OMB, the Congressional Budget Office ("CBO"), and the Budget Committees of Congress. OMB, *Budget of the United States Government, Fiscal Year 2014—Analytical Perspectives* 141 (2013).

OMB generally makes budgetary designations in accordance with principles outlined in the 1967 Report of the President's Commission on Budget Concepts. *See id.* at 123, 141. That report called for the budget to "be comprehensive of the full range of Federal activities. Borderline agencies and transactions should be included in the budget unless there are exceptionally persuasive reasons for exclusion." *Report of the President's Commission on Budget Concepts* 25 (1967) ("1967 Report"). The 1967 Report concludes, for example, that trust fund activities should be included in the budget even though the funds in theory "do not *belong* to the Federal Government" and despite their "partial isolation from the budget and appropriations processes," based on the Federal Government's unquestioned "responsibility for determining the size and shape" of these programs, "or for altering or redirecting these programs by appropriate changes in legislation." *Id.* at 26. Similarly, the 1967 Report concluded that the Federal Deposit Insurance Corporation should be included in the budget, despite being exempted by statute from the budgetary review process, because its structure and function are governmental in nature. *Id.* at 30. On the other hand, federal lending entities established by Congress that were privately owned and that operated in essentially the same way as private banks were considered appropriately excluded from the budget. *Id.* at 29–30.

II.

A.

The Board contends that subjecting its funds to sequestration is contrary to Sarbanes-Oxley and BBEDCA. In particular, it maintains that its program receipts and expenditures have been improperly included in the President's budget—and therefore categorized as subject to BBEDCA sequestration—because provisions in Sarbanes-Oxley indicate that Congress intended to exclude the Board from the President's budget. *See* PCAOB Memorandum at 8. Although we summarize and address below the Board's chief arguments, we find that most of them do not directly bear on the point we find dispositive: that Congress clearly identified in BBEDCA and its amendments the entities that it intended to exempt from sequestration, and the Board was not one of them.

The Board's position rests principally on the language of Sarbanes-Oxley, which provides that (i) "[t]he Board shall not be an agency or establishment of the United States Government," (ii) the Board's receipts "shall not be considered public monies of the United States," and (iii) the Board shall not be "subject to procedures in Congress to authorize or appropriate funds." 15 U.S.C. §§ 7211(b), 7219(c)(1), 7219(j). The Board maintains that the President's budget, as the "budget of the United States Government," 31 U.S.C. § 1105, may only include government agencies and establishments, and that the Board, by virtue of these provisions of Sarbanes-Oxley, is not part of the government for purposes of the President's budget. PCAOB Memorandum at 8–9. This conclusion, the Board submits, is compelled by *Lebron v. National Railroad Passenger Corp.*, in which the Supreme Court, in considering whether Amtrak is a government actor for First Amendment purposes, stated (in dicta) that a statutory provision providing that Amtrak "will not be an agency or establishment of the United States Government," 45 U.S.C. § 541 (1992), "is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control." 513 U.S. 374, 392 (1995). The Board maintains that whether it should be included in the budget and subject to sequestration is just such a matter "within Congress's control," and that Congress spoke directly to this question in Sarbanes-Oxley. PCAOB Memorandum at 9. The Board adds that it should not be subject to sequestration when Congress modeled it on other private self-regulatory organizations, such as the New York Stock Exchange, that are not included in the President's budget and are not subject to sequestration. *Id.* at 14–15.

According to OMB, however, the language of Sarbanes-Oxley is not conclusive of the question presented here. Whether to include an item in the President's budget, OMB explains, is "largely a policy judgment" that is guided principally by the 1967 Report's "general rule" that "[b]orderline agencies and transactions should be included in the budget unless there are extremely persuasive reasons for exclusion." *See* OMB Memorandum at 6; 1967 Report at 25. OMB argues that nothing in 31 U.S.C. § 1105 prevents the President from including in his budget the congressionally authorized receipts and outlays of an entity whose authorizing statute provides that it is not a federal "agency or establishment" for statutory purposes. OMB Memorandum at 7. What is important here, OMB notes, is that OMB has taken the position that the Board should be included in the budget since the Board was established in 2003. *See* OMB, *Budget of the United States Government, Fiscal Year 2004—Analytical Perspectives* 463 (2003) ("Even though the statute says the Board is not an agency or establishment of the Government, its sources of funding and activities are governmental in nature."). The CBO has also consistently considered the Board to be an on-budget entity (i.e., one that is included in the budget) because it "exercis[es] the sovereign power of the federal government" and is "subject to a significant level of federal control"—conclusions reflected in Sarbanes-Oxley's pre-enactment legislative history. S. Rep. No. 107-205, at 61 (2002) ("CBO Report"). OMB further observes that the President's budget includes several other entities subject to sequestration whose organic statutes contain similar provisions stating that they are not agencies or establishments of the United States and that their funds are not government funds. *See* OMB Memorandum at 9. OMB submits, however, that the critical point is not the merits of the underlying designation, but rather that the Board has consistently been designated as on-budget and that Congress knew and understood that fact when it enacted BBEDCA section 251A. *See id.* at 1.

We begin our analysis by focusing on the text of BBEDCA. Under that statute, an agency's funds are subject to sequestration if the agency's account is included in the President's budget. *See* 2 U.S.C. § 900(c)(11). The Board recognizes, as it must, that it has long been included in the budget, but believes that its inclusion has been a mistake. In the Board's view, once this mistake is corrected, the consequence will be the exclusion of its funds from BBEDCA sequestration. We interpret BBEDCA differently. We think that the key question is whether Congress understood the Board to be within the category of accounts subject to sequestration when it amended BBEDCA. Put another way, when it amended BBEDCA in 2010 and 2011, Congress understood the Board to be part of the President's budget and declined to exempt it from sequestration. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (Congress is presumed to be aware of settled administrative interpretations of legislative commands);

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184–85 (1988) (stating that Congress "is knowledgeable about existing law pertinent to the legislation it enacts"). In these circumstances, even if the Board had mistakenly been included in the budget in the first place,[7] that would not overcome Congress's more specific intent in BBEDCA to subject the Board to sequestration. *Cf. Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 504 (2012) (invoking the "ancient interpretive principle that the specific governs the general").

By its terms, sequestration under BBEDCA section 251A applies to each "account" that is not listed as exempt in section 905 of title 2. *See* 2 U.S.C. § 901a(7). BBEDCA defines an "account" as: (i) "an item for which appropriations are made in any appropriation Act and, [(ii)] for items not provided for in appropriation Acts, . . . an item for which there is a designated budget account identification code number in the President's budget." *Id.* § 900(c)(11). The universe of "accounts" subject to sequestration therefore includes, among other things, all items with an account identification code number in "the President's budget" (unless exempted by section 905). Congress's reference to "the President's budget" plainly means the budget that OMB prepares and the President submits to Congress according to the requirements of 31 U.S.C. § 1105. To the extent that OMB had settled on and abided by a consistent understanding of the requirements of section 1105—including which entities should and should not be included in the budget—we presume that Congress intended to adopt this understanding when it substantially revised BBEDCA in 2010 and 2011. *See Bragdon*, 524 U.S. at 645. In other words, we presume that, when Congress referred to the list of entities in the President's budget, Congress knew what was on that list. *See id.*; *Goodyear Atomic Corp.*, 486 U.S. at 184–85.

That list has, at all relevant times, included the Board. Before the enactment of Sarbanes-Oxley, the CBO concluded that the Board should be included in the budget, and the bill's pre-enactment Senate Report reflected the CBO's conclusion. *See* CBO Report at 61 (2002) (quoted *supra* p. 70). OMB agreed with the CBO's judgment and included the Board in the President's budget beginning in the year the Board was established; OMB also included in an accompanying report a full para-

[7] We express no view on this question, but note that the President does appear to have significant discretion about what is included in the budget. *See supra* Part I.C.

graph explaining the reasons for this decision. *See* OMB, *Budget of the United States Government, Fiscal Year 2004—Appendix* 1104 (2003); OMB, *Budget of the United States Government, Fiscal Year 2004—Analytical Perspectives* 463 (2003). OMB has designated the Board as on-budget in every year since then.[8] Thus, we presume that, when Congress directed OMB to use the list of entities covered in the President's budget in implementing sequestration under section 251A, it was aware of OMB's settled practice and understood that the Board would be among the affected entities.

This conclusion finds strong support in the structure of BBEDCA. Congress specifically exempted dozens of accounts and activities from sequestration in the statute. If Congress had intended to exempt the Board from sequestration, it could simply have added the Board's account to its lengthy list of accounts and activities exempt from sequestration under section 905, either in 2010 when it fully revised the list of exempt accounts and activities, or in 2011 when it enacted section 251A. Significantly, there can be no doubt that Congress referred to the President's budget in the course of drawing up these lists: each exempt account in section 905 "is identified by the designated budget account identification code number set forth in the Budget of the United States Government 2010—Appendix." 2 U.S.C. § 905(j). The 2010 budget appendix—like every budget appendix going back to the Board's creation in 2003—included the Board. And Congress had yet another opportunity to exempt the Board from sequestration. In August 2012, Congress enacted the Sequestration Transparency Act, Pub. L. No. 112-155, 126 Stat. 1210 (2012), which required OMB to submit a comprehensive report the following month explaining which accounts would be subject to sequestration reductions. Congress required OMB to submit the report in advance

[8] *See* OMB, *Budget of the United States Government, Fiscal Year 2005—Appendix* 1184 (2004); OMB, *Budget of the United States Government, Fiscal Year 2006—Appendix* 1223 (2005); OMB, *Budget of the United States Government, Fiscal Year 2007—Appendix* 1207 (2006); OMB, *Budget of the United States Government, Fiscal Year 2008—Appendix* 1126 (2007); OMB, *Budget of the United States Government, Fiscal Year 2009—Appendix* 1229 (2008); OMB, *Budget of the United States Government, Fiscal Year 2010—Appendix* 1288 (2009); OMB, *Budget of the United States Government, Fiscal Year 2011—Appendix* 1329 (2010); OMB, *Budget of the United States Government, Fiscal Year 2012—Appendix* 1299 (2011); OMB, *Budget of the United States Government, Fiscal Year 2013—Appendix* 1405 (2012); OMB, *Budget of the United States Government, Fiscal Year 2014—Appendix* 1317 (2013).

of implementing sequestration reductions in order to "obtain information about how this sequester will be applied and its effect on both nondefense and defense programs," with the ultimate aim of "provid[ing] both the President and the Congress [with] improved tools to reconsider spending." H. Rep. No. 112-577, at 5, 10 (2012). The Sequestration Transparency Act gave Congress the opportunity to preview OMB's determination of which accounts and activities were subject to sequestration, and allowed Congress time to revise BBEDCA before sequestration reductions took effect if it disagreed with any of OMB's determinations concerning the statute's application. OMB's report, submitted in September 2012, included the Board. *See OMB Report Pursuant to the Sequestration Transparency Act of 2012* at 218 (2012) (describing Board's budget account as containing budget authority subject to sequestration). Had Congress wanted to exempt the Board from sequestration following receipt of this notice from OMB, it could have added the Board to the section 905 list when it amended BBEDCA in January 2013. It did not do so. *Cf. Whether Reservists Must Exhaust Available Leave 5 U.S.C. § 6323(b) Before Taking Leave Under 5 U.S.C. § 6323(a)*, 36 Op. O.L.C. 129, 149–50 (2012) (stating that Congress may be understood to have ratified an administrative interpretation when there is evidence to suggest that Congress was aware of that interpretation, citing *Brown v. Gardner*, 513 U.S. 115, 121 (1994)).[9]

Given the strong textual indicia of congressional intent to subject the Board to sequestration, we cannot accept the Board's contrary arguments. As noted above, the Board emphasizes *Lebron*'s statement that statutory language resembling the referenced provisions of Sarbanes-Oxley is

[9] The Board objects that this reasoning "overlooks that an entity requires an exemption only if it is properly subject to sequestration in the first place." Memorandum for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, and Benjamin Mizer, Deputy Assistant Attorney General, Office of Legal Counsel, from J. Gordon Seymour, General Counsel, Public Company Accounting Oversight Board, *Re: Whether the Public Company Accounting Oversight Board Is Subject to Sequestration under the Balanced Budget and Emergency Deficit Control Act of 1985, as Amended by the Budget Control Act of 2011* at 9 (June 10, 2013) ("PCAOB Reply"). We agree that, if Congress had not included the Board in the entities subject to sequestration as an initial matter, it would have had no reason to list the Board as exempt in section 905. But as explained above, we believe Congress subjected the Board to sequestration when it defined the covered accounts to include those OMB had listed in the budget. In this context, Congress's failure to list the Board as exempt evinces its intent to subject it to sequestration.

"assuredly dispositive of [the Board's] status as a Government entity for purposes of matters that are within Congress's control." *Lebron*, 513 U.S. at 392. But the Court further explained in *Lebron* that such statutory language bears on the applicability of laws that expressly depend on the entity's status as part of the federal government or as a government agency, such as the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (2012), the Federal Advisory Committee Act, 5 U.S.C. app. § 1 *et seq.*, and the laws governing federal government procurement, 41 U.S.C. § 5 *et seq.* (2006 & Supp. V 2012). *See Lebron*, 513 U.S. at 392. As set out above, BBEDCA's applicability does not depend on an entity's governmental status for the purposes addressed in this passage of *Lebron*.[10] And in other instances in which Congress has sought to make clear that funds are exempt from BBEDCA sequestration, it has said so clearly and with express reference to BBEDCA. *See* 39 U.S.C. § 2009a(3) (2006 & Supp. V 2012) (providing that Postal Service Fund receipts and disbursements "shall be exempt from any order issued under part C of the Balanced Budget and Emergency Deficit Control Act"); Pub. L. No. 101-508, § 13301(a), 104 Stat. 1388, 1388-623 (1990) (stating that Social Security trust funds "shall not be counted as new budget authority, outlays, receipts, or deficit or surplus for purposes of . . . the Balanced Budget and Emergency Deficit Control Act of 1985").

Finally, we note that the Board is not the only federal entity subject to sequestration despite a congressional statement that it is not an "agency or establishment of the United States," or that its funds are not "Government funds or appropriated monies." *Cf.* PCAOB Memorandum at 14–17. As OMB notes, OMB Memorandum at 9, other entities are in the same position. *See, e.g.*, 15 U.S.C. § 78ccc(a)(1)(A) (Securities Investor Protection

[10] For the same reason, the analysis contained in a 2007 opinion from our Office does not apply here. *See Status of the Public Company Accounting Oversight Board Under 18 U.S.C. § 207(c)*, 31 Op. O.L.C. 47 (2007) ("2007 Opinion"). In the 2007 Opinion, we concluded that a former SEC employee representing the Board before the SEC was not acting "on behalf of . . . the United States" for purposes of 18 U.S.C. § 207(c). Applying *Lebron*, we reasoned that the statutory provision stating that the Board is not "an agency or establishment of the United States Government" was dispositive of the Board's status as an agency or instrumentality of the United States Government for purposes of the conflict of interest laws. *Id.* at 51. As was the case in *Lebron* (and not the case here) the applicability of those laws, specifically 18 U.S.C. § 207(c), depended on the entity's status as part of the United States Government.

Corporation); 22 U.S.C. § 2131(b)(1) (2006 & Supp. V 2012) (Corporation for Travel Promotion); 12 U.S.C. § 16 (2012) (Office of the Comptroller of the Currency); *id.* § 5497(c)(2) (Consumer Financial Protection Bureau); 15 U.S.C. § 78d(i)(4) (SEC Reserve Fund). The fact that similarly situated entities are included in the budget and not exempted from sequestration by section 905 of BBEDCA supports OMB's conclusion that Congress intended to subject the Board's funds to sequestration.

B.

The text of BBEDCA refers to the President's budget to determine whether an entity's funds are subject to sequestration. As a result, the Board, which has consistently been included in the President's budget, is subject to sequestration. The analysis does not end there, however, because section 251A sequestration applies only to "budgetary resources," 2 U.S.C. §§ 900(c)(2), 901a(7)(A), which means "new budget authority, unobligated balances, direct spending authority, and obligation limitations," *id.* § 900(c)(6). The Board asserts that even if its operating funds are held in an "account" within the meaning of BBEDCA, that account does not contain "budgetary resources" subject to sequestration.

Because none of the other categories of "budgetary resources" applies here, the resolution of this argument turns on whether the Board possesses "budget authority." The Board argues that it lacks budget authority. It relies on a Government Accountability Office ("GAO") publication defining budgetary authority as the "[a]uthority provided by federal law to enter into financial obligations that will result in immediate or future outlays involving federal government funds." GAO, *A Glossary of Terms Used in the Federal Budget Process* 20 (2005); *see* PCAOB Memorandum at 11–12; PCAOB Reply at 2–3. The Board argues that, under Sarbanes-Oxley, it does not have the authority to incur obligations that will result in outlays on behalf of the federal government, and therefore does not have "budget authority" under that definition of the term.

But BBEDCA contains its own, broader definition of "budget authority": "the authority provided by Federal law to incur financial obligations," consisting of, among other things, "provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections." 2 U.S.C. § 622(2)(A); *see id.* § 900(c)(1) (incorporating definition of "budget authority" in section 622). The definition also includes "offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority." *Id.* § 622(2)(A)(iv). BBEDCA therefore defines "budget authority" as funds made available pursuant to authority provided by federal law, irrespective of whether the funds are labeled "federal government funds" or otherwise. The Board's funds plainly satisfy BBEDCA's definition of "budget authority." They are funds collected (as SEC-approved mandatory registration and accounting support fees) and obligated (consistent with an SEC-approved annual budget) for expenditure consistent with the congressional authorization provided in Sarbanes-Oxley. In other words, the Board's activities are funded under "provisions of law that make funds available for obligation and expenditure." *Id.* § 622(2)(A). They are therefore budgetary resources subject to sequestration under BBEDCA.[11]

The Board also argues that subjecting it to sequestration would "lead to incongruous results" because the Board may continue to collect receipts at its normal pace but may not obligate those funds or send them to the Treasury Department. *See* PCAOB Memorandum at 12 n.10. Funds may therefore be escrowed and not made available for obligation by the Board until BBEDCA section 251A sequestration is no longer in effect; in the meantime, sequestration reductions imposed on the Board "will not decrease the federal deficit by a single dollar." *Id.* at 2. The Board's argument appears to be that requiring cancellation of the authority to obligate collected offsetting receipts—and putting collected funds in escrow until the end of sequestration—would not result in deficit reduction, and thus would be inconsistent with (or at least would not advance) BBEDCA's legislative purpose. But Congress considered the possibility that this scenario might occur and expressly provided for it: "Budgetary resources sequestered in revolving, trust, and special fund accounts and offsetting collections sequestered in appropriation accounts shall not be available for obligation during the fiscal year in which the sequestration occurs, but shall be available in subsequent years to the extent otherwise provided in law." 2 U.S.C. § 906(k)(6). An argument based on BBEDCA's general

[11] Congress's declaration of purpose in the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified at 2 U.S.C. § 621), does not provide significant guidance in determining BBEDCA's reach. *See* PCAOB Reply at 2. In BBEDCA, Congress adopted the prior act's definition of "budget authority," but it did not expressly or implicitly adopt the earlier statute's declaration of purpose. In any event, section 621's declaration of purpose is broad and general, and provides little assistance in interpreting the phrase "budget authority" in section 622.

purpose cannot be used to countermand section 251A, particularly where Congress has expressly recognized that some applications of the statute might not directly serve that purpose. *See Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012).[12]

III.

For these reasons, we conclude that the Board is subject to the sequestration provisions of BBEDCA section 251A.

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Deputy Assistant Attorney General
Office of Legal Counsel

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[12] The Board also suggests that if OMB includes it in the list of programs, projects, and activities subject to sequestration, then it must also include "purely private" entities ranging from "Apple to the local apple cart, as well as state and local activities with no federal involvement." PCAOB Memorandum at 12 n.11; *see also* PCAOB Reply at 3. Our reading of BBEDCA, however, does not lead to the absurdity that the Board posits. In our judgment, the Board's funds are subject to sequestration under BBEDCA section 251A because (i) that section specifies that sequestration applies to entities that are on-budget, (ii) the Board has consistently been such an entity since its inception, (iii) Congress did not exempt the Board from sequestration, and (iv) the Board collects and obligates funds pursuant to authority provided by federal law. Plainly, the entities the Board likens to itself do not meet these criteria. In any event, we do not address the circumstances of entities not presented here.

Obligation of Revolving Funds Requiring Reimbursement from Time-Limited Funds Under the Anti-Deficiency Act

The Anti-Deficiency Act prohibits an agency from awarding a severable services contract that lasts longer than one year and obligates revolving funds that must be reimbursed with time-limited funds.

The Anti-Deficiency Act violation caused by awarding such a contract is not undone by subsequently modifying the contract's term so as not to exceed one year.

October 21, 2013

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION*

The Anti-Deficiency Act prohibits "officer[s] or employee[s] of the United States Government" from "involv[ing] . . . [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341 (2006). You have asked whether an agency violates the Anti-Deficiency Act (codified at 31 U.S.C. §§ 1341–1342, 1349–1351, 1511–1519) ("ADA" or "Act") when it awards a severable services contract with a performance period that exceeds one year and the contract obligates revolving funds that an agency has a legal obligation to reimburse with time-limited funds.[1] If we conclude that such an action violates the ADA, you have also asked whether an agency can cure the violation by modifying the contract so that the performance period lasts only one year.

In federal appropriations law, services are considered "severable" if they are continuing and confer a benefit each time they are rendered. Section 3902(a) of title 41 of the U.S. Code allows a contract for severa-

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* Editor's Note: This is a revised version of an opinion issued on July 8, 2013. *See infra* note 7.

[1] *See* Letter for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from Kris E. Durmer, General Counsel, General Services Administration (Aug. 29, 2012) ("GSA Letter"). In preparing this opinion, we also considered views provided by the Department of Homeland Security. *See* Letter for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from Audrey J. Anderson, Deputy General Counsel, Department of Homeland Security (Nov. 29, 2012) ("DHS Letter").

ble services that obligates time-limited funds to extend beyond the period of availability of those funds, provided that the total length of the contract for such services does not exceed one year. 41 U.S.C. § 3902(a) (2006 & Supp. V 2012). By contrast, a contract that obligates only revolving funds would not generally be subject to this one-year limit. 31 U.S.C. § 1502(a). Thus, to resolve your first question, we must consider whether the statutory rule that contracts for severable services be limited to one year applies to contracts that obligate revolving funds in circumstances where an agency must reimburse those revolving funds with time-limited funds that are unavailable for obligation beyond a one-year period. In our view, it does. In such a case, the contract has the effect of obligating those time-limited funds for reimbursement in advance of an appropriation and thus violates the Anti-Deficiency Act. *Id.* § 1341.

We also conclude that an agency cannot cure an ADA violation of this type by subsequently shortening the contract's performance period. We recognize that an agency can cure the type of ADA violation that occurs when an expenditure is charged to the wrong account, so long as funds were legally available at the time of obligation. In the example you have described, however, no funds were legally available at the time of obligation to reimburse payments on a greater-than-one-year contract. In circumstances such as these, the violation can be limited but not cured.

I.

We begin by noting that the practice of this Office is to address only general legal questions having prospective application. We thus set forth and analyze the following information, such as the agreement between the Department of Homeland Security ("DHS") and the General Services Administration ("GSA") and the subsequent contractual arrangements and findings of GSA's Office of the Inspector General, solely for illustrative purposes and to provide relevant context. We describe these contractual arrangements as they have been presented to us and do not make any factual findings or determinations regarding these specific contracts.

GSA entered into a series of contractual arrangements that have led to your questions. In the American Recovery and Reinvestment Act of 2009 ("Recovery Act"), Congress designated $200 million for DHS to use in "planning, design, construction costs, site security, information technology infrastructure, fixtures, and related costs to consolidate the

Department of Homeland Security headquarters." Pub. L. No. 111-5, div. A, tit. VI, 123 Stat. 115, 162 (2009). To implement DHS's plan for a new, consolidated headquarters, DHS and GSA's Northern Capital Region Public Buildings Service ("GSA-PBS") entered into an agreement "provid[ing] GSA access to $198.9 million" of DHS's Recovery Act funds to pay for various elements of the consolidation project (hereinafter "DHS-GSA Agreement"). *See* GSA Letter att. 1, at 2.[2] The Recovery Act provided that DHS's funds were time-limited; after September 30, 2010, they would expire and no longer be available for obligation. *See id.* at 1; *see also* Recovery Act div. A, § 1603, 123 Stat. at 302.

As part of the consolidation project, GSA-PBS sought to secure two contracts for severable services, which would ultimately be funded with the time-limited Recovery Act funds that GSA-PBS had authority to obligate. GSA Letter at 1–2. As noted, severable services are services that are continuing in nature, and from which a benefit is received each time the service is rendered, such as the maintenance of landscaping or repair work.[3] Severable services contracts funded with time-limited funds are in certain respects governed by rules different from those applicable to other types of contractual arrangements.

For example, government contracts are generally governed by the "bona fide needs rule," but there is a limited exception to that rule for severable services contracts. The bona fide needs rule provides that an agency generally may obligate appropriations that Congress makes available for a limited period of time only to pay for "bona fide needs" incurred *during that period of availability*. *See* 31 U.S.C. § 1502(a); 1 General Accounting Office, *Principles of Federal Appropriations Law* 5-11 (3d ed. 2004) ("*Federal Appropriations Law*"). For a service such as routine landscap-

[2] The DHS-GSA Agreement indicated that GSA would use the money to obtain nonseverable services, GSA Letter att. 1, at 1, but all agree that GSA ultimately entered into contracts to obtain severable services under the Agreement. We have not considered and do not address whether the DHS-GSA Agreement's original characterization of the money as restricted to contracts for nonseverable services was erroneous or what the consequences of any such error would be.

[3] In contrast, nonseverable, or entire, services are those for which the entire benefit is received at the time the service is completed, such as building construction or other projects that yield a final product. All agree that the relevant contracts here (between GSA's agent—the Federal Acquisition Services component of GSA's Northern Capital Region—and the third party contractors) were for severable services.

ing work, for example, the need arises when grass needs to be cut or hedges need to be trimmed; thus, an agency ordinarily could not enter into a contract for cutting or trimming that would occur after current funds cease to be available. Under a statutory exception, however, agencies may obligate time-limited appropriations for "contract[s] for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year." 41 U.S.C. § 3902. In other words, an agency could use Fiscal Year ("FY") 2013 funds, available for obligation only during FY 2013, to enter into a landscaping contract that lasted into FY 2014, so long as the total contractual period did not exceed one year.

To obtain the severable services contracts, GSA-PBS entered into an agreement with the Federal Acquisition Services component of GSA's Northern Capital Region ("GSA-FAS"). GSA Letter att. 2. The agreement specified that GSA-FAS, acting on behalf of GSA-PBS, would acquire technology services from a contractor. *Id.* §§ B.2, B.6. GSA-FAS would pay the contractor's charges upfront with money from the Acquisition Services Fund, a fund established by statute that GSA uses to procure services on behalf of other federal agencies. *Id.* §§ A.7, B.8, B.13; *see* 40 U.S.C. § 321(c). The Acquisition Services Fund is a revolving fund, meaning that it is both a receipt account and an expenditure account, such that collected receipts are available for expenditure without the need for further appropriations from Congress and without fiscal year limitation. 3 *Federal Appropriations Law* at 12-87, 12-88 (3d ed. 2008). The statute governing the use of the Acquisition Services Fund requires agencies for which GSA expends money from the fund either to pay into the fund in advance or to "prompt[ly] reimburse" the fund for expenditures made on their behalf. 40 U.S.C. § 321(d)(3). Consistent with this statutory requirement, the agreement between GSA-PBS and GSA-FAS provided that GSA-FAS would pay the contractor's charges from the Acquisition Services Fund, and then GSA-PBS would reimburse GSA-FAS from the Recovery Act funds DHS had set aside for GSA-PBS's use. GSA Letter att. 2, §§ B.8, B.12. The agreement made GSA-PBS "responsible for prompt payment of all billings" for reimbursement, set forth criteria for determining when billings would become delinquent, and established that delinquency in reimbursement could result in certain consequences for GSA-PBS. *Id.* § A.7. The agreement also stated that "[GSA-FAS's] acceptance of this document creates an obligation on the part of [GSA-PBS]." *Id.* § B.18.

Under the authority of its agreement with GSA-PBS, GSA-FAS awarded two task orders for severable services on September 30, 2010, the last day that Recovery Act funds were available for obligation. *See* GSA Letter at 2. At least one of the task orders indicated that the performance period would extend from September 30, 2010 to November 2011, longer than the one-year period permitted by the statute that allows agencies to use time-limited funds for severable services contracts crossing fiscal years.[4] *Id.* Midway through the contract, in the summer of 2011, GSA-FAS modified the task orders so that the performance periods of both task orders ended on September 29, 2011, within a year after they began. *Id.*

GSA's Office of the Inspector General conducted a limited scope audit of both task orders and concluded, among other things, that the initial task orders violated both the bona fide needs rule and the Anti-Deficiency Act.[5] The Inspector General concluded that the revolving fund money GSA-FAS obligated by entering into the task orders had "the same purpose and time limitations" as the time-limited Recovery Act funds designated to reimburse the revolving fund. OIG Reports at 3. Because GSA-PBS could not use Recovery Act funds to reimburse GSA-FAS for any charges incurred beyond the first twelve months of the contract, the Inspector General concluded that GSA-FAS had obligated money in advance of an appropriation and thereby violated the Anti-Deficiency Act. The Inspector General further concluded that GSA-FAS could not cure the violation by modifying the task orders' performance periods so that they did not exceed one year.

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[4] We understand that GSA believes that the performance period for the other task order never clearly extended beyond one year. GSA Letter at 2. We do not resolve that issue.

[5] *See* Office of Inspector General, General Services Administration, Report No. A110024/Q/A/P12006, *Limited Scope Audit of Task Order NP4700101050 Funded by the American Recovery and Reinvestment Act of 2009* (May 2, 2012); *see also* Office of Inspector General, General Services Administration, Report No. A110024/Q/A/P12007, *Limited Scope Audit of Task Order NP4700101051 Funded by the American Recovery and Reinvestment Act of 2009* (May 2, 2012) (collectively, "OIG Reports"). Because the relevant content of the two reports is identical, citations to "OIG Reports" should be understood as citations to the specified pages in both reports.

II.

As stated above, the Anti-Deficiency Act prohibits "officer[s] or employee[s] of the United States Government" from "involv[ing] . . . [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."[6] 31 U.S.C. § 1341. GSA agrees that an ADA violation occurs when an agency obligates time-limited funds by entering into a severable services contract that exceeds one year. *See* 1 *Federal Appropriations Law* at 5-40 (violation of bona fide needs rule can also violate the ADA). Because there is a statutory prohibition on obligating time-limited funds beyond their period of availability for greater-than-one-year severable services contracts, an agency entering into such a contract would have no funds legally available at the time of obligation to pay for the services it would receive beyond the one-year mark. So, for example, if a landscaping contract obligated FY 2013 funds for a period of time lasting into FY 2014, the FY 2013 funds would be legally available for the first twelve months of that contract. But at the end of that twelve months, FY 2013 funds would no longer be available. If the contract continued beyond that point, it would therefore have effectively obligated FY 2014 funds "before an appropriation is made." 31 U.S.C. § 1341.

The difference between this hypothetical landscaping contract and a contract like the one GSA describes is that, under the latter, the agency does not obligate time-limited funds outright; instead, it obligates revolving funds that will later be reimbursed by time-limited funds. As GSA sees it, this arrangement does not violate the ADA. GSA reasons that an agency generally may obligate revolving funds to pay for severable services for any period of time, so long as money in the revolving fund remains available for obligation. GSA argues that, even though a contract may indicate that particular time-limited funds will reimburse the revolving fund, the reimbursing agency could defer repayment until new time-limited funds become available.[7]

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[6] The Anti-Deficiency Act applies not only to contracts between a government agency and a private party, but also to contracts between one government agency and another. *See, e.g.*, *Public Printer—Four-Year Contract for Purchase of Paper for Postal Cards*, 27 Op. Att'y Gen. 584 (1909).

[7] After we issued the initial version of this opinion, GSA requested that we reconsider our conclusion. *See* Letter for Virginia A. Seitz, Assistant Attorney General, Office of

GSA correctly notes that the one-year limit on severable services contracts does not generally apply to revolving funds. But we do not believe that general rule applies when an agency obligates money from a revolving fund under an arrangement in which the fund must be reimbursed with time-limited funds. In our view, money from a revolving fund like the Acquisition Services Fund, which agencies are legally required to reimburse, can be obligated only to the extent that the relevant appropriations are legally available for the expenditures made by the fund.[8] *See* Memorandum for the Files from Stephen J. Wilkinson, Office of Legal Counsel, *Re: Federal Register Publication on November 23, 1981* (Dec. 4, 1981). Restrictions on the availability or use of the designated reimbursement funds limit an agency's ability to obli-

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Legal Counsel, from Kris E. Durmer, General Counsel, General Services Administration (Aug. 28, 2013) ("Reconsideration Request"). The Reconsideration Request argues that, at least with respect to one of the task orders, any contractual obligation exceeding the twelve-month period for which Recovery Act funds were available for reimbursement was, on the particular facts, not an impermissible obligation of Recovery Act funds, but solely an obligation of the revolving funds in the Acquisition Services Fund. *Id.* at 2. On that view, no Anti-Deficiency Act violation occurred because GSA-PBS would have had no obligation to reimburse the Acquisition Services Fund for services that GSA-FAS contracted for on GSA-PBS's behalf that extended beyond the twelve-month period.

We are not in a position to evaluate the particular facts that GSA identified in its Reconsideration Request, including whether the particular contracts at issue obligated GSA-PBS to reimburse the revolving fund for expenses beyond the twelve-month period, in light of our practice to address only general legal questions that have prospective application. We accordingly reach no conclusion as to how GSA should apply our opinion to each of its past contractual arrangements. Our opinion is confined to those circumstances in which one government entity obligates revolving funds that another government entity is legally obligated to reimburse with time-limited funds. We defer to GSA's determination of whether those circumstances arose in its past contracts.

[8] GSA points out that the statute requires the Administrator of GSA to establish rates for services it provides customer agencies and to set those rates "at levels sufficient to recover . . . so far as practicable" certain costs, 40 U.S.C. § 321(d)(2). *See* GSA Letter at 5 n.9. We understand the "so far as practicable" language as an accommodation to the reality that GSA may not always be able to quantify precisely the costs associated with "inventory losses," "amortization . . . of equipment," "transportation cost," and the other costs listed in section 321(d)(2). We do not read this language to suggest that customer agencies must only reimburse GSA to the extent that they have funds available, or that GSA may obligate money from the Acquisition Services Fund that it does not expect to recoup. The phrase "so far as practicable" qualifies the requirement that the GSA Administrator establish prices, not the requirement that agencies reimburse the GSA for obligations GSA undertakes on their behalf.

gate the revolving funds; otherwise, the restrictions on the use of funds could be circumvented simply by channeling their expenditure through a revolving fund. The one-year limit on the obligation of funds for purchase of severable services thus continues to apply when those funds are used to fulfill a legal obligation to reimburse a revolving fund for payment for severable services.

This conclusion is consistent with prior advice of our Office. In November 1981, Executive Branch entities experienced a lapse in appropriations when the President vetoed a continuing resolution. *Id.* at 1. The Office of the Federal Register, an Executive Branch entity, asked whether, notwithstanding the lapse in appropriations, it could request that the Government Printing Office ("GPO"), a Legislative Branch entity, print the *Federal Register* the following day. *Id.* It explained that GPO charges the cost of printing the *Federal Register* to a revolving fund, which agencies must, by statute, reimburse. *Id.* We reasoned that "[b]ecause the agencies are required to reimburse the revolving fund from their own appropriations, at some point in the process the printing of the *Federal Register* creates an obligation within the meaning of . . . the Antideficiency Act." *Id.* We advised the Office of the Federal Register that printing the *Federal Register* would violate the Act if doing so "called for the obligation created by the printing process to be charged to appropriations not yet enacted." *Id.* at 2.

The Comptroller General has taken a similar view.[9] *See Chemical Safety and Hazard Investigation Board—Interagency Agreement with the General Services Administration*, B-318425, 2009 WL 5184705 (Comp. Gen. Dec. 8, 2009) ("*Chemical Safety Board*"). In *Chemical Safety Board,* the Comptroller General rejected a proposed interagency agreement in which GSA would have used the Acquisition Services Fund to pay for an open-ended severable services contract, which the Chemical Safety Board would later reimburse through some combination of FY 2009 funds and future funds. *Id.* at *1, *4. The Comptroller General reasoned that pledging future-year appropriations to reimburse GSA for the obligations it incurred under the interagency agreement would "obli-

[9] The Comptroller General's views often provide helpful guidance on appropriations matters and related issues, although they do not bind the Executive Branch. *See Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, 31 Op. O.L.C. 54, 55 n.1 (2007).

gate [the Chemical Safety Board] to pay for severable services to be performed in future fiscal years" and thereby violate the Anti-Deficiency Act. *Id.* at *4. That GSA would use a revolving fund to pay expenses at the outset made no difference, for "[a]n interagency agreement . . . that is funded through an intragovernmental revolving fund, is akin to a contract and the obligational consequences are the same as if it were a contract." *Id.* at *1 n.6.

Our analysis would not change even if the contracting agency did not actually spend revolving-fund money when reimbursement funds were unavailable, but only entered into a contract to do so. The Anti-Deficiency Act prohibits "involv[ing] . . . [the] government in a contract or obligation for the payment of money before an appropriation is made," meaning that the violation occurs when the agency enters into the contract, even if it never spends the money it obligated. *See Public Printer—Four-Year Contract for Purchase of Paper for Postal Cards*, 27 Op. Att'y Gen. 584, 587 (1909) (advising that it would violate a predecessor version of the Anti-Deficiency Act to enter into a four-year paper contract, even though "[t]he four-year contract proposed would . . . not require any expenditure in excess of the appropriation" for the current fiscal year, because "there is no appropriation" for any "paper contracted to be furnished after" the date that current-year funds expire); *see also Online Terms of Service Agreements with Open-Ended Indemnification Clauses Under the Anti-Deficiency Act*, 36 Op. O.L.C. 112, 125 (2012) (acknowledging that commitments made in violation of the ADA cannot be legally enforced, but advising that "[t]he mere fact that commitments made in violation of the ADA are not legally enforceable does not somehow erase the ADA violation").

Our conclusion is not at odds with the Comptroller General's statement that "a naked contractual obligation that carries with it no financial exposure to the government does not violate the Antideficiency Act." *See* DHS Letter at 3 (quoting *Funding of Maintenance Contract Extending Beyond Fiscal Year*, B-259274, 1996 WL 276377, at *4 (Comp. Gen. May 22, 1996) ("*Maintenance Contract*")). In *Maintenance Contract*, the Comptroller General concluded that an agency did not violate the ADA by leaving eight months of a twelve-month severable services contract unfunded at the time of the award where that contract included a clause making the government's obligation for the unfunded months "contingent upon the contracting officer notifying the contractor in writing that funds were available for continued performance and that the contractor continue work." 1996 WL 276377, at *1. Because the agency had made the continuation of the contract contingent on the availability of funds, it had not involved the government in an obligation for which funds were not yet available; it had merely given the government the option to continue the contract should funds become available. When no such contractual contingency exists, an agency violates the Anti-Deficiency Act when it enters into a contract that obligates the government to make payments beyond the period in which funds are available to reimburse those expenditures.

III.

GSA, joined by DHS, urges that, even if entering into a greater-than-one-year severable services contract would violate the ADA, an agency can cure, if not altogether avoid, the violation by modifying the contract so that the performance period does not exceed one year.[10] While shortening a severable services contract's period of performance may terminate an ongoing ADA violation, it would not undo the violation that occurred when the contracting agency obligated revolving funds in advance of an appropriation for reimbursement funds.

The Comptroller General has long taken the view that an ADA violation can be cured under certain circumstances. *See* 2 *Federal Appropriations Law* at 6-80 to 6-82 (3d ed. 2006). If an agency charges an obligation to the wrong appropriation account, and funds are available in the correct account, the agency may adjust its accounts by charging the obligation to the correct one. *Id.* As long as sufficient appropriated funds were available when the obligation occurred and remain available in the

[10] For the purposes of this opinion, we use the word "cure" to mean taking some action after an ADA violation has occurred that retroactively eliminates the violation and makes a report to Congress unnecessary. We use the word "avoid" to mean preventing the violation from occurring in the first place. And we use the word "terminate" to mean taking some post-violation action that stops an ongoing ADA violation but does not eliminate the original violation and accordingly does not discharge the violating agency from its responsibility to report to Congress. We do not suggest that these words are terms of art in appropriations law, but rather define them to make sure our analysis here is clear.

correct account at the time of the adjustment, the agency does not have to report its initial improper obligation as a violation of the ADA. *Id.*

A critical feature of a curable ADA violation, however, is the existence of legally available funds to cover the expenditure *when the obligation occurs*. If funds are not legally available, the agency cannot simply adjust its accounts and thereby correct the improper obligation, because the agency lacked authority to enter into the obligation at the outset. Thus, for example, when an agency charges an appropriation account for a purpose other than that specified in the appropriation, and no existing account is legally available for the charged purpose, the agency violates the ADA in a way that it cannot cure. *Id.* at 6-82. Similarly, when an agency violates the ADA by entering into a contract with an impermissible indemnification provision that exposes the government to unlimited financial liability, the agency cannot cure that violation, because it did not have funds legally available for the obligation when it was incurred. *See Department of the Army—Escrow Accounts and the Miscellaneous Receipts Statute*, B-321387, 2011 WL 1178327 (Comp. Gen. Mar. 30, 2011) ("*Escrow Accounts*"). In the latter situation, a contractual modification that removes the impermissible provision may terminate an ongoing ADA violation, but it does not undo the violation that occurred when the agency involved the government in a contract for which appropriations were unavailable. *See id.* at *9.

Thus, in assessing whether the ADA violations resulting from a contractual arrangement in which one federal entity obligates revolving funds that another entity legally must reimburse with time-limited funds, we would examine whether funds were legally available to cover the obligation to reimburse when the contractual obligation arose. In our judgment, contractual arrangements in which time-limited funds are obligated for reimbursement beyond the twelve-month period permitted by 31 U.S.C. § 1502(a) resemble contracts with impermissible indemnification clauses: No funds are legally available to cover the pertinent obligation at the time it is incurred. The statute governing obligations of the revolving fund requires that the revolving fund be reimbursed, and the contract providing for reimbursement of the fund specifies the use of time-limited funds that could not be obligated for any part of a contract that extended beyond one year.

The Comptroller General decisions that GSA and DHS identify as support for their arguments do not conflict with our view. In one of the decisions, the Comptroller General concluded that a three-year requirements contract violated "the statutory prohibitions against obligating the government in advance of appropriations," with no indication that the agency could cure the violation. *See Appropriations—Availability—Contracts—Future Needs*, 42 Comp. Gen. 272, 272 (1962) ("1962 Decision"); *see also Contracts—Federal Supply Schedule—Multi-Year Procurement*, 48 Comp. Gen. 497, 499 (1969) (explaining that the 1962 Decision concluded that a violation of the ADA had occurred). The Comptroller General allowed the contracting agency to complete the contract "in view of the circumstances of the award," which appeared to include the fact that the contract provided services to a military base on a remote island, but he did not suggest that a contractual modification could cure the violation. 1962 Decision, 42 Comp. Gen. at 278. The *Maintenance Contract* decision, discussed above, does not address whether an agency can cure a violation; rather, it concludes that a contractual arrangement that does not result in any financial exposure for the government does not violate the ADA. *Maintenance Contract*, 1996 WL 276377, at *4.

The remaining three decisions address situations in which no ADA violation occurred or any ADA violation could be cured, but none involves a contractual arrangement similar to the one that we have described. In one decision, the Comptroller General concluded that entering into a lease without legal authority to do so did not result in an ADA violation (though it violated other laws) because appropriations were available to pay for leases at the time of the obligation, and the agency recorded the obligation in the correct account. *See Interagency Agreements—Use of an Interagency Agreement between the Counterintelligence Field Activity, Department of Defense, and GovWorks to Obtain Office Space*, B-309181, 2007 WL 2389756 (Comp. Gen. Aug. 17, 2007). In another, the Comptroller General concluded that an agency could cure an improper obligation of expired funds if it had sufficient current-year funds at the time of obligation to cover the obligation. *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 WL 2120292 (Comp. Gen. July 17, 2007). In the final decision, the agency improperly divided payments under a nonseverable services contract over the course of two years, and the Comptroller General concluded that the agency could cure an ADA violation if it could adjust accounts so that it recorded the entire contract as an obligation for the first fiscal year, and had sufficient funds available to do so. *Financial Crimes Enforcement Network—Obligations under a Cost-Reimbursement, Nonseverable Services Contract*, B-317139, 2009 WL 1621304 (Comp. Gen. June 1, 2009). In each decision, the agency's ability either to avoid or to cure an ADA violation turned on whether sufficient funds were legally available at the time the obligation occurred. When funds are not legally available at the time of obligation so that the agency could correct the violation through an adjustment of accounts, the ADA violation cannot be cured.

We appreciate that modifying an impermissible contract term may prevent an ADA violation from continuing and may prevent the government from actually spending the funds that it obligated in advance of an appropriation. But a contractual modification that prevents improper spending does not by itself cure an initial improper obligation. *See Escrow Accounts*, 2011 WL 1178327, at *9. For that reason, and those explained above, we conclude that an agency cannot cure an ADA violation that occurs when it enters into a greater-than-one-year severable services contract by modifying the contract's performance period.

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