National Guard Fiscal Law Guidebook 2019

Contract and Fiscal Law Division
Office of the Chief Counsel
National Guard Bureau

26 March 2019

MEMORANDUM FOR All National Guard Leaders

Subject: National Guard Fiscal Law Guidebook 2019

1. This National Guard Fiscal Law Guidebook was developed by the Contract and Fiscal Law Division within NGB's Office of the Chief Counsel (NGB-JA). It is rooted in decades of experience working through the laws and regulations that govern the use of National Guard funding. It is written for all members of the National Guard—attorneys and non-attorneys alike. Its purpose is to foster a common understanding regarding the basic rules that govern the ways in which the National Guard uses its federal dollars.

2. This Guidebook is designed to be used in two ways. First, all National Guard leaders would benefit from reading this Guidebook from cover-to-cover. It will assist you in broadening your understanding of this important area of law that affects all National Guard personnel and missions. Second, it is intended to serve as a well-organized reference for the many individual fiscal law topics—all of which are set out in the Table of Contents.

3. This Guidebook is designed to be informative, accurate and written in plain English. That said, it is designed to be general in nature and nothing in this Guidebook should be considered to be an independent source of legal authority, or replace the professional legal advice of our National Guard Judge Advocates and Civilian Attorneys. Additionally, all statutory, regulatory and decisional citations referenced in this Guidebook are subject to change over time.

4. This Guidebook will be updated periodically. To that end, we invite comments and suggestions for improvement. Any comments or questions regarding this Guidebook can be sent to COL Pat Butler at edward.p.butler2.mil@mail.mil.

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TABLE OF CONTENTS

A—OVERVIEW

For this current fiscal year, the National Guard received authority to obligate approximately ***twenty-seven billion dollars*** of appropriated funds from Congress. These funds are used for almost everything we do, including, but not limited to, the following:

- Salaries/Pay and allowances for our entire NG force – including military personnel, Title 5 civilians, technicians, cooperative agreement employees and contractors
- Funding our drills, exercises and annual training events
- Funding ANG aircraft operations, mission support operations, depot-level aircraft maintenance, contractor logistics support and base support operations
- Procuring and maintaining critically important (NGREA) equipment
- Fueling, maintaining and repairing our vehicles and aircraft
- Acquiring, designing, constructing, sustaining, restoring, and modernizing our facilities and infrastructure/utilities systems
- Maintaining our training areas.
- Funding our TDY travel and school attendance
- Funding education benefits and recruiting/retention incentives
- Funding our IT and communications systems
- Funding our many NG programs, including recruiting, marketing, advertising, CSTs, CBRNE, Youth Challenge, Counterdrug and the State Partnership Program
- Funding mobilization-related costs

Stated simply, the National Guard's three core missions—fighting America's wars, securing the homeland, and building enduring partnerships—are inextricably tied to our

National Guard appropriations. As such, this Guidebook is intended to ensure that there is a common understanding of the basic rules that govern the use our federal appropriated funds in the National Guard.

Although the information in this Guidebook is tailored for the National Guard, its development was significantly shaped by three other outstanding resources:

(1) The Government Accountability Office's (GAO) treatise entitled *Principles of Federal Appropriations Law,* referred to as the GAO "Red Book,"

(2) The Army Judge Advocate General School's *2019 Fiscal Law Deskbook*, and

(3) The DoD Financial Management Regulation (DoD FMR), 7000.14-R

Nothing in this Guidebook should be read as conflicting with any of those three resources or any other statutory/regulatory/policy-based authority. Further, this Guidebook is designed to allow the reader to quickly link to the source material that is being referenced to perform a deeper dive as needed. Readers can click on all authorities in this **Guidebook that are in this purple/bold font**—indicating that there is an embedded hyperlink. Additionally, at the end of each section and subsection of this Guidebook there is a "Crosswalk Links" tab that readers can click on to open the relevant authorities that are cited in that section. An example of the crosswalk link is as follows:

Click Here for Full Document → **Click Here for Corresponding Pinpoint Citation (if available)** →

Crosswalk Links 	**GAO Red Book**	**Chapter 1: Introduction**
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 1: Introduction to Fiscal Law**
	DoD FMR	**Introduction & Summary of Major Changes**
	U.S. Code	**31 U.S.C. § 1301 (The Purpose Statute)**

The term "fiscal law" refers to the body of law that governs how federal agencies, such as NGB, may use the funds that are appropriated to them by Congress. Fiscal law is firmly rooted in the U.S. Constitution, and is further defined by many laws that have been passed over the years by Congress. Additionally, departmental and agency regulations and various judicial and administrative decisions (particularly Comptroller General Decisions from Government Accountability Office – "GAO") also shape this area of law. At heart, fiscal law focuses on ensuring that agencies are using federal funding in accordance with the rules and conditions set out by Congress. The analysis begins with the U.S. Constitution, to which we now turn.

A.1—THE CONSTITUTIONAL BASIS OF FISCAL LAW

As reflected in our military and civil servant oaths of office, the Constitution is the *supreme law* of the United States. That central document sets out the authority for, and the very structure of, our U.S. Government. One of the primary functions of the Constitution is to set out the *separation of powers* between the three branches of our federal Government: (1) the legislative, (2) the executive, and (3) the judiciary.

In enumerating the powers of those three branches, the framers of the Constitution were very concerned with controlling the limited financial resources of our fledgling republic. Accordingly, the framers drafted the "appropriations clause," which is found in the Constitution at Article I, Section 9, Clause 7. It is a key element of the constitutional framework of *checks and balances*. This clause, often referred to as the source of Congress's "power of the purse," states, in relevant part, as follows:

> ***No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.***

This simple and straightforward Constitutional language squarely places Congress in charge of deciding the purposes and conditions under which federal funds may be obligated and expended. Additionally, Congress passed a very clear statute, aptly referred to as the "Purpose Statute," that reinforces the Constitution's Appropriations Clause. The Purpose Statute, codified at **31 U.S.C. § 1301(a)**, was first passed by Congress 210 years ago—on March 3, 1809. It states in relevant part, as follows:

> ***Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.***

Again, the importance of Congress in deciding how much funding will be appropriated, and for what purposes (including limitations and prohibitions) cannot be overstated. As GAO explains, the two underlying purposes behind this legislative power are (1) ensuring that the Federal Government remains directly accountable to the will of the people, and (2) as a check on the power of the other branches, particularly a check on Presidential power.[1] Quoting the U.S. Federal Circuit for DC, **GAO has explained:**

> ***Indeed, a federal agency is a creature of law and can only carry out any of its functions to the extent authorized by law…. Therefore, agencies must operate not only in accordance with the funding levels Congress has permitted, but also in accordance with their authorizing statutes.[2]***

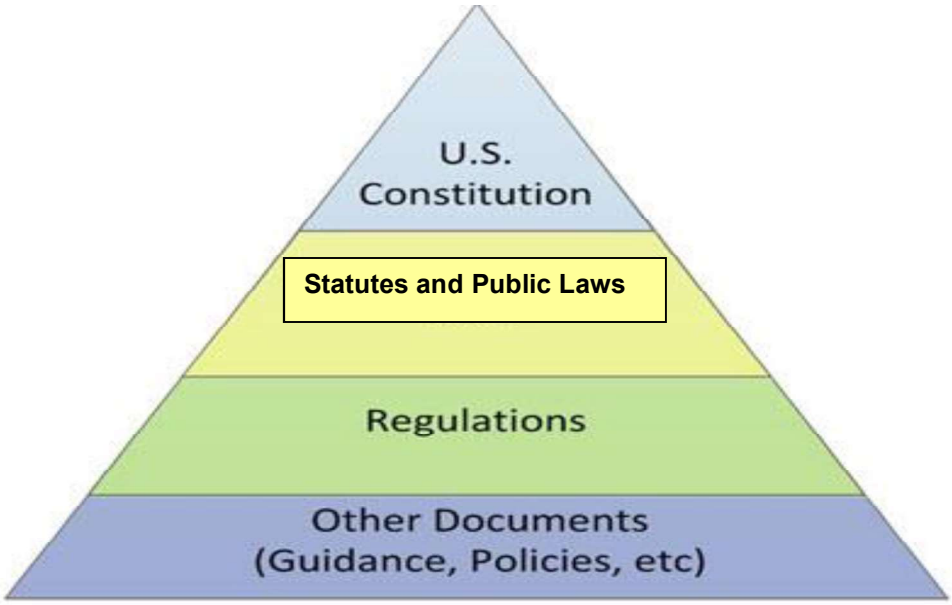
The Supreme Court of the United States has likewise set forth clear decisions on this central point. In an often-cited 1976 decision, ***U.S. v. MacCollom,*** the Supreme Court stated as follows:

> ***The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.***

In light of the above, when it comes to using National Guard appropriations, the appropriate question to ask is "what authority allows us to use these funds for this requirement?" as opposed to "what authority prohibits using these funds for this requirement?" If there is not specific authority, the focus is on the "logical relationship" between the proposed expenditure and the appropriation sought to be charged—explained further in this Guidebook, below.

Finding an appropriate authority for a new idea, or creating an authority (*e.g.*, through the proper implementation of a regulation, or the drafting of legislative proposals) is often difficult and tedious work. Regardless, great or innovative ideas that require funding must be rooted in positive legal authority in order to comply with fiscal law. An example of this hard work is reflected in Section 1651 of **this year's NDAA** which provides clear positive legal authority for a "pilot program" for a "regional cybersecurity training center for the Army National Guard." That legislation set out the purpose, type of location, Congressional notification requirements and length of the time for the program. It is a great example of taking an idea for enhancing the National Guard's cyber mission and securing the proper authority for it.

Finally, it is important to remember that just like the military, our sources of federal law follow a hierarchical structure. See Figure 1, below. The Constitution takes precedence over statutes. Statutes take precedence over DoD regulations. DoD regulations take precedence over Army and Air Force regulations. Army and Air Force Regulations generally take precedence over NGB-level regulations. In a perfect world, all implementing regulations would be harmonious with higher level authorities and up-to-date. Unfortunately, if an office of primary responsibility (OPR) does not update their own regulations to reflect changes in higher-level authorities, the OPR's regulations can become obsolete (at least in part) and ultimately misleading for the field.



(Figure 1: Hierarchy of US Laws)

Crosswalk Links 	**The United States Constitution**	**Article 1, Section 9, Clause 7**
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 1: Introduction to Fiscal Law**
	GAO Red Book	**"Introduction," Fourth Edition, Ch. 1, 2016** **"The Legal Framework," Fourth Edition, Ch. 2, 2016**

	The Military Commander and the Law, Edition 15 (2019), Chapter 13, Fiscal and Contracting Issues
	***United States v. MacCollum*, 426 U.S. 317 (1976)**

A.2—"PURPOSE, TIME AND AMOUNT"

The main theme of fiscal law can be summed up in three words: **"Purpose, Time and Amount.**" This concept is often referred to by its acronym—"**PTA.**" A fiscal law analysis first asks whether or not a particular expenditure is in accordance with the *purpose* for which Congress provides us with that type of funding. This is sometimes referred to colloquially as a "color of money" issue"—meaning that each appropriation (*e.g.,* O&M, RDT&E, MILCON, etc.*)* has its own "color" that can only be used for those purposes. In order to determine if a proposed expenditure is for a proper purpose, we examine the hierarchy of laws and regulations set out above to understand if the proposed expenditure is expressly authorized. If it is not *expressly* authorized, the analysis defaults to GAO's three-part purpose test:

(1) Does the expenditure bear a "logical relationship" to the appropriation?
(2) Is the expenditure prohibited by law? and
(3) Does the expenditure fall within the scope of a more specific appropriation or statutory funding scheme?

If the answer to the first question above is "yes," and the answer to the second two questions is "no," then the proposed expenditure would pass this test. That said, in answering the first question, there must be an articulable and supportable argument explaining *why* the expenditure ties in with an authorized function or mission of the National Guard. This concept (also referred to as the "Necessary Expense Doctrine") is explained in further detail in Section B, "Availability of NG Appropriations as to Purpose."

If the answer to the second or third question is also "yes," than the proposed expenditure cannot be funded with that appropriation. The second question is obvious—if an expenditure is prohibited by law, it cannot be purchased with appropriated dollars.

The third question reflects the fact that more specific appropriations trump general appropriations. For example, ARNG O&M cannot be used for the purchase of ammunition, because there is a more specific appropriation for that purpose called "Procurement of Ammunition, Army." See the various specific appropriations for the Army and Air Force in Subsection A.4 of this Guidebook, below. If, however, two

general appropriations are available for the same requirement, the agency can select either. However, once that election is made, the agency must continue to use the selected appropriation to the exclusion of any other until the end of the current fiscal year.[3] (This is sometimes referred to as the "pick and stick" rule.") If the agency intends on changing the election, the agency, at the start of the fiscal year, must notify Congress of the intent to change for the subsequent fiscal year.

Next, the *time* analysis is based on the fact that Congress typically states how long a particular appropriation is available for obligation. This is a very important constraint that reflects Congress's power of the purse. For the National Guard, our military personnel and O&M appropriations have a one-year "period of availability." As a "procurement" appropriation, our NGREA funds have a three-year period of availability. Finally, our military construction funding has a five-year period of availability. Regardless of the length of the availability period, once it ends the funds in question enter into an "expired" status for five years—during which time they can only be obligated for certain limited purposes. After those five years expire, the account is "closed" and the funds are no longer available for any purpose. The timing rules are explained in further detail in Section C, "Availability of NG Appropriations as to Time."

Finally, the *amount* analysis focuses on ensuring that government officials do not obligate the government in a manner that exceeds an appropriation, apportionment or a formal subdivision of funds. For example, if a contracting officer inadvertently entered into a contract with Air National Guard O&M funding for an amount that exceeded the amount that was left in the Air National Guard O&M appropriation for that fiscal year, we would have an "amount" problem. Further, an *amount* problem can arise in a situation where there is *no* funding available for a particular expenditure. For example, if Congress prohibits *any* funds being expended for "X" and a government official obligates the Government to pay for "X," there is both a *purpose* and an *amount* violation. Additionally, such an obligation would likely violate the Antideficiency Act ("ADA"). The ADA actually consists of several statutes that allow for administrative and *criminal* sanctions for the unlawful use of appropriated funds. This concept is explained in further detail in Section D, "Availability of NG Appropriations as to Amount."

Crosswalk Links 	**GAO Red Book**	**Introduction, Fourth Edition, Ch. 1, 2016.** **Availability of Appropriations: Purpose, Fourth Edition, Ch. 3, 2017 Revision.**

		Availability of Appropriations: Time, Third Edition, Ch. 5, 2004. (See also Annual Update). **Availability of Appropriations: Amount, Third Edition, Ch. 6., 2006 (See also Annual Update.)**
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 1: Introduction to Fiscal Law** **Chapter 2: Availability of Appropriations as to Purpose** **Chapter 3: Availability of Appropriations as to Time** **Chapter 4: Antideficiency Act**
	U.S. Code	**31 U.S.C. § 1301 (The Purpose Statute)**

A.3—THE 14 PRINCIPLES OF GOVERNMENT ETHICS AND FISCAL LAW

Before moving further into the substance of fiscal law, it is important to recognize that fiscal law should be interpreted in harmony with basic principles of government ethics. In August of 2017 the Secretary of Defense signed a memorandum for all DoD Employees with the Subject "Ethical Standards for All Hands." The memo stated, in part, as follows:

> *Those entrusted by our nation with carrying out violence, those entrusted with the lives of our troops,* ***and those entrusted with enormous sums of taxpayer money*** *must set an honorable example in all we do.*
>
> *I expect every member of the Department to play the ethical midfield. I need you to be aggressive and* ***show initiative without running the ethical sidelines****, where even one misstep will have you out of bounds. I want our focus to be on the essence of ethical conduct: doing what is right at all times, regardless of the circumstances or whether anyone is watching.*

Notably, the first sentence of the SECDEF's memo refers, in part, to "those entrusted with enormous sums of taxpayer dollars." Various scandals over the past decade have unfortunately demonstrated that too often a small number of government officials have broken the sacred trust that the federal government has in terms of safeguarding taxpayer dollars.

Further, as will be seen throughout this Guidebook, fiscal law inevitably leads to some gray areas. When faced with fiscal law gray areas, applying these 14 Ethical Principles (from **Executive Order 12731**) is a useful and appropriate means of finding the right answer. In this regard, it is particularly important to notice that the last of the 14 principles, below, emphasizes that all government officials should avoid taking actions that even give the "*appearance*" of unethical conduct. Although Government ethics is a highly regulated area that is outside of the subject matter of this Guidebook, almost all ethical pitfalls can be avoided by following the well-established 14 principles of ethical conduct:

1. *Public Service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.*

2. *Employees shall not hold financial interests that conflict with the conscientious performance of duty.*

3. *Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.*

4. *An employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.*

5. *Employees shall put forth honest effort in the performance of their duties.*

6. *Employees shall make no unauthorized commitments or promises of any kind purporting to bind the Government.*

7. *Employees shall not use public office for private gain.*

8. *Employees shall act impartially and not give preferential treatment to any private organization or individual.*

9. *Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.*

10. *Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.*

11. *Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.*

12. *Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those-- such as Federal, State, or local taxes -- that are imposed by law.*

13. *Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.*

14. *Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order.*

These principles are further reinforced in the Federal Acquisition Regulation (FAR) which states:

> *Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct.… While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.*

See FAR § 3.101, "Standards of Conduct." Many fiscal law questions arise in the context of government contracting—including purchases made using the Government Purchase Card (GPC). Accordingly, in addition to a pure fiscal law analysis, it is

important to remember that when we contract in the National Guard using taxpayer dollars, we must ensure that we would have "no reluctance to make a full public disclosure" of the transaction(s).

When there is doubt regarding whether or not a proposed contracting/GPC action complies with either fiscal law or the laws of federal government ethics, there are many personnel who can assist in that analysis. This includes the USPFOs, the state Judge Advocates, NGB's Head of the Contracting Activity (HCA), NGB's Senior Contracting Official (SCO—previously called the Principal Assistant Responsible for Contracting or PARC) and NGB's Office of the Chief Counsel (NGB-JA). In addition, our subject matter experts (SMEs) on federal government ethics reside within the Ethics Division within the Office of the Chief Counsel for the National Guard Bureau (NGB-JA). NGB-JA's Ethics Team can be reached by email at **NG.Ethics@mail.mil**. All of the above-referenced officials are part of a robust support structure that is designed, in part, to ensure that our use of public funds complies with all laws and ethical principles.

<table>
<tr><td rowspan="6">Crosswalk Links
  </td><td colspan="2">Executive Order 12371: Principles of Ethical Conduct for Government Officers and Employees</td></tr>
<tr><td colspan="2">DoD Standards of Conduct Office (SOCO) Library</td></tr>
<tr><td>Federal Acquisition Regulation (FAR)</td><td>FAR § 3.101, Standards of Conduct</td></tr>
<tr><td colspan="2">DoD Directive 5500.07, Standards of Conduct, November 29, 2007</td></tr>
<tr><td colspan="2">SECDEF Memorandum, Subject: Ethical Standards for All Hands, 4 August 2017.</td></tr>
<tr><td colspan="2">Acting SECDEF Memorandum, Subject: Leading with an Ethics Mindset</td></tr>
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A.4—KEY TERMINOLOGY FOR FISCAL LAW

As with any area of law, a common definition of certain key terms is important for a shared understanding. The terms set out below, are just some of the terms set out by the GAO in a (182-page) document entitled, *A Glossary of Terms Used in the Federal Budget Process.*[4] It is important to review these terms at the outset, since they are used frequently throughout the rest of this Guidebook. Some of the key terms (and their definitions) are as follows:

- **Fiscal Year.** The Federal Government's fiscal year begins on 1 October and ends on 30 September. For example, Fiscal Year 2019 began on 1 October 2018 and will end on 30 September 2019.

- **Period of Availability.** The period of time in which budget authority is available for the original obligation.

- **Expired Funds.** Once a period of availability ends, the funds in that appropriation become "expired." Expired funds can be used to adjust prior obligations under certain circumstances, but they are generally not available for new obligations.

- **Commitment.** An administrative reservation of allotted funds, or of other funds, in anticipation of their obligation. Commitments are important to ensuring that the subsequent entry of an obligation will not exceed available funds. Commitments in the Army National Guard were traditionally accomplished in the form of a DA Form 3953, "Purchase Request and Commitment," (often referred to as a "PR" or a "PR&C." Commitment in the Air National Guard were traditionally accomplished in the form of a "Request for Purchase" on an Air Force Form 9 (often referred to simply as a "Form 9.") A lot of these commitments and PRs are now performed electronically within the General Fund Enterprise Business System—GFEBS (for the ARNG) or Defense Enterprise Accounting and Management System—DEAMS (for the ANG).

- **Obligation.** An obligation is any act that legally binds the government to make payment. Obligations are amounts representing orders placed, contracts awarded, services received, and similar transactions that will require payment.

- **Budget Authority.** Budget authority means "the authority provided by Federal law to incur financial obligations." Such obligations result in immediate or future outlays involving Federal Government funds. (Although we often say that we receive "money" from Congress, it is technically more accurate to say that we receive "budget authority" from Congress.)

- **Contract Authority.** Contract authority is a limited form of budget authority. It is a statutory authority to incur obligations on behalf of the Government. In the National Guard, contracting authority falls under the responsibility of NGB's "Head of the Contracting Activity," or "HCA." Only those National Guard personnel who receive a warrant (contracting officer) from NGB's Director of Acquisitions/HCA or SCO have the legal authority to obligate funds with third

parties. The only exception to this rule are personnel appointed as cardholders under the GPC program managed and operated by the NGB Directorate of Acquisitions.

- **Grant/Cooperative Agreement Authority**. The authority to award grants and cooperative agreements is also a limited form of budget authority. The central statutory authority is the Federal Grant and Cooperative Agreement Act (FGCAA) set out in Chapter 63 of Title 31 of the U.S. Code. In order to award a grant or cooperative agreement, the USPFOs must have an appointment letter from NGB's Director of Acquisitions/HCA or SCO have the legal authority to sign grants or cooperative agreements.

- **Authorization Act**. An authorization act is a bill that is passed annually by Congress, to authorize the appropriation of funds for programs and activities. An authorization act does not provide budget authority. (Budget authority stems from an appropriations act.) Authorization acts also frequently contain restrictions or limitations on the obligation of appropriated funds.

- **Appropriations Act.** An appropriations act is the most common form of budget authority. An appropriation is a statutory authorization "to incur obligations and make payments out of the Treasury for specified purposes." The National Guard receives the bulk of its federal funds from two annual appropriations acts: (1) The Department of Defense Appropriations Act, and 2) the Military Construction Appropriations Act. In some years, however, this legislation is combined into what is referred to as an "omnibus" appropriations act.

- **The Government Accountability Office (GAO).** The Government Accountability Office is a federal agency under the legislative branch. It was established by the Budget and Accounting Office of 1921. As an investigative arm of Congress, its mission is to examine all matters relating to the receipt and disbursement of funds. GAO is the most common forum for procurement protests. In terms of fiscal law, GAO issues many decisions of the Comptroller General that explain the rules outlining the proper obligation of federal funds. Further GAO publishes a highly-regarded treatise on fiscal law that is called "Principles of Federal Appropriations Law," but more commonly referred to as the "GAO Red Book."

- **The Comptroller General (within GAO).** The Comptroller General is the head of the GAO. GAO publishes a series of decisions called "Comptroller General Opinions," which are organized by a "B-number" and date (*e.g.*, B-32414,

January 27, 2014). The Red Book has hundreds of citations to various Comptroller General Decisions.

- **Treasury Warrant.** An official document that the Secretary of the Treasury issues upon enactment of an appropriation that establishes the amount of moneys authorized to be withdrawn from the central accounts that the Department of the Treasury maintains.

- **Fund Citations.** Fund Citations are accounting classifications that are used to administratively manage appropriations. The first two digits denote the military department. Army National Guard Appropriations fall under the code "21" for the Department of the Army. Air National Guard Appropriations fall under code "57" for the department of the Air Force. DoD funding (such as those that fund the NG Youth Challenge Program) fall under the DoD code "97." The next digit (third digit) shows the fiscal year/period of availability of the appropriation. The next four digits reveal the type of the appropriation. For example the fund cite "21 9 2065" denotes FY19 Army National Guard O&M accounts. Within the National Guard, the following are the designators for our eight organic appropriations:

Appropriation Type	**Army National Guard**	**Air National Guard**
Military Personnel	21*2060	57*3850
Operation and Maintenance	21*2065	57*3840
Military Construction	21*2085	57*3830
National Guard and Reserve Equipment Appropriation	97*0350	97*0350

[Note 1: The asterisk "*" in the third digit is replaced with the last number in the relevant fiscal year. For example, Operations & Maintenance, Army National Guard funds for FY19 would be depicted as 2192065.]

In addition to our organic appropriations, the National Guard receives some DoD-level O&M funding called, "Operation and Maintenance, Defense-Wide" which has a fund citation starting with 97*0100. Further, National Guard leaders should be generally aware of the Army and Air Force's organic appropriations (including the USAR and USAF Reserve), which are as follows:

Appropriation Type	Army	Air Force
Military Personnel	21*2010	57*3500
Reserve Personnel	21*2070	57*3700
Operation and Maintenance (O&M)	21*2020	57*3400
Operation and Maintenance - Reserve	21*2080	57*3740
Procurement – Aircraft	21*2031	57*3010
Procurement – Missiles	21*2032	57*3020
Procurement – Weapons and Tracked Vehicles	21*2033	N/A
Procurement – Ammunition	21*2034	57*3011
Procurement – Other (OPA)	21*2035	57*3080
Research, Development Testing and Evaluation (RDT&E)	21*2040	57*3600
Military Construction (MILCON)	21*2050	57*3300
Family Housing Construction	21*0720	57*0704
Military Construction – Reserve	21*2086	57*3730

Crosswalk Links 	**GAO's Glossary of Terms Used in the Federal Budget Process**	
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 1: Introduction to Fiscal Law**

A.5—THE UNITED STATES PROPERTY AND FISCAL OFFICERS (USPFOs)

The 54 USPFOs (and their staffs) are critical to ensuring the proper oversight of federal property and funding in the possession of their assigned state's National Guard. The USPFOs play a central role in ensuring that state-level obligations and expenditures of federal funds comply with fiscal law.

The position of the USPFO is *statutorily* established in both Title 10 and Title 32. The primary statute defining the position is 32 U.S.C. § 708. That statute defines how USPFOs are appointed (by the governor) and approved (under authorization from the service secretaries). In terms of duties, the statute requires the USPFOs to "receipt and account for all funds and property of the United States in the possession of the National Guard for which he is [the USPFO]." That statute also explains that the Secretary of the Army and Secretary of the Air Force shall prescribe joint regulations necessary to carry out the requirements of the statute.

In Title 10, the USPFOs are expressly referenced in the legislation that defines the primary functions of the National Guard Bureau – 10 U.S.C. § 10503. That statute called for the promulgation of the NGB Charter, to include NGB's responsibility for:

> *Supervising the acquisition and supply of, and accountability of the States for, Federal property issued to the National Guard through the property and fiscal officers designated, detailed, or appointed under section 708 of title 32.*

Turning to the implementing regulations, the National Guard Charter is set out as DoD Directive (DoDD) 5105.77, "National Guard Bureau (NGB)." That regulation explains that the USPFOs are a part of the Office of the Chief of the National Guard Bureau, and directly implements the language cited above from 10 U.S.C. § 10503.

Additionally, DoD Instruction (DoDI) 1200.18, "The United States Property and Fiscal Officer (USPFO) Program," further defines responsibilities in this area. It explains that "federal funds shall be issued directly to the USPFOs" who are "agents of the Secretaries of the Army and Air Force." It requires the USPFOs to "ensure that Federal funds are obligated and expended in compliance with applicable statutes and regulations."

Although the USPFO has supervisory control over the purchasing and contracting office—as demonstrated above— it is important to remember that the

procurement authority for those contracting officers is separate and flows through NGB's Director of Acquisitions/HCA and SCO. This is reflected in the contracting officers' warrants that are signed by the HCA or SCO, and not by the USPFO. Further, although the USPFOs serve as the primary "grants officer" in their state, that authority is also derivative of an appointment from NGB's Directorate of Acquisitions/HCA.

DoDI 1220.18 also explains that it is DoD policy that USPFO duties and responsibilities "shall be carried out by full-time staff assigned directly under the USPFO's daily supervision, and by Assistant USPFOs who shall be primarily accountable to the USPFO for fiscal, property and real property matters." Finally, the DoDI states:

> *The Office of the USPFO … shall be provided resources and manpower staffing at a level not less than the respective State's average Joint Force Headquarters (JFHQ) manning levels and, at a minimum, necessary to effectively perform all statutory duties and responsibilities.*

The NGB-level regulation (approved by the Service Secretaries) is NGR 130-6/ANGI 36-2, "United States Property and Fiscal Officer, Appointment, Duties, and Responsibilities." That regulation further defines the roles and responsibilities of the USPFOs.

In sum, the National Guard's USPFOs are the statutorily-required oversight officials for our federal funds and property. USPFOs are critical to federal oversight at the state National Guard level. They are personally responsible for ensuring proper oversight of federal property and funding for adherence to fiscal law.

Crosswalk Links 	**32 U.S.C. § 708**
	10 U.S.C. § 10503
	DoD Directive 5105.77, National Guard Bureau (NGB), Incorporating Change 1, 10 October 2017
	DoDI 1220.18, The United States Property and Fiscal Officer (USPFO) Program, 7 June 2012
	NGR 130-6, United States Property and Fiscal Officer, Administration, Duties and Responsibilities, 1 July 2007

A.6—OTHER "ACCOUNTABLE OFFICERS" IN THE NATIONAL GUARD

Although the USPFOs play a central role in providing oversight and accountability for federal funding at the state National Guard level, they are not the only ones who are *personally* responsible (and personally liable) for funding in the National Guard. Rather, there are many "accountable officials" throughout the National Guard.

An "accountable official" is any government officer or employee who by reason of his or her employment is responsible for, or has custody of, government funds. A listing of the various types of accountable officers (*e.g.,* disbursing officials, cashiers, paying agents, collection agents, etc.) is set forth in greater detail in Chapter 14 of the Army JAG School's 2019 Fiscal Law Deskbook as well as Chapter 9 of the GAO Red Book, "Liability and Relief of Accountable Officers." Since this Guidebook is tailored to the National Guard, this section focuses on the two most common accountable officers that we have—(1) certifying officers, and (2) departmental accountable officials (DAOs).

Certifying officers and DAOs within the National Guard are appointed on a DD Form 577. That form includes the following important acknowledgement:

> ***I acknowledge and accept the position and responsibilities defined above. I understand that I am strictly liable to the United States for all public funds or payment certification, as appropriate, under my control. I have been counseled on my pecuniary liability applicable to this appointment and have been given written operating instructions.***

As stated above, a National Guard member who signs a DD Form 577 is signing up for "pecuniary liability." *Pecuniary liability,* as defined in the DoD FMR as "*personal* financial liability for fiscal irregularities of accountable officials as an incentive to guard against errors and theft by others, as well as protect the government against errors and dishonesty by the officers themselves." Stated differently, those who sign a DD Form 577 are taking on ***personal*** financial liability for the misuse or loss of the federal funds connected to their duties. It is not an obligation that should be taken lightly.

National Guard Certifying Officers

A National Guard "certifying officer," is a government officer or employee whose job is, or includes, certifying vouchers for payment. Typically a certifying officer does not have physical custody of government funds, however as stated in the DoD FMR

they "attest to the correctness of statements, facts, accounts, and amounts appearing on a voucher, or other documents." *Certification* is the "act of attesting to the legality, propriety and accuracy of a voucher for payment." Certifying Officer liability is established by 31 U.S.C. § 3528. The GAO Red Book sets out more information on certifying officers (and their liability) in Volume II, Chapter 9 (3rd Edition). Certifying officers play a critical accountability function within the National Guard. This is an "inherently governmental function," that cannot be performed by contractors. In light of their role and personal financial liability, it is critical that all National Guard certifying officers understand the basics of fiscal law.

In terms of liability, a certifying officer is responsible for the following:

(1) The correctness of the facts recited in the certificate, or otherwise stated on the voucher or supporting papers;
(2) The correctness of computations on the voucher;
(3) The legality of the proposed payment under the appropriation or fund cited on the voucher;
(4) Ensuring that the payee has fulfilled the prerequisites to payment (*e.g.*, an invoice, receiving report, etc.).

Further a certifying officer is personally accountable for any payment:

(1) Determined to be prohibited by law;
(2) Determined to be illegal, improper, or incorrect because of an inaccurate or misleading certificate, or
(3) Determined to not represent a legal obligation under the appropriation or fund involved, unless payment is recovered by collections or offset from the payee or another source.

See **31 U.S.C. § 3528**, and **DoD FMR, Vol. 5, Ch. 5, Para 050304**.

Further, it is important to understand that certifying officers are accountable for illegal, improper, or incorrect payments made as a result of their certifications *even though they may have relied on information, data, or services of other departmental accountable officials.* On this point, the Comptroller General has stated:

> A critical tool that certifying officers have to carry out this responsibility is the power to question, and refuse certification of payments that may be improper.

See *Matter of Mr. Jeffery Elmore, Request for Relief of Financial liability*, B-307693 (Apr. 12, 2007). Accordingly, all National Guard personnel in the chain of any financial transaction are obligated to respond to questions from certifying officers in order to provide them with the information that they need to perform their important duty of certification. It is improper and unacceptable for any National Guard member to pressure any certifying officer to certify a payment that the certifying officer reasonably believes to be illegal, improper or incorrect. If such issues cannot be resolved, they should be raised through appropriate legal and USPFO/NGB/command channels for resolution. Ultimately, a certifying officer can request an "advance decision" under 31 U.S.C. § 3529; however **DoD has taken the position that any advance decision must come from DoD, and not the Comptroller General**. Instead of the Comptroller General, DoD looks to the DoD Deputy General Counsel (Fiscal) as the official capable of providing the authoritative advance decision to a certifying officer, DAO, or other "accountable official." This process is spelled out in the DoD FMR in Volume 5, Chapter 12.

National Guard "Departmental Accountable Officials"

A *Departmental Accountable Official* (DAO) in the National Guard is an "individual who provides certifying officers with information, data, or services that the certifying officers rely upon directly in certifying vouchers for payment." See DoD FMR, Volume 5, Ch. 5, para. 050305. The position of a DoD DAO is established by 10 U.S.C. § 2773a. It is implemented by regulation in Volume 5 of the DoD FMR (Para 050305). They must be appointed (and terminated) in writing on a DD Form 577.

The DoD FMR explains that DAOs "may be held pecuniarily liable under 10 U.S.C. § 2773a for illegal, improper or incorrect payment resulting from information, data, or services they negligently provide to certifying officers; and upon which the certifying officers relied to certify payment vouchers." This liability is "joint and several" with that of any other officer or employee of the United States or member of the uniformed services who is also pecuniarily liable for such loss. See DoD FMR Vol. 5, Ch. 5, para 050701.C.

Crosswalk Links 	**GAO Red Book**	**Liability and Relief of Accountable Officers, 3rd Edition, Ch. 9, 2006**
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 14: Liability of Accountable Officers**

	DoD FMR	**Volume 5, Ch. 5, Certifying Officers, Departmental Accountable Officials, and Reviewing Officials, July 2017**
	DoD FMR	**Volume 5, Ch. 12, Questionable and fraudulent claims, April 2018**
	10 U.S.C. § 2773a, Departmental accountable officials	
	31 U.S.C. § 3528, Responsibilities and relief from liability for certifying officials	
	GAO Decision: *Matter of Mr. Jeffery Elmore, Request for Relief of Financial liability*, B-307693 (Apr. 12, 2007)	
	DD Form 577 – Appointment/Termination – Authorized Signature	

A.7—NATIONAL GUARD CONTRACTING AUTHORITY

Since fiscal law concerns often arise in the context of federal contracts, it is important to have a general understanding of NGB's contracting authorities and structure. Although NGB enters into contract for both ARNG and ANG requirements, it is strictly an *Army* contracting activity. The contracting structure for the entirety of DoD is set out in the **Defense Federal Acquisition Regulation Supplement**.

The DFARS is structured in a manner in which each regulatory section is placed next to a policy document that is called "Procedures, Guidance, and Information" or "PGI." **PGI Section 202.101** shows all of the various contracting activities throughout DoD. In terms of organization, some fall under DoD, many fall under the Services, and others are "stand alone" DoD-level contracting activities (*e.g.*, DISA, DIA, DFAS, etc.). As seen in that PGI, NGB falls under the "Department of the Army."

NGB receives its contracting authority from a direct delegation from the Assistant Secretary of the Army for Acquisition Logistics and Technology—ASA(ALT). This is a written delegation from the ASA(ALT) directly to the HCA who is NGB's "Director of Acquisitions"—a Senior Executive Service (SES) position. NGB's HCA/Director of Acquisitions is the Senior Procurement Official in the National Guard and reports directly to the Army on matters related to procurement. As stated in the Federal Acquisition Regulation (FAR), the HCA is the "official who has overall responsibility for managing the contracting activity. The HCA delegates a significant amount of responsibility to the Senior Contracting Official (SCO). Among their many responsibilities, the HCA and the SCO are responsible for establishing criteria and

procedures to ensure that only contracting officers with adequate knowledge and experience award and administer contracts.

In federal government contracting, it is critical to understand that only those with *actual* authority can enter into contracts. Actual authority to contract (outside of the GPC programs) is established through a specific appointment form (**Standard Form 1402**) that is signed by the appropriate agency official. This document is often referred to as a contracting officer's "warrant." The reason that only warranted contracting officers can enter into contracts on behalf of the federal government was aptly stated by the U.S. Federal Circuit in a 1990 case:

> The United States Government employs over 3 million civilian employees. Clearly, federal expenditures would be wholly uncontrollable if Government employees could, of their own volition, enter into contracts obligating the United States.

***City of El Centro v. U.S.*, 922 F.2d 816, 820 (Fed. Cir. 1990).** The "warrant" refers to a Standard Form 1402, "Certificate of Appointment" as a "Contracting Officer for the United States of America." The warrant will typically set a maximum dollar threshold for that contracting officer, and can contain other limitations. Only NGB's HCA and SCO can sign the SF 1402 appointing an individual as an NGB contracting officer. (The HCA and SCO can also suspend or terminate a warrant at any time.) That is, although many of our contracting officers are supervised through the USPFO chain, their procurement authority comes from NGB's HCA/Direct of Acquisitions and SCO.

It is also critical to understand that although commanders have broad authority to direct operations, they ***do not*** have the authority to obligate the U.S. Government to expend funds. That is, "**command authority" is not "contracting authority."** Further, once appointed, a contracting officer carries a heavy responsibility of upholding all procurement laws and regulations in all of their contracting actions. The FAR explains that a contracting officer cannot enter into a contract unless he or she "*ensures that all requirements of law, executive orders, regulations, regulations, and all other procedures, including clearances and approvals, have been met."* (See **FAR § 1.602-1, "Authority"**). Accordingly, one of a contracting officer's many responsibilities is ensuring that a particular contracting action complies with fiscal law. As noted in Subsection A.6, above, this responsibility also falls to the certifying officer and any departmental accountable officials in the chain of that transaction. Fiscal law concerns should be raised through the appropriate chains. If they cannot be resolved at lower levels, the Contract and Fiscal Law Division within NGB-JA is available to provide the agency-level legal advice on fiscal law questions.

Finally, although *contract law* is outside the scope of this Guidebook, it is important to understand that the Federal Acquisition Regulation (FAR) is designed to provide a centralized and all-encompassing regulation governing every aspect of federal contracting. Further, NGB contracting officers must ensure that their contracting actions also comply with (1) the Defense FAR Supplement (DFARS), (2) the Army FAR Supplement (AFARS), and (3) NGB Acquisition Instructions and policies. The Army JAG School provides an outstanding resource called the "Contract Attorneys Deskbook,"—the most recent version of which can be accessed in the crosswalk links, below.

Crosswalk Links 	**Army JAG School Contract Law Deskbook (2018)**
	Federal Acquisition Regulation (FAR)
	Defense FAR Supplement (DFARS): **PGI 202.101—Definitions**
	Army FAR Supplement (AFARS)
	NGB Directorate of Acquisitions Website

A.8—NATIONAL GUARD FISCAL STEWARDSHIP

The National Guard is a large and complex organization that is geographically dispersed across the 50 states, three territories and the District of Columbia. It is comprised of over 450,000 Soldiers and Airmen utilizing hundreds of facilities, supported by an annual budget of over $27 billion. It is in possession of hundreds of billions of dollars of military equipment, including a wide array of aircraft and ground-based vehicles and weapons systems. As a state-based reserve component of the Army and the Air Force, the National Guard is governed by myriad federal and state laws and regulations. In light of the above, strong internal controls are critical to the National Guard's fiscal operations.

DoD' responsibilities for internal controls are set out in DoD Instruction 5010.40, "Manager's Internal Control Program Procedures." In addition to the "Red Book," GAO also publishes an outstanding resource referred to as the "Green Book." The formal name for the Green Book is "Standards for Internal Control in the Government." It

provides federal managers with criteria for designing implementing and operating an effective internal control system. It begins as follows:

> *Policymakers and program managers are continually seeking ways to improve accountability in achieving an entity's mission. A key factor in improving accountability in achieving an entity's mission is to implement an effective internal control system. An effective internal control system helps an entity adapt to shifting environments, evolving demands, changing risks, and new priorities. As programs change and entities strive to improve operational processes and implement new technology, management continually evaluates its internal control system so that it is effective and updated when necessary.*

See GAO Green Book, Page 1.

The National Guard Bureau promulgated CNGBI 9500.01, "National Guard Fiscal Stewardship" on 9 August 2016.[1] That CNGBI, influenced by the GAO Green Book, establishes policy and assigns responsibilities for the National Guard Fiscal Stewardship Comprehensive Plan (FSCP, pronounced "*fis-cap"*). It explains that it is National Guard policy to promote fiscal stewardship "by assessing the fiscal state of the NG … maintaining situational awareness, and strengthening Internal Controls (IC) and audit readiness."

The three main goals of the NG's fiscal stewardship program are to (1) maintain situational awareness on fiscal issues across the entire NG enterprise, (2) strengthen the NG's internal controls, and (3) increase the NG's "audit readiness." The FSCP is carried out through four groups: (1) The National Guard Enterprise Management Council (NGEMC), (2) Senior Assessment Teams (SATs), (3) Senior Management Council(s) and (4) the Fiscal Stewardship Fusion Cell. The precise composition of these groups is beyond the scope of this Guidebook; however, a review of the CNGBI reflects a goal of bringing together NG overall leadership (at the NGB and State levels) along with specific NGB offices/directorates who have an important role to play in fiscal matters—*e.g.,* NGB's Head of the Contracting Activity, NG's Comptrollers represented by the J8, NGB's Office of the Chief Counsel, and NGB's Inspector General.

Although NG's Fiscal Stewardship program addresses many more issues than just fiscal law, it is placed in this Guidebook for awareness. That is, fiscal irregularities or fiscal law violations in one state or territory are often a "red flag" that the same issue

[1] This CNGBI is currently being revised, so check the NGB Publications Library for the latest version of this regulation.

may be happening in other states/territories. The Fiscal Stewardship program is designed, in part, to be a proactive system to ensure that proper internal controls are in place and operating effectively.

Crosswalk Links 	**GAO's Green Book: Standards for Internal Control in the Federal Government, September 2014**
	DoDI 5010.40, Managers' Internal Control Program Procedures, May 30, 2013
	CNGBI 9500.01, National Guard Fiscal Stewardship, 9 August 2016

A.9—THE ROLE OF GAO AS APPLIED TO FISCAL LAW

The Government Accountability Office (GAO) is an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds. That is, unlike DoD, GAO is a *legislative branch* agency, not an executive branch agency. The GAO was established by the Budget and Accounting Act of 1921. GAO issues opinions and reports to federal agencies concerning the obligation and expenditure of appropriated funds.

The GAO issues decisions called "Comptroller General Decisions." These decisions are identified by a "B-number and date (*e.g.*, B-324214, January 27, 2014). Many of these decisions focus on fiscal law issues—explaining GAO's views on a wide-range of PTA types of issues. Although these decisions and their corresponding "recommendations" are not legally binding on executive agencies, GAO decisions are afforded great weight among all executive agencies, including the National Guard Bureau. Further, as mentioned at the beginning of this Guidebook, GAO published "the" most authoritative treatise on fiscal law—the "Red Book" which covers almost every conceivable fiscal law issue in a detailed fashion.

Crosswalk Links 	**GAO Red Book**	
	GAO: Decisions of the Comptroller General	
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 1: Introduction to Fiscal Law**
	GAO's Main Website	

B—THE AVAILABILITY OF NG APPROPRIATIONS AS TO *PURPOSE*

B.1—THE GENERAL CONCEPT: IN SEARCH OF AUTHORITY

As stated in Section A (above) the main theme of fiscal law can be summed up in three words: "Purpose, Time and Amount." Of those three, it has been our office's experience that the vast majority of issues that are raised in the National Guard are *purpose* questions. Purpose questions almost always focus on *authority*. Generally speaking, the question in this area is: What authority allows the National Guard to obligate our funds for this requirement? *Authorities* can be broken down into two main categories—express and implied. Drilling down further, we find that "express" authorities can be specific or general in nature.

In terms of *express* authorities in the National Guard, a proper fiscal law analysis starts with the language that has been enacted into law. The three main types of legislation for the National Guard are as follows: (1) Appropriation Acts, (2) Authorization Acts, and (3) "permanent" or "standing" legislation. As applied to the National Guard, this last category typically refers to the statutes set out in Title 5, Title 10 and Title 32 of the U.S. Code in addition to provisions in certain Public Laws (P.L.s).

It is important to understand that of the three types of legislation described above, only the appropriation acts provide "budget authority" to actually incur obligations. That is, although the authorization acts and permanent legislation provide authority to spend our funds on a wide range of activities, they do not by themselves provide the actual *budget authority*—which can only come from the *appropriation act* (to include a "continuing resolution").

In addition to the three types of legislation set out above, there are also *permanent fiscal statutes*, found in Title 31 of the U.S. Code, that implement Congress's power of the purse and are always relevant to a fiscal law analysis. These Title 31 authorities will be seen throughout this Guidebook. The most important of these authorities are as follows:

Statutory Citation (Hit [ctrl] + click to access statute)	Summary of Statute
31 U.S.C. § 1301(a)	Appropriations may be used only for their intended purposes. (This is known as the "Purpose Statute.")
31 U.S.C. § 1301(d)	A statute will not be construed as making an appropriation unless it expressly so states.
31 U.S.C. § 1502(a)	Appropriations made for a definite period of time may be used only for expenses properly incurred during that time. (This is known as the "*bona fide needs* statute.")
31 U.S.C. § 1532	An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law. Except as specifically provided by law, an amount authorized to be withdrawn and credited is available for the same purpose and subject to the same limitations provided by the law appropriating the amount. (This is known as the "transfer statute.")
31 U.S.C. § 1552	Time-limited appropriations that are unobligated at the end of their period of availability are said to "expire," and are no longer available for new obligations. (This is known as the "account closing law.") It allows expired funds to remain available only for limited uses.
31 U.S.C. § 1341	Agencies may not spend, or commit themselves to spend, in advance of or in excess of appropriations. (This is one of the statutes that comprise the "Antideficiency Act")
31 U.S.C. § 3302(b)	Unless authorized by law, an agency may not keep money it receives from sources other than appropriations, but must deposit the money in the Treasury. (This is known as the "miscellaneous receipts statute.")
31 U.S.C. § 1501	All obligations that an agency incurs must be supported by documentary evidence and must be promptly recorded. (This is known as the "recording statute.")
31 U.S.C. §§ 6301-6308	These sections are collectively referred to as the "Federal Grant and Cooperative Agreement Act" or "FGCAA." See Subsection E.1 of this Guidebook for further information on these sections.

In terms of answering fiscal law *purpose* questions, the text of appropriation acts, authorization acts and permanent legislation, discussed earlier, is critically important.

That said, it is also important to understand that properly promulgated agency *regulations* have "the force and effect of law." That is, if an agency, in creating a regulation, interprets a statute, that interpretation is granted a great deal of deference. Accordingly, if an agency regulation determines that appropriated funds may be utilized for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous. Again, only appropriation acts provide *budget authority*, but properly promulgated regulations can serve as positive legal authority allowing funds to be obligated for a particular *purpose.*

While legislation typically provides an agency with certain authorized functions, it rarely spells out the details about how the agency will carry out that mission. Rather, the details are filled in by the regulations. For example, the statutory functions of NGB are set out at **10 U.S.C. § 10503**, which expressly requires that the Secretary of Defense promulgate a "charter" for NGB. That charter was promulgated in the form of a DoD regulation—**DoD Directive 5105.77, National Guard Bureau (NGB).** As such, that DoD Directive has the "force and effect of law."

The NGB Charter at DoD Directive 5105.77 is just one example of several hundred (if not over a thousand) regulations that govern our National Guard operations and provide positive legal authority for obligating our appropriated funds. These regulations include **DoD Directives, DoD Instructions**, **Army Regulations**, **Air Force Instructions** and **NGB-level regulations (NGRs, ANGIs, CNGBIs, CNGBMs and CNGBNs**.) Such regulations may provide the requisite authority for a particular expenditure, or conversely, it could *prohibit* a particular expenditure.

In addition to legislation and regulations, positive legal authority for a particular expenditure can be found in the budget materials that the National Guard Bureau submits to Congress through the Services (both **Army** and **Air Force**). **DoD also sets out its budget materials online**. These budget materials are called "Justification Books," (or "J-Books"). This budget submission process is mandated by OMB regulations and further implemented in the DoD FMR (Vol 2A and 2B). The J-Books contain a description of the purpose for the requested appropriations. Unless otherwise prohibited, the National Guard may reasonably assume that appropriations are available for the purposes that are *specifically* identified in the J-Books.

Finally, if a questioned expenditure is not specifically addressed in either statute, regulation, or budget submission materials, the analysis then defaults to an *implied* authority type of analysis. That is, if a particular expenditure is not specifically authorized by an express authority (statute or regulation), National Guard officials are

directed to apply GAO's three-part test to determine whether a proposed expenditure is permissible. The three-part test is as follows:

> (1) The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carryout out either a specific appropriation or an authorized agency function for which more general appropriations are available.
>
> (2) The expenditure must not be prohibited by law.
>
> (3) The expenditure must not be otherwise provided for; that is, it must not be something that falls within the scope of some other appropriations or funding scheme.

As stated above, however, a fiscal law analysis for the National Guard typically begins by examining the language passed by Congress, which is discussed immediately below.

<table>
<tr><td rowspan="10">Crosswalk Links
  </td><td>GAO Red Book</td><td>Introduction, Fourth Edition, Ch. 1, 2016.

Availability of Appropriations: Purpose, Fourth Edition, Ch. 3, 2017 Revision.</td></tr>
<tr><td>Army JAG School Fiscal Law Deskbook (2019)</td><td>Chapter 1: Introduction to Fiscal Law

Chapter 2: Availability of Appropriations as to Purpose</td></tr>
<tr><td colspan="2">Fiscal Year 2019 Defense Appropriation Act</td></tr>
<tr><td colspan="2">DoD Regulations Website</td></tr>
<tr><td colspan="2">Army Regulations Website</td></tr>
<tr><td colspan="2">Air Force Regulations Website</td></tr>
<tr><td colspan="2">National Guard Regulations Website</td></tr>
<tr><td>U.S. Code</td><td>31 U.S.C. § 1301 (The Purpose Statute)</td></tr>
<tr><td colspan="2">Army National Guard Budget Materials</td></tr>
<tr><td colspan="2">Air National Guard Budget Materials</td></tr>
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B.2—THE NATIONAL GUARD'S *ORGANIC* APPROPRIATIONS

As stated in the first sentence of this Guidebook: "In fiscal year 2019, the National Guard received budget authority for approximately **twenty-seven billion dollars** of appropriated funds from Congress." That $27 Billion was comprised of the following appropriations and (approximate) amounts:

ARMY NATIONAL GUARD		AIR NATIONAL GUARD	
National Guard Personnel, Army	**$8.6B**	National Guard Personnel, Air Force	**$3.7B**
Operation and Maintenance, Army National Guard	**$7.2B**	Operation and Maintenance, Air National Guard	**$6.4B**
National Guard and Reserve Equipment Account	**$421M**	National Guard and Reserve Equipment Account	**$421M**
Military Construction, Army National Guard	**$220M**	Military Construction, Air National Guard	**$171M**

The eight separate appropriations set out above are referred to in this Guidebook as the National Guard's *organic* appropriations. It is important to note that appropriations (including those above) do not represent cash actually set aside in the Treasury—rather, they represent amounts that agencies may obligate during the period of time specified in the appropriation acts. Also, contrary to popular misconception, they are not an administrative subdivision of the Active Component's appropriations, but rather, are separate appropriation accounts limited to obligation and expenditure strictly in support of the National Guard.

The NG's military personnel, O&M and NGREA appropriations are provided in the annual defense appropriations acts. Our military construction funding, however, typically is set out in a separate annual military construction appropriation. For example, the FY19 military construction appropriation was passed as a separate "minibus" appropriation along with a few other department's' appropriations. The resulting appropriation was House Resolution 5895, enacted as Public Law No: 115-244, with the rather unwieldy name of the "**Energy, Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019.**" That MILCON appropriation was signed into law by the President on 24 September 2018—a few days before the regular defense appropriation bill was signed.

The defense appropriation act is broken down into nine separate "Titles." These are Titles *within* the defense appropriation act, and should not be confused with Titles within the U.S. Code (*e.g.*, Title 10, Title 32). These defense appropriation "titles" are reflected in the FY19 defense appropriations act as follows:

Title I—Military Personnel

Title II—Operation and Maintenance

Title III—Procurement

Title IV—Research, Development, Test and Evaluation

Title V—Revolving and Management Funds

Title VI—Other Department of Defense Programs

Title VII—Related Agencies

Title VIII—General Provisions

Title IX—Overseas Contingency Operations

Of these nine Titles, the National Guard's organic appropriations (with the exception of MILCON) fall under Titles I, II, and III (Title III being for our NGREA funding.). As explained below, our Counterdrug funding is appropriated through Title VI, and then transferred to our organic appropriations (Military Personnel and O&M). The National Guard also receives some funding in Title IX for Overseas Contingency Operations, (referred to as "OCO" funding) as an addition to our ARNG and ANG personnel and O&M appropriations. It should be noted that the National Guard does **not receive an organic RDT&E appropriation** under Title IV. Accordingly, it is important to ensure that NG appropriations are not used for RDT&E efforts, because such uses would violate the Purpose Statute, and could lead to Antideficiency Act violations.

Since a fiscal law *purpose* analysis typically starts with a review of the text of the annual appropriations acts, it is helpful to set out the (recurring) language that is used for each of these eight NG appropriations from the 2019 appropriation acts:

National Guard Personnel, Army	"For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Army National Guard while on duty under sections 10211, 10302, or 12402 of title 10 or section 708 of title 32, United States Code, or while serving on duty under section 12301(d) of title 10 or section 502(f) of title 32, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing training, or while performing drills or equivalent duty or other duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $8,264,626,000."
National Guard Personnel, Air Force	"For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Air National Guard on duty under sections 10211, 10305, or 12402 of title 10 or section 708 of title 32, United States Code, or while serving on duty under section 12301(d) of title 10 or section 502(f) of title 32, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing training, or while performing drills or equivalent duty or other duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $3,408,817,000."
Army National Guard Operation & Maintenance	"For expenses of training, organizing, and administering the Army National Guard, including medical and hospital treatment and related expenses in non-Federal hospitals; maintenance, operation, and repairs to structures and facilities; hire of passenger motor vehicles; personnel services in the National Guard Bureau; travel expenses (other than mileage), as authorized by law for Army personnel on active duty, for Army National Guard division, regimental, and battalion commanders while inspecting units in compliance with National Guard Bureau regulations when specifically authorized by the Chief, National Guard Bureau; supplying and equipping the Army National Guard as authorized by law; and expenses of repair, modification, maintenance, and issue of supplies and equipment (including aircraft), $7,284,170,000."

Air National Guard Operation & Maintenance	"For expenses of training, organizing, and administering the Air National Guard, including medical and hospital treatment and related expenses in non-Federal hospitals; maintenance, operation, and repairs to structures and facilities; transportation of things, hire of passenger motor vehicles; supplying and equipping the Air National Guard, as authorized by law; expenses for repair, modification, maintenance, and issue of supplies and equipment, including those furnished from stocks under the control of agencies of the Department of Defense; travel expenses (other than mileage) on the same basis as authorized by law for Air National Guard personnel on active Federal duty, for Air National Guard commanders while inspecting units in compliance with National Guard Bureau regulations when specifically authorized by the Chief, National Guard Bureau, $6,900,798,000."
National Guard and Reserve Equipment Account	"For procurement of rotary-wing aircraft; combat, tactical and support vehicles; other weapons; and other procurement items for the reserve components of the Armed Forces, $1,300,000,000, to remain available for obligation until September 30, 2020: *Provided*, That the Chiefs of National Guard and Reserve components shall, not later than 30 days after enactment of this Act, individually submit to the congressional defense committees the modernization priority assessment for their respective National Guard or Reserve component: *Provided further*, That none of the funds made available by this paragraph may be used to procure manned fixed wing aircraft, or procure or modify missiles, munitions, or ammunition: *Provided further*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985."
Army National Guard Military Construction	"For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the Army National Guard, and contributions therefor, as authorized by chapter 1803 of title 10, United States Code, and Military Construction Authorization Acts, $220,652,000, to remain available until September 30, 2022: *Provided*, That, of the amount, not to exceed

	$16,271,000 shall be available for study, planning, design, and architect and engineer services, as authorized by law, unless the Director of the Army National Guard determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of the determination and the reasons therefor."
Air National Guard Military Construction'	"For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the Air National Guard, and contributions therefor, as authorized by chapter 1803 of title 10, United States Code, and Military Construction Authorization Acts, $171,491,000, to remain available until September 30, 2022: *Provided*, That, of the amount, not to exceed $18,000,000 shall be available for study, planning, design, and architect and engineer services, as authorized by law, unless the Director of the Air National Guard determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of the determination and the reasons therefor."

As seen above, the National Guard appropriations in the annual appropriations act consist of (1) the name of the appropriation, (2) a paragraph explaining the purpose of that appropriation, and (3) a specific dollar amount. As a general rule, the text of an appropriation act is the clearest and most authoritative expression of Congressional intent in terms of a fiscal law purpose analysis. This is followed closely by the annual "authorization acts,"—a topic explained immediately below.

A close reading of the above-quoted appropriation language—particularly the military personnel appropriations—demonstrates that the National Guard receives funding in accordance with authorities that are set out in *both* Title 10 and Title 32 of the U.S. Code. Accordingly, although it is common for NG personnel to use the terms "Title 32 funds" and "Title 10 funds" as distinguishing NG funding from active component funding, that terminology is inaccurate and misleading. (Other misleading labels for National Guard appropriations include "state funds" or "training dollars.") Rather, it is more accurate to refer to these appropriation accounts by their actual names—such as "Army National Guard, O&M" and "Army, O&M"— instead of "ARNG Title 32 Funds" and "Army Title 10 Funds" respectively.

In addition to our eight organic appropriations listed above, Congress also expressly sets out funding for the National Guard's Counter-drug program. As stated earlier, this falls under Title VI of the defense appropriation act for "Other Department of Defense Programs." Within that title is the heading "Drug Interdiction and Counter-Drug Activities, Defense," which states as follows:

> *For drug interdiction and counter-drug activities of the Department of Defense, for transfer to appropriations available to the Department of Defense for military personnel of the reserve components serving under the provisions of title 10* ***and title 32****, United States Code; for operation and maintenance; for procurement; and for research, development, test and evaluation, $881,525,000, of which $517,171,000 shall be for counter-narcotics support; $121,900,000 shall be for the drug demand reduction program;* ***$217,178,000 shall be for the National Guard counter-drug program; and $25,276,000 shall be for the National Guard counter-drug schools program:*** *Provided, That the funds appropriated under this heading* ***shall be available for obligation for the same time period and for the same purpose as the appropriation to which transferred****: Provided further, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein,* ***such amounts may be transferred back to this appropriation:*** *Provided further, That the transfer authority provided under this heading is in addition to any other transfer authority contained elsewhere in this Act.* (Emphasis added).

As seen in the language above, Congress provides budget authority to DoD for the department's overall drug interdiction and counter-drug program (over $881M), however Congress is specifically mandating that $217,178,000 of that amount be transferred to the National Guard program, with an additional $25,276,000 for the National Guard counter-drug schools program. In order to shift dollars from one appropriation to another, there must be specific statutory authority (to comply with 31 U.S.C. § 1352). The above-quoted language provides that transfer authority. It also includes language that prevents the National Guard from using the funding for other purposes—stating that if it is determined that "all or part" of the fund are not necessary for the program, "such amounts shall be transferred back to this appropriation. In other words, although these funds become National Guard funds, they do not lose their identity as being earmarked strictly for the Counterdrug program. This is oftentimes referred to by the (unofficial) term of "fencing." More information on the NG's counter-drug program is set out in Subsection B.10, below.

Crosswalk Links	Fiscal Year 2019 Defense Appropriation Act
	Fiscal Year 2019 Military Construction Appropriation Act

B.3—THE NATIONAL DEFENSE AUTHORIZATION ACTS (NDAAs)

As its name implies, the annual defense "authorization acts" (often called the National Defense Authorization Act or "NDAA") *authorize* the use of funds for a wide-range of purposes. It is required by **10 U.S.C. § 114**. It does not, however, provide "budget authority" like an appropriation act. Additionally, authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.

In a normal legislative cycle, the NDAA is enacted first, and then followed by an appropriation act. In FY19, for example, the NDAA was passed on 13 August 2018 and the appropriations act was passed on 28 September 2018. However, as will be seen in Section H below (Continuing Resolutions and Lapses in Appropriations) the "normal" process followed for FY19 was quite unusual in light of the experience over the last several decades.

The annual NDAAs always include National Guard-specific language. Perhaps the most important provision is the section that sets out the "authorized strengths" of the reserve components. The FY19 NDAA set this out at Section 411. It authorized 343,500 Soldiers for the Army National Guard and 107,100 Airmen for the Air National Guard. The very next section of the NDAA sets out the "end strength" for reserves on active duty for the purposes of "organizing, administering, recruiting, instructing, or training reserve components." The ARNG authorization in this regard was for 30,595 (AGRs) for the ARNG and 19,861 for the Air National Guard. The next section (Section 413) sets out the "minimum" number of dual-status military technicians—22,294 for the ARNG and 15,861 for the ANG. Finally, the next section (Section 414) sets out the "maximum" number of reserve component personnel on "full time operational support duty." This ceiling was set at 17,000 for the ARNG and 16,000 for the ANG.

Another National Guard-specific provision is Section 111 the FY19 NDAA, which included language that specifically required the Chief of Staff of the Army and CNGB to provide a "joint assessment," on the efforts of the Army to achieve "parity" among the

active component, the Army Reserve and the Army National Guard with respect to equipment and capabilities. This assessment was added to the statutory requirement set out in 10 U.S.C. § 10541 that requires SECDEF to submit a report to Congress annually on the equipment of the National Guard and the reserve components. From a fiscal law perspective, this language not only provides authority for NGB to use its resources to produce this report, but also mandates that the report be completed.

Another example of National Guard-specific authority is found in Section 1651, "Pilot Program on Regional Cybersecurity Training Center for the Army National Guard." This allows "SECARMY" to carry out a program to create this training center for members of the ARNG. It sets out the purpose of the center—explaining that it "educates and trains members of the Army National Guard quickly and efficiently by concurrently training cyber protection teams and cyber network defense teams on a common standard to defend DoD networks in a State environment, State networks and critical infrastructure." That section also sets out characteristics of the National Guard facility/location that is selected to host the center, the activities that will be carried out, the notifications to Congress required, and the length of time for the pilot program (two years after enactment of the NDAA. As stated in the first section of this Guidebook (Section A.1, "Overview"), this is an excellent example of securing the positive legal authority (required under fiscal law) to turn a great idea into reality.

Further, annual NDAAs *authorize* "land acquisition projects," which specifically *authorize* the ARNG and ANG to use our military construction funding to "acquire real property and carry out military construction projects" as set forth in a specific table. As explained in Section X, below, these are known as the "specified" MILCON projects. That table was set out for the ARNG at Section 2601 and the ANG as section 2604 of the 2019 NDAA as follows:

ARMY NATIONAL GUARD

State	Location	Amount
Alaska	Joint Base Elmendorf-Richardson	$27,000,000
Illinois	Marseilles Training Center	$5,000,000
Montana	Malta	$15,000,000
Nevada	North Las Vegas	$32,000,000
New Hampshire	Pembroke	$12,000,000
North Dakota	Fargo	$32,000,000
Ohio	Camp Ravenna	$7,400,000
Oklahoma	Lexington	$11,000,000
Oregon	Boardman	$11,000,000
South Dakota	Rapid City	$15,000,000

AIR NATIONAL GUARD

State	Location	Amount
California	Channel Islands ANG Station	$8,000,000
Hawaii	Joint Base Pearl Harbor-Hickam	$17,000,000
Llinois	Greater Peoria Regional Airport	$9,000,000
Louisiana	Naval Air Station JRB New Orleans	$39,000,000
Minnesota	Duluth International Airport	$8,000,000
Montana	Great Falls International Airport	$9,000,000
New York	Francis S. Gabreski Airport	$20,000,000
Ohio	Mansfield Lahm Airport	$13,000,000
	Rickenbacker International Airport	$8,000,000
Pennsylvania	Fort Indiantown Gap	$8,000,000
Virginia	Joint Base Langley-Eustis	$10,000,000

The annual NDAA is also important because it is a legislative vehicle that can be used to add language that can resolve thorny fiscal law issues. For example, in the year leading up to the FY19 NDAA, a concern arose regarding the extent to which the Army National Guard was authorized to participate in the "Army Compatible Use Buffer" (ACUB) program, detailed in **10 U.S.C. § 2684a**. This program uses federal funds to enter into agreements (through an intermediary) with landowners surrounding military installations in order to limit development around those installations. Increased development leads to increased pressure on the environment and increased population density which can lead to restrictions on the ability of the ARNG to train on those areas. The fiscal law issue arose because the enabling legislation that was passed in 2002 did not define the term "military installation," and some believed that the term was limited to federally-owned (and not state-owned) military installations. Accordingly Section 2827 of this year's NDAA was drafted to remove all doubt. It states, in relevant part, as follows:

> State-owned National Guard installations have always qualified as military installations under Section 2684a of title 10, United States Code; and State-owned National Guard installations should continue to qualify as military installations under section 2684a of that title.

Further, the same section of the NDAA expressly amended the permanent legislation at 10 U.S.C. § 2684a by inserting "as well as a State-owned National Guard installation," after "military installation." Finally Section 2827 expressly stated that it had "retroactive effect," back to the very inception of the program which started in 2002.

As demonstrated above, the annual appropriation and authorization acts are critically important to the operation of the National Guard. They authorize our force levels, our military construction projects, and a number of other National Guard-specific, provisions. All National Guard leaders should be aware of the importance of the annual NDAA. NGB's Legislative Liaison Office provides a synopsis each year. As discussed earlier however, the authorization acts can provide positive legal authority to use our NG funds in specific ways, but they do not provide actual budget authority. Rather, budget authority only comes from an appropriation act.

In addition to the annual NDAA, the National Guard can look to a wide array of statutes—primarily in Titles 5, 10 and 32 of the U.S. Code—as supplying positive legal authority for the various uses of our National Guard appropriations. We now turn to those permanent legislative authorities.

Crosswalk Link 	**Fiscal Year 2019 Defense Authorization Act**

B.4—THE NATIONAL GUARD'S PERMANENT LEGISLATION

In addition to the appropriation and authorization acts, a fiscal law *purpose* analysis in the National Guard next turns to the body of existing legislation under which the National Guard operates. There are multiple terms used to describe this type of legislation—including "permanent" legislation, "standing" legislation, or "program" legislation. This Guidebook prefers the term "permanent" legislation, which generically refers to all of Title 32 and those portions of Title 5 and Title 10 related to the National Guard. Additionally, there are "Public Laws" passed by Congress with provisions that are not codified within the U.S. Code called "Public Laws," which are part of this body of legislation to the extent that it is related to the National Guard.

The purpose of this section is twofold: (1) to explain the importance of permanent legislation to a fiscal law *purpose* analysis, and (2) to highlight the most important laws for general awareness across the NG enterprise. On this second point, we note that this section does not include *every* piece of legislation that could be relevant to National

Guard operations, but rather sets out the most important ones from a fiscal law perspective that should be familiar to all National Guard Leaders.

One type of permanent legislation that is particularly relevant to a purpose analysis is known as "enabling" legislation, which creates an agency, establishes a program, or prescribes a function. For example the enabling legislation for NGB is set out at **10 U.S.C. §§ 10501 – 10508**. It starts by stating: "There is in the Department of Defense the National Guard Bureau, which is a joint activity of the Department of Defense." Those Code sections go on to explain the purposes, leadership positions, functions, reporting requirements, manpower and composition of NGB.

Another relevant example of enabling legislation is found in **32 U.S.C. § 509**, which established the National Guard Youth Challenge program. That statute sets out the purpose of the program, the funds to be used, a "matching fund" requirement, the eligibility criteria for participants, the types of facilities to be used, etc. Without this enabling legislation, there would not be positive legal authority to use DoD O&M funding to "improve the life skills and employment potential" of youths who dropped out of high school.

Unlike the other reserve components, the National Guard has its very own Title within the U.S. Code—Title 32, "National Guard." Title 32 is organized into five separate chapters as follows:

Chapter 1: Organization, 32 U.S.C. §§ 101-115

Chapter 3: Personnel, 32 U.S.C. §§ 301-328

Chapter 5: Training, 32 U.S.C. §§ 501-509

Chapter 7: Service, Supply and Procurement," 32 U.S.C. §§ 701-717

Chapter 9: Homeland Defense Activities 32 U.S.C. §§ 901-908

Although all Code sections in Title 32 are important for different reasons, the following are the most important from a *fiscal law* perspective:

Title 32

Statutory Citation (-+Hit [ctrl] + click to access statute)	Summary or Full Text of Statute
32 U.S.C. § 101	Summary: Sets out the "definitions" to be used throughout Title 32. Importantly it explains the difference between the "Army National Guard" and the "Army National Guard of the United States," and the difference between the "Air National Guard" and the "Air National Guard of the United States." These terms explain the difference between the National Guard as a federally recognized "organized militia," and as the "reserve component" of the Army and Air Force."
32 U.S.C. § 106	Full text: "Sums will be appropriated annually, out of any money in the Treasury not otherwise appropriated, for the support of the Army National Guard and the Air National Guard, including the issue of arms, ordnance stores, quartermaster stores, camp equipage, and other military supplies, and for the payment of other expenses authorized by law."
32 U.S.C. § 107	Full Text: "Under such regulations as the secretary concerned may prescribe, appropriations for the National Guard are available for: (1) the necessary expenses of members of a regular or reserve component of the Army or the Air Force traveling on duty in connection with the National Guard; (2) the necessary expenses of members of the Regular Army or the Regular Air Force on duty in the National Guard Bureau or with the Army Staff or the Air Staff, traveling to and from annual conventions of the Enlisted Association of the National Guard of the United States, the National Guard Association of the United States, or the Adjutants General Association; (3) the transportation of supplies furnished to the National Guard as permanent equipment;

	(4) the office rent and necessary office expenses of officers of a regular or reserve component of the Army or the Air Force on duty with the National Guard; (5) the expenses of the National Guard Bureau, including clerical services; (6) the promotion of rifle practice, including the acquisition, construction, maintenance, and equipment of shooting galleries and suitable target ranges; (7) such incidental expenses of authorized encampments, maneuvers, and field instruction as the Secretary considers necessary; and (8) **other expenses of the National Guard authorized by law.**" (Emphasis added.)
32 U.S.C. § 108	Full Text: "If, within a time fixed by the President, a State fails to comply with a requirement of this title, or a regulation prescribed under this title, the National Guard of that State is barred, in whole or in part, as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law."
32 U.S.C. § 110	Full Text: "The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard."
32 U.S.C. § 112	Summary: Allows SECDEF to provide funding to the Governor of a State who submits a "drug interdiction and counter-drug activities plan." Funds can be used for paying the NG members of that State "not in federal service," for drug interdiction and counter-drug activities; O&M for equipment and facilities used therefore; the procurement of services, equipment and leasing of equipment (equipment limited to items with a cost of $5,000 or below unless approved by SECDEF).

	Further explains when the program can use NG personnel in a federal status under 32 U.S.C. § 502(a) and (f); and when NG members can be used to assist other organizations, Further explains what the state plan must address and how that plan is examined prior to SECDEF approval.
32 U.S.C. §§ 114-115	Summary: Allows funeral honors to be performed as a federal function under certain terms and limitations.
32 U.S.C. § 501	Full Text: "(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force; (b) The training of the National Guard shall be conducted by the several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands in conformity with this title.
32 U.S.C. § 502	Summary: This section provides the authority for drill and two-week AT. Subsections (f)(1) and (f)(2) are particularly important. They provide authority to order a NG member to perform training "or other duty" in addition to standard drills and AT. This includes supporting operations and missions undertaken by the member's unit at the request of the President or SECDEF.
32 U.S.C. § 504	Summary: Statute authorizing members of the NG to attend NG, Army and/or Air Force Schools and to participate in small arms competitions.
32 U.S.C. § 508	Summary: Provides authority for members and units of the NG to provide specified logistics-type support to a list of specified "eligible organizations." (*e.g.*, Boy Scouts, Girl Scouts, Boys/Girls Club of America, etc.). Allows this support for "other youth and charitable organizations designated by [SECDEF]."
32 U.S.C. § 509	Summary: This is the authorizing legislation for the National Guard Youth ChalleNGe program. It sets out the program's purpose, structure, limitations, eligible participants, etc. See Subsection B.10 for a more in-depth description of this program.
32 U.S.C. § 701	Full Text: "So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued

	to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard."
32 U.S.C. § 708	Summary: This section creates the position of the United States Property and Fiscal Officer (USPFO). It explains the way USPFOs are appointed, their general duties, maximum grade, and the requirement for implementing regulations. (See Subsection A.5 for a more in-depth explanation of USPFOs)
32 U.S.C. § 709	Summary: This is the "Technician Statute," which sets out the statutory rules regarding the employment of the National Guard's dual-status and non-dual status technicians.
32 U.S.C. § 710	Summary: This section addresses "accountability for military property issued by the U.S. to the National Guard. It explains that such property "remains the property of the United States." Provides authority for the regulatory implementation of rules regarding the liability and accountability for federal property under the control of the National Guard.
32 U.S.C. § 901	Summary: This section sets out the definitions relevant to Chapter 9, "Homeland Defense Activities."
32 U.S.C. § 902	Full Text: "The Secretary of Defense may provide funds to a Governor to employ National Guard units or members to conduct homeland defense activities that the Secretary, determines to be necessary and appropriate for participation by the National Guard units or members, as the case may be."
32 U.S.C. § 903	Full Text: "The Secretary of Defense shall prescribe regulations to implement this chapter."
32 U.S.C. § 904	Summary: Explains that all duty performed under this chapter shall be considered to be "full time National Guard duty under [32 U.S.C. §] 502(f). Sets the duration of such missions and explains that NG members shall also participate in regular 502(a) training in addition to homeland defense missions.
32 U.S.C. § 905	Full Text: "In the case of any homeland defense activity for which the Secretary of Defense determines under section 902 of this title that participation of units or members of the National Guard of a State is necessary and appropriate, the Secretary may provide funds to that State in an amount that the Secretary determines is appropriate for the following costs of the participation in that activity from funds available to the Department for related purposes: (1) The pay, allowances, clothing, subsistence, gratuities, travel, and related expenses

	of personnel of the National Guard of that State. (2) The operation and maintenance of the equipment and facilities of the National Guard of that State. (3) The procurement of services and equipment, and the leasing of equipment, for the National Guard of that State."

In addition to Title 32, there are important provisions within Title 10, "Armed Forces" that are important from a fiscal law perspective. Title 10 is broken down into five separate Subtitles as follows:

Subtitle A—General Military Law (Sections 101 - 4881)
Subtitle B—Army (Sections 7001 - 7831)
Subtitle C—Navy and Marine Corps (Sections 8001 - 8951)
Subtitle D—Air Force (Sections 9011 - 9831)
Subtitle E—Reserve Components (Sections 10001 - 18501)

Since the National Guard is a Reserve Component of the Army and Air Force, all the Subtitles above, with the exception of Subtitle C, have direct relevance from an *overall* perspective. However, since this Guidebook is more focused on the proper expenditure of our organic NG appropriations, the majority of the statutes set out below are found in Subtitle E—Reserve Components. In this regard, when we go back and look at our ARNG and ANG military personnel appropriations—set out in Subsection B.2 of this Guidebook—we see that it expressly authorizes pay and allowances for NG members performing:

> duty under sections 10211, 10302, [10305] or 12402 of title 10 … or while serving on duty under section 12301(d) of title 10 or section 502(f) of title 32, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing training, or while performing drills or equivalent duty or other duty, and expenses authorized by section 16131 of title 10, United States Code ….

As seen above, our military personnel appropriations for both the ARNG and ANG are expressly connected to authorities set out at Subtitle E of Title 10. Additionally Subtitle E of Title 10 sets out the enabling legislation for the National Guard Bureau (at 10 U.S.C. §§ 10501-10508). Accordingly, outside of the "definitions" section, the below list is limited to those sections found within Subtitle E that are important from a fiscal law perspective.

Title 10

Statutory Citation (-+Hit [ctrl] + click to access statute)	Summary or Full Text of Statute
10 U.S.C. § 101	Summary: This is the "definitions" section for Title 10. As applied to the NG, this section defines explains the difference between the use of the terms "Army National Guard" and "Air National Guard" (as the federally recognized organized militia) and the terms "Army National Guard of the United States," and "Air National Guard of the United States," (as the reserve components of those two services.) It also explains that "active duty" does not include "full-time National Guard duty," although FTNG falls under "active service." It defines FTNGD as well as "Active Guard and Reserve."
10 U.S.C. § 2231	Full Text: Provisions of law relating to facilities for reserve components are set forth in chapter 1803 of this title (beginning with section 18231).
10 U.S.C. § 10102	Full Text: "The purpose of each reserve component is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency, and at such other times as the national security may require, to fill the needs of the armed forces whenever more units and persons are needed than are in the regular components."
10 U.S.C. § 10107	Full Text: "When not on active duty, members of the Army National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Army National Guard."
10 U.S.C. § 10113	Full Text: "When not on active duty, members of the Air National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Air National Guard."
10 U.S.C. § 10211	Summary: Requires that the Service Secretaries ensure that reserve component officers are part of the full time staff to ensure participation in preparing and administering RC policies.
10 U.S.C. § 10216	Summary: This section focuses on the administration and management of dual status military technicians.

10 U.S.C. § 10217	Summary: This section focuses on the administration and management of non-dual status military technicians.
10 U.S.C. § 10219	Summary: This section focuses on suicide prevention and resilience program for the NG and Reserves. Focuses on training in this area at events such as the Yellow Ribbon Reintegration Program.
10 U.S.C. § 10302	Summary: This section creates the "Army Reserve Forces Policy Committee," which is designed to review and comment on major policy matters directly affecting the RC. The committee consists of officers (O6 and above) from the Regular Army, ARNG and USAR.
10 U.S.C. § 10305	Summary: This section creates the "Air Force Reserve Forces Policy Committee," which is designed to review and comment on major policy matters directly affecting the RC. The committee consists of officers (O6 and above) from the Regular AF, ANG and AF Reserve.
10 U.S.C. § 10501 - 10508	Summary: These sections comprise the enabling statutes for the National Guard Bureau. It explains that NGB is a "joint activity" of DoD, and the "channel of communications" on all matters pertaining to the ARNG/ARNGUS and ANG/ANGUS between Army/AF and the states. It explains the position and functions of CNGB/VCNGB/DARNG/DANG, the functions of NGB and the need for a charter, manpower requirements of NGB, etc.
10 U.S.C. § 12301	Summary: This section governs "reserve components generally," and explains the authority of the Service Secretaries to order units and members of the reserve components to active duty. The *full text* of subsection (d) states as follows: "At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the ARNGUS or ANGUS many not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned."
10 U.S.C. § 12310	Summary: This section allows the Secretary concerned to order a member of the RC to active duty under 10 U.S.C. § 12301(d) to perform AGR duties—organizing, administering,

	recruiting, instructing or training the RC. It explains the "additional duties" that an AGR can perform to the extent it does not interfere with the performance of the primary AGR duties.
10 U.S.C. § 12402	Summary: This statute allows the President to order (with their consent) commissioned officers of the ARNGUS and ANGUS to active duty in the NGB.
10 U.S.C. § 16131	Summary: This statute authorizes an "educational assistance program" for the RC pursuant to regulations prescribed by SECDEF.
10 U.S.C. § 18233	Summary: This statute provides authority to the National Guard to carry out construction projects through federal contracts or cooperative agreements depending on the purpose of the project. See Subsection F.1 of this Guidebook for a more in-depth explanation.
10 U.S.C. § 18236	Summary: This statute explains the rules governing contributions to states when the National Guard carries out a construction project through a cooperative agreement. In terms of armories and readiness centers, it allows the federal government to pay 100% of the architect, engineering and design costs, but limits the federal government to a total contribution of 75% of the total cost of construction.
10 U.S.C. § 18240	Summary: This is a unique authority that is currently being exercised on the Air National Guard side. It allows for an acquisition of a facility by an "exchange" with a state and local governments as well as private entities.
10 U.S.C. § 18501	Full Text: The Secretary concerned is responsible for providing the personnel, equipment, facilities, and other general logistic support necessary to enable units and Reserves in the Ready Reserve of the reserve components under his jurisdiction to satisfy the training requirements and mobilization readiness requirements for those units and Reserves as recommended by the Secretary concerned and by the Chairman of the Joint Chiefs of Staff and approved by the Secretary of Defense, and as recommended by the Commandant of the Coast Guard and

	approved by the Secretary of Homeland Security when the Coast Guard is not operated as a service of the Navy.
10 U.S.C. § 18502	Full Text: (a) The Secretary concerned shall make available to the reserve components under his jurisdiction the supplies, services, and facilities of the armed forces under his jurisdiction that he considers necessary to support and develop those components. (b) Whenever he finds it to be in the best interest of the United States, the Secretary concerned may issue supplies of the armed forces under his jurisdiction to the reserve components under his jurisdiction, without charge to the appropriations for those components for the cost or value of the supplies or for any related expense. (c) Whenever he finds it to be in the best interest of the United States, the Secretary of the Army or the Secretary of the Air Force may issue to the Army National Guard or the Air National Guard, as the case may be, supplies of the armed forces under his jurisdiction that are in addition to supplies issued to that National Guard under section 702 of title 32 or charged against its appropriations under section 106 or 107 of title 32, without charge to the appropriations for those components for the cost or value of the supplies or for any related expense. (d) Supplies issued under subsection (b) or (c) may be repossessed or redistributed as prescribed by the Secretary concerned.

To recap, a fiscal law "purpose" analysis is designed to ensure that an executive agency is spending their federal funds in accordance with the will of Congress. There is no better way to determine the will of Congress than to read the very language that Congress passes (and the President signs) into law. As we have discussed above, as applied to the National Guard, this legislation takes the form of appropriation acts, authorization acts, permanent fiscal statutes (in Title 31 of the U.S. Code), and our permanent legislation (in Titles 5, 10 and 32 of the U.S. Code). Further, there are uncodified standalone provisions within "Public Laws" that may serve as authority for certain National Guard activities or programs. These are usually enduring provisions in the annual NDAA that were not later codified into the U.S. Code—which often complicates researching them. As reflected in many of the above-referenced pieces of legislation, Congress understands that the actual execution of their intent is almost

always implemented "under such regulations as [the appropriate Secretary] may prescribe." In other words, agency level *regulations* play a critical role in a fiscal law *purpose* analysis—a topic to which we now turn.

Crosswalk Links 	**GAO Red Book**	**Introduction, Fourth Edition, Ch. 1, 2016.** **Availability of Appropriations: Purpose, Fourth Edition, Ch. 3, 2017 Revision.**
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 1: Introduction to Fiscal Law** **Chapter 2: Availability of Appropriations as to Purpose**

B.5—REGULATIONS AS AUTHORITY

When legislation authorizes a program or function, it rarely prescribes exact details about how the agency will carry out that authority. Instead, it is up to the agency to implement regulations consistent with the legislation. If an agency, in creating a regulation, interprets a statute, that interpretation is granted a great deal of deference. Thus, if an agency regulation determines appropriated funds may be utilized for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous. As GAO explains, "[w]hen Congress vests an agency with responsibility to administer a particular statute, the agency's interpretation of that statute, by regulation or otherwise, is entitled to considerable weight."

Agency-level regulations, may also place restrictions on the use of appropriated funds. For example, the DoD Instruction that implements the National Guard Youth Challenge program includes a provision that prohibits expenditures to renovate buildings exceeding $100,000 per year per facility unless an exception to policy is granted. This restriction is not found in the enabling legislation at 32 U.S.C. § 709, rather it is strictly a creature of regulation.

As a general rule, for the National Guard we typically first look to see if there are any DoD-level regulations that govern a particular function or activity. These regulations, in order of importance, are generally **DoD "Directives," and DoD "Instructions."** We start with the DoDDs and DoDIs (and their related publications and manuals) because they are higher-level regulations that are controlling with respect to

regulations issued at the Service-level. Some of those DoD Issuances focus (in whole or in part) on the National Guard. These include, but are not limited to, the following:

- **DoD Directive 1200.17, Managing the Reserve Components as an Operational Force, October 29, 2008;**
- **DoD Directive 3025.18, Defense Support of Civil Authorities (DSCA), Incorporating Change 2, March 19, 2018;**
- **DoD Directive 3160.01, Homeland Defense Activities Conducted by the National Guard, Incorporating Change 2, June 6, 2017;**
- **DoD Directive 4270.5, Military Construction, Incorporating Change 1, August 31, 2018;**
- **DoD Directive 5105.77, National Guard Bureau (NGB), Incorporating Change 1, October 10, 2017;**
- **DoD Directive 5105.83, National Guard Joint Headquarters – State (NG JFHQS-State, Incorporating Change 1, September 30, 2014;**
- **DoD Instruction 1025.8, National Guard Youth Challenge Program, March 20, 2002;**
- **DoD Instruction 1200.18, The United States Property and Fiscal Officer (USPFO) Program, June 7, 2012;**
- **DoD Instruction 1205.18, Full-Time Support (FTS) to the Reserve Components, May 12, 2014;**
- **DoD Instruction 1215.06, Uniform Reserve, Training, and Retirement Categories for the Reserve Components, Incorporating Change 1, May 19, 2015**
- **DoD Instruction 1225.06, Equipping the Reserve Forces, Incorporating Change 1, November 30, 2017;**
- **DoD Instruction 1225.08, Reserve Component (RC) Facilities Programs and Unit Stationing, Incorporating Change 1, December 1, 2017;**

- **DoD Instruction 1235.12, Accessing the Reserve Components (RC)**

- **DoD Instruction 3025.21, Defense Support of Civilian Law Enforcement Agencies, Incorporating Change 1, February 8, 2019;**

- **DoD Instruction 3025.22, The Use of the National Guard for Defense Support of Civil Authorities, Incorporating Change 1, May 15, 2017;**

- **DoD Instruction 4000.19, Support Agreements, Incorporating Change 2, August 31, 2018;**

- **DoD Instruction 4140.58, National Guard and Reserve Equipment Report (NGRER), January 8, 2010;**

- **DoD Manual 3025.01, vol. 3, Defense Support of Civil Authorities: Pre-Planned DoD Support of Law Enforcement Agencies, Special Events, Community Engagement, and Other Non-DoD Entities, August 11, 2016.**

Additionally, the **DoD Financial Management Regulation** (DoD FMR – DoD 7000.14-R) serves as the central regulation implementing DoDI 7000.14, "DoD Financial Management Policy and Procedures." As the central DoD regulation for financial management, the DoD FMR is a wide-ranging repository of information that "directs statutory and regulatory financial management requirements, systems, and functions for all appropriated and non-appropriated, working capital, revolving, and trust fund activities." Stated simply, the DoD FMR is a centrally important regulation designed, in part, to provide DoD officials at all levels with essential information to comply with fiscal law. A helpful video explaining the purpose and organization of the DoD FMR can be accessed here**: DoD FMR Introduction Video**.

Further, since DFAS plays a central role in the processing of NG obligations for all of our organic appropriations, it is also helpful to be familiar with DFAS-IN Regulation 37-1, Finance and Accounting Policy Implementation (December 27, 2017). DFAS-IN 37-1 is designed to comport with the DoD FMR. The "Foreword" section of that regulation explains that it *"is not intended to replace [the DoD FMR] or other pertinent regulations. Rather, it provides policies and procedures that guide DFAS-specific finance and accounting practices*." Accordingly, DFAS-IN 37-1 should be read in harmony with the higher-level DoD FMR.

At the Service-level, we are generally examining Army Regulations (ARs) and Air Force Instructions (AFIs) and their implementing policy documents. The Air Force

specifically covers "Financial Management" in Series "65" of their Service-level regulations. Among those regulations, AFI 65-601 (Volumes 1, 2 and 3) serve as a central location for answering many fiscal law questions regarding the proper use of Air National Guard appropriations. Recently, the Air Force has transferred a lot of the substance of those AFIs to **AFMAN 65-605, Volume 1, Budget Guidance and Technical Procedures, 24 October 2018**. (This AFMAN is in a transition process, and therefore should be monitored for pending changes.)

The Army does not have a centralized regulation that mirrors AFI/AFMAN 65-601. Accordingly fiscal law issues on the Army regulatory side tend to be AR-specific. Importantly, whenever we are reviewing ARs, it is important to first check the "applicability" section which is found in the front matter of the regulation (along with other sections such as History, Summary, Proponent/Exception Authority, etc.). Although most ARs are applicable to the ARNG/ARNGUS, some are not (and others are applicable only as expressly stated in the AR). That said, the ARs that are most relevant from a fiscal law perspective are as follows:

Army Regulation	Proponent & Exception Authority	Brief Summary
AR 1-1: Planning, Programming, Budgeting, and Execution	ASA(FM&C)	Prescribes policy and responsibilities for the Army planning, programming, budgeting, and execution (PPBE) process. Designed to help the Army acquire, allocate, and manage resources for military functions. Outlines the organizational process in which the PPBE process operates and describes its functional phases.
AR 30-22: Army Food Program	Deputy Chief of Staff, G-4	Sets out garrison, field and subsistence supply operations. Identifies the DoD FMR as the source of meal rates for reimbursement purposes, governs the use of GPC for subsistence purchases. Addresses requirements for the purchase of bottled water.
AR 37-104-4: Military Pay and Allowance Policy	ASA(FM&C)	Prescribes policy for unique military pay and allowance policy guidance for the payment of Soldiers using DoD Joint Military Pay System – Active Component and Reserve Component.
AR 165-1: Chaplain Activities in the	Chief of Chaplains	Prescribes policies on Total Army religious support activities, religious ministries, chaplain and religious affairs specialist personnel …

United States Army		training, moral leadership, management of information, logistics and resources.
AR 415-32: Engineer Troop Construction in Connection with Training Activities	Chief of Engineers	Identifies the roles and responsibilities of the U.S. Army Installation Management Command. It clarifies and expands the responsibilities for those Army service component commands with units habitually assigned to them.
AR 420-1: Army Facilities Management	Assistant Chief of Staff for Installation Management	Addresses the management of Army Facilities. Describes the management of public works activities, housing, and other facilities operations and management, military construction program development and execution, master planning, utilities services and energy management, and fire and emergency services. NOTE: Does not apply to installations, or parts thereof, which have been licensed to D.C. or to any state, territory, or commonwealth of the US for use by the National Guard
AR 600-8-22: Military Awards	Deputy Chief of Staff, G1.	Provides Department of the Army policy, criteria, and administrative instructions concerning individual military decorations and trophies/similar devices awarded in recognition of accomplishments.

Finally, as part of a fiscal law purpose analysis, we look to our own agency regulations, which are primarily comprised of Chief of the National Guard Bureau Instructions (CNGBIs) and Chief of the National Guard Manuals (CNGBMs), as well as Army National Guard Regulations (NGRs) and Air National Guard Instructions (ANGI). All of these NGB-level publications are available at the **NGB Publications & Forms Library**.

Crosswalk Links 	**DoD Regulations Website**
	Army Regulations Website
	Air Force Regulations Website
	National Guard Regulations Website

B.6—OBLIGATIONS v. COMMITMENTS

From a fiscal law perspective, it is important to understand the difference between an "obligation" and a "commitment." While these definitions were set out earlier in this Guidebook (at Section A.4), they are worth repeating here:

> A "**commitment"** is an administrative reservation of allotted funds, or of other funds, in anticipation of their obligation. Commitments are important to ensuring that the subsequent entry of an obligation will not exceed available funds. Commitments in the Army National Guard are typically accomplished in the form of a DA Form 3953, —"Purchase Request and Commitment," (often referred to as a "PR" or a "PR&C"). Commitment in the Air National Guard are typically accomplished in the form of a "Request for Purchase" on an Air Force Form 9 (often referred to simply as a "Form 9.")
>
> An "**obligation,"** by contrast, is any act that legally binds the government to make payment. Obligations are amounts representing orders placed, contracts awarded, services received, and similar transactions that will require payment.

Fiscal law attorneys are more concerned with "obligations" than "commitments" because fiscal law violations (*e.g.,* the Antideficiency Act) are triggered by obligations, not commitments. This does not mean that commitments are not important—to the contrary, they ensure that there are enough funds to cover the subsequent obligation and that are no objections to the use of those funds for the proposed purpose. However, a commitment that does not result in a subsequent obligation allows those funds to be administratively de-committed, which can lead to under-execution of a program, but not to a fiscal law violation.

Additionally, from a timing perspective, the key event is the date of the obligation, not the subsequent "expenditure" of the funds that matters. That is, activities may only *commit* and *obligate* funds that meet the bona fide needs of the period for which Congress appropriated the funds, however the invoicing and payment (expenditure) can legally take place while the funds are technically in an expired status. For example, $100,000 of FY19 ARNG/ANG O&M funding can be committed on 1 August 2019 to purchase a currently needed supply item, obligated (*e.g.,* contract awarded) on 15 September 2019, with the invoice paid by DFAS on 14 October 2019. That is completely legal. This is contrasted with the same basic transaction, but where funds

are committed on 15 September, but the contract is not awarded (and funding *obligated)* on 4 October 2019, with payment on 14 October 2019. In this latter scenario, the obligation took place too late for FY19, and therefore the proper funds needed were FY20 O&M funds.

Based on some recent issues, it is likewise important to note that NGB's cooperative agreements with the states are obligated only when the state (*e.g.* The Adjutant General) and the USPFO actually sign (and countersign) the cooperative agreement, or modification thereto. The mere commitment or reservation of funds by NGB does not by itself translate into a binding agreement requiring NGB to make payment. In other words, this is not a situation where you can simply "catch up with the paperwork later." Rather, as GAO explains in the Red Book:

> Thus, in very general and simplified terms, an "obligation" is some action that creates a legal liability or definite commitment on the part of the government, or creates a legal duty that could mature into a legal liability by virtue of an action that is beyond the control of the government. Payment may be made immediately or in the future.

GAO Red Book, Chapter 7, *Obligation of* Appropriations, Pgs. 7-3 and 7-4. The actual signing and countersigning of the cooperative agreement is what legally binds the federal government to reimburse the state in accordance with the terms of the agreement—thereby creating a valid "obligation."

Other "obligation v. commitment" problems have arisen over the years in interagency acquisitions pursuant to the Economy Act. These types of transactions—often referred to as "contract offloads"—typically involve an agreement between the two federal agencies (either an MOA or a DD Form 1144). Those agreements document the underlying agreement between the two agencies; however, any funds that are sent through a Military Interdepartmental Purchase Request (MIPR) pursuant to that agreement still requires a valid obligation during the funds' period of availability. This means that the servicing agency must actually award the underlying contract (or task order) in order to properly obligate the National Guard funds being transferred. If the servicing agency does not award the contract/task order in time, the funds expire, requiring them to be de-obligated and sent back to NGB. If they are not sent back, but are used to fund the late contract award, this is known as "parking" funds which is a fiscal law timing violation and a potential Antideficiency Act violation.

Crosswalk Links 	GAO Red Book	Chapter 7: Obligation of Appropriations
	GAO's Glossary of Terms Used in the Federal Budget Process	
	Army JAG School Fiscal Law Deskbook (2019)	Chapter 5, "Obligating Appropriated Funds"
	DoD FMR	Vol. 3, Ch.8: Standards for Recording and Reviewing Commitments and Obligations Vol. 3, Ch. 15, Receipt and Distribution of Budgetary Resources – Execution Level

B.7—THE EXPENSE/INVESTMENT THRESHOLD

As explained in Section B.2, above, the National Guard receives four types of organic appropriations: Operation and Maintenance, Military Personnel, Military Construction, and National Guard and Reserve Equipment (NGREA) funding. The last pot of money, NGREA, is called a "procurement" appropriation. "Procurement appropriations," as a general rule are used to purchase "investment items" as opposed to "expenses" such as lower-dollar items that are consumed during the course of operations. Such low-dollar "consumable" types of expenses are generally paid for out of O&M accounts.

Despite the general rule that procurement appropriations are for "investments" and O&M appropriations are for "expenses," Congress passes a provision in each defense appropriations act that *allows* DoD to purchase investment items, not exceeding a certain threshold, with O&M funds. For example, Section 8031 of the FY19 defense appropriations act states:

> During the current fiscal year, appropriations which are available to the Department of Defense for operation and maintenance may be used to purchase items having an investment item unit cost of not more than $250,000.

DoD, in turn, implements that statutory authority in the DoD FMR, which requires DoD entities to fund investment items under $250,000 with O&M funds as opposed to procurement funds. See DoD FMR Volume 2A, Chapter 1, Para 010201(F).

For most items, this is a straightforward analysis: If the National Guard wants to procure an item that costs $200,000, O&M funds are available. On the contrary, if the

National Guard wanted to purchase an item that costs $300,000, then procurement funding is needed. Some of the NG's procurement needs are covered in the services' procurement budgets. The Services receive far more "procurement" dollars as compared with the amount of NGREA dollars received by the ARNG and ANG. Further, NGREA is a special pot of money that is closely controlled and is tied to the NGREA "buy list" that is ultimately submitted to Congress. (See Subsection B.11 of this Guidebook for more information on NGREA.)

Based on past experience, the most difficult analysis in this area for the National Guard involves a requirement for a "system." That is, even if the separate parts of a system would each be under $250,000, the expense/investment threshold applies to the entire system. Accordingly, the question typically turns on whether the disparate parts are actually a "system," or if they are really a series of stand-alone items. This comes up in such requirements as computer systems, video telecommunication systems, security systems, etc. A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement. This can be a highly technical question that often requires technical experts to examine the definition against the alleged "system" to determine if it meets that requirement. NGB's fiscal law attorneys are available to assist with these types of questions in close coordination with the technical experts.

Crosswalk Links 	**Army JAG School Fiscal Law Deskbook (2019)**	**Chapter 2: Availability of Appropriations as to Purpose, (Starting on Page 12 of that Chapter)**
	FY19 Defense Appropriations Act	**Section 8031**
	DoD FMR	**Volume 2A, Chapter 1, (Starting on Page 1-21)**

B.8—TRANSFER AUTHORITIES AND REPROGRAMMING ACTIONS

As stated at the beginning of this Guidebook, fiscal law is focused on ensuring that agencies are using federal funding in accordance with the rules and conditions set by Congress. As explained previously, in the appropriation acts Congress provides agencies with budget authority in very specific amounts—typically in lump sums. (For example, the FY19 ARNG O&M appropriation was set at the specific lump sum of

$7,284,170,000.) However, Congress recognizes that there needs to be some flexibility in the system to allow for the re-prioritization of funds in light of the ever-shifting realities of the national security landscape. This flexibility comes in the form of "transfer authorities," and their resultant "reprogramming actions."

Please note that this Subsection of the Guidebook is designed to address this subject in a general matter to provide the reader with an awareness from a fiscal law perspective. It is not an in-depth examination into all of the technicalities involved. On this point, we note that a deeper dive is set out in the **DoD FMR at Volume 3, Chapter 6, "Reprogramming of DoD Appropriated Funds."**

Earlier, in Section B.1. of this Guidebook, we examined permanent fiscal statutes that are always relevant to a fiscal law analysis. One of those statutes is **31 U.S.C. § 1532**, which is known as the "transfer statute." That law explains that funds cannot be withdrawn from one appropriation and credited to another except as "authorized by law." Further, assuming that such a movement of funds is authorized, the amount that is withdrawn and credited "is available for the same purpose and subject to the same amount limitations" as the gaining appropriation.

There are two types of the above-referenced legislation that allows a transfer between appropriations: general and specific. The "general transfer authority" for DoD is set out in the annual defense appropriations act and the NDAA. The general transfer authority in the annual appropriation acts is set out in Title VIII (General Provisions). Section 8005 of Fiscal Year 2019's defense appropriations act states, in relevant part, as follows:

> Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4M … of funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred.

The above-referenced provision goes on to limit this authority to situations where the funding is needed for "higher priority items, based on unforeseen military requirements."

Additionally, Congress provides specific transfer authority in specified sections of the NDAA and defense appropriation acts. An example of this is seen in our Counter-drug funding that is appropriated into an appropriation called

"Drug Interdiction and Counter-Drug Activities, Defense," with an express mandate to transfer a specific amount of that funding into the National Guard's Counter-drug program. See section B.2, earlier, for the exact language from this year's defense appropriation act.

Crosswalk Links 	**Army JAG School Fiscal Law Deskbook (2019)**	**Chapter 12: Reprogramming**
	GAO Red Book	**Chapter 2: The Legal Framework (Starting on Page 2-38)**
	Fiscal Year 2019 Defense Authorization Act	**Section 1001, General Transfer Authority**
	DoD FMR	**Volume 3, Chapter 6: Reprogramming of DoD Appropriated Funds**

B.9—OVERSEAS CONTINGENCY OPERATIONS ("OCO FUNDING")

As explained in Subsection B.2., above, the defense appropriations act is organized into nine separate "titles." The ninth title is for "Overseas Contingency Operations." These are "additional amounts" that are "designated by Congress for Overseas Contingency Operations/Global War on Terrorism." These amounts are not subject to sequestration because Congress expressly states that they fall within an exception to the Balanced Budget and Emergency Deficit Control Act of 1985. Although it is listed as a separate "title" within the appropriations act, it actually provides additional funding that effects several of the other titles in the appropriation act.

As applied to the National Guard, OCO funds provide additions to our ARNG and ANG military personnel and O&M accounts. For example, the text from the FY19 defense appropriations act stated:

> For an additional amount for "National Guard Personnel, Army," $195,283,000: Provided, that such amount is designated by Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to

> section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

The same operative language is used for the Air National Guard, albeit the amount provided was $5,460,000. The same language is also used for the OCO portion of our O&M appropriations—with the ARNG receiving an additional $110,729,000 and the ANG receiving an additional $15,870,000. At the DoD level, the primary regulations governing OCO funding (including budgeting and execution) is found in the DoD FMR at Volume 12, Chapter 23, "Contingency Operations."

B.10—SPECIFIC NATIONAL GUARD PROGRAMS

Based on our offices' experience, there are several specific National Guard programs that have resulted in a number of fiscal law questions over the years. Accordingly, this section is designed to create a shared understanding of the laws and regulations that govern them, which can assist in resolving any fiscal law issues that may arise in the future. These programs are (1) Youth Challenge, (2) Counter-drug, and (3) The State Partnership Program. We note, however, that this Guidebook is only as good as the regulations and policies that are in existence at the time of publishing. That is, anyone researching any aspect of the below programs should ensure that they have the latest legislation, regulations and policies—which could have changed since the publishing date of this Guidebook.

Youth Challenge

The National Guard Youth Challenge Program's enabling legislation is 32 U.S.C. § 509, which explains that the program is designed to:

> improve the life skills and employment potential of participants by providing military-based training and supervised work experience, together with the core components of assisting participants to receive a high school diploma or its equivalent, leadership development, promoting fellowship and community service, developing life coping skills and job skills, and improving physical fitness and health and hygiene.

The statute further explains the structure of the program, the oversight roles, the use of cooperative agreements, the requirement for "matching funds," the authorized benefits of participants, authorized military status of program personnel, equipment and facilities that can be used, and the reporting requirements. Anyone involved with the funding of

the National Guard Youth Challenge Program should be very familiar with this statute because it sets out the primary authority for the program.

One of the most important subsections from a fiscal law perspective is found at 32 U.S.C. § 509(d), "Matching Funds Required." It states as follows:

> (1) The amount of assistance provided by the Secretary of Defense to a State program of the Program for a fiscal year under this section may not exceed 75 percent of the costs of operating the State program during that fiscal year. (2) The limitation in paragraph (1) may not be construed as a limitation on the amount of assistance that may be provided to a State program of the Program for a fiscal year from sources other than the Department of Defense.

This is an example of Congress authorizing a program, while simultaneously limiting the amount of funding that can be used for it. As such, those carrying out this program for the National Guard must be careful to ensure that the limitation above is strictly observed to prevent a fiscal law *amount* problem. This reinforces the importance of permanent legislation in fiscal law as was discussed in Subsection B.4 of this Guidebook.

The Youth Challenge program is rooted in 32 U.S.C. § 509, and implemented in regulation at the DoD-level by DoD Instruction 1025.8, "National Guard Youth ChalleNGe Program." This is further implemented by CNGBI 9350.01, "National Guard Youth Challenge Program." The program is carried out through cooperative agreements—the terms of which must be in accordance with the statute and governing regulations (unless a proper exception to policy to a regulatory provision has been secured). The use of cooperative agreements to carry out the program is expressly called for at 32 U.S.C. § 509(c). (See the Subsection E.1, below, for more information on cooperative agreements).

<u>Counter-Drug</u>

The National Guard Bureau (NGB) administers the nationwide National Guard (NG) Counter-drug (CD) Program and the five regional National Guard Training Centers pursuant to 32 U.S.C. § 112, Public Law 109-469 and DoD and NGB policy. (The funding language by which Congress appropriates funds into the O&M, Defense-wide appropriation and subsequently transfers a portion to the NG is set forth in Subsection B.2 earlier in this Guidebook.) As explained in Subsection B.8 earlier in this Guidebook, the CD funding is appropriated into a DoD appropriation called "Drug Interdiction and Counter-Drug Activities, Defense" and then reprogrammed into NG appropriations.

The 54 National Guard CD Programs primarily provide support to Federal, State, tribal, and local law enforcement agencies that request assistance for authorized and approved CD missions. NG CD Programs may also support approved community-based organizations and other organizations that request civil operations support. NG CD Programs provide support operations where the primary purpose is "drug interdiction and counter-drug activities" (a.k.a. CD Nexus) as defined and authorized by DoD and NGB policy. When using CD appropriated funds States may only execute missions within their annual Governor's State Drug Interdiction and Counterdrug Activities Plan (State Plan) that have been approved by the Secretary of Defense. The NGB regulation on point is CNGBI 3100.01A, "National Guard Counterdrug Support."

State Partnership Program

The State Partnership Program is codified at 10 U.S.C. § 341. This statute authorized SECDEF, with the concurrence of the Secretary of State is authorized to establish state partnerships to support the security cooperation objectives of the United States, between members of the National Guard of a State or territory and the military or security forces of a foreign country or a governmental organization of a foreign country whose primary functions include disaster/emergency response.

The statute requires a 15-day notification to Congress before initiating an activity with (1) a security force or (2) a governmental organization of a foreign country whose primary functions include disaster/emergency response. The notification must state that the activity is in the national security interests of the United States. (This notification is not required for activities with the "military forces" of a foreign country.)

The statute states that SECDEF shall prescribe regulations to carry out the program, and that such regulations "shall include accounting procedures to ensure that expenditures of funds to carry out this section are accounted for and appropriate." It states that DoD funding, including ARNG and ANG funding is available (1) for payment of costs incurred by the National Guard of a State or territory to conduct activities under a program, and (2) for payment of incremental expenses of a foreign country to conduct activities under a [state partnership] program. It caps the total amount of incremental expenses of foreign countries at $10M for any fiscal year. The statute goes on to explain that a NG member travelling to a foreign country must be on "active duty in the Armed Forces" in order to use program funds.

The implementing regulation (specifically required by the enabling statute) is DoD Instruction 5111.20, "State Partnership Program (SPP)." The permissible uses (and

limitations) of federal funds for the program are set out in Section 3 of DoDI 5111.20. This includes guidance on the "expenses of foreign nationals," to include any SPP activity that includes travel of foreign military or non-military personnel. Such travel must be approved under Section 1205, Volume 12 (Ch. 18) of the DoD FMR, and the Joint Travel regulations … or be otherwise authorized under existing law. See Section 3.2 of DoDI 5111.20.

<table>
<tr><td rowspan="10">Crosswalk Links
  </td><td>U.S. Code</td><td>32 U.S.C. § 509, National Guard Youth Challenge Program opportunities for civilian youth</td></tr>
<tr><td colspan="2">DoD Instruction 1025.8, National Guard Youth ChalleNGe Program</td></tr>
<tr><td colspan="2">CNGBI 9350.01, National Guard Youth Challenge Program, 15 November 2015</td></tr>
<tr><td>U.S. Code</td><td>32 U.S.C. § 112, Drug interdiction and counter-drug activities</td></tr>
<tr><td colspan="2">CNGBI 3100.01A, National Guard Counterdrug Support</td></tr>
<tr><td>U.S. Code</td><td>10 U.S.C § 341, Department of Defense State Partnership Program</td></tr>
<tr><td colspan="2">DoDI 5111.20, State Partnership Program</td></tr>
<tr><td colspan="2">CJCSI 3710.01B, DoD Counterdrug Support, January 26, 2007</td></tr>
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B.11—NGREA FUNDING

The National Guard and Reserve Equipment Appropriation (NGREA) was created by Congress in 1981 as a separate procurement appropriation (from the active components) focused exclusively on the equipment needs of the reserve components. NGREA was intended to supplement the Services' base procurement budgets. Similar to the Services' procurement appropriations, NGREA funding has a period of availability of three years. It is not an RDT&E account, which are found in Title IV of the defense appropriation acts. Rather, NGREA falls under Title III, Procurement. Accordingly, NGREA is not available for efforts that the active component would be required to fund through RDT&E appropriations.

As seen in the actual NGREA appropriation language earlier in this Guidebook (at Subsection B.2), it is available for "procurement of rotary-wing aircraft; combat, tactical and support vehicles; other weapons; and other procurement items for the

reserve components of the Armed Forces." It further requires CNGB (and the Chiefs of the other Reserve components) to submit a report to the Congressional defense committees that explains the modernization priority assessment. The National Guard and Reserve Equipment Report (NGRER) is mandated by 10 U.S.C. § 10541, and it reflects Congressional interest in ensuring a well-equipped and robust Reserve Component capability within the Armed Forces.

There is a specific notification process connected with NGREA—which is referred to as the "NGREA buy list" process. It is set out in the DoD FMR at Volume 3, Chapter 6, Paragraph 0611. Essentially it is the process through which the Army National Guard and the Air National Guard transmit their "buy list" (through the Assistant Secretary of Defense for Reserve Affairs) to the House and Senate Armed Services Committees (HASC and SASC) and the Senate and House Defense Appropriations Subcommittees. The "buy list" is important because the DoD FMR prohibits the use of NGREA for any item not included on the list unless and until the Congressional committees have been properly notified. That is, changes to the buy list can be made, but doing so requires staffing through ASD(RA) ultimately to the Congressional committees. The submission of the buy list to the four Congressional committees triggers a "30-day automatic hold" to allow the committees a chance to assert any objections or seek further clarification. Once that 30-day period ends, and assuming there is no objection from any of the committees DoD can begin taking actions to carry out the buy list.

Many of the items that the ARNG and the ANG procures off of the NGREA buy list are through assisted acquisitions (a.k.a. "contract offloads) with procuring agencies specializing in that type of equipment (*e.g.* Program Executive Offices—"PEOs"). Fiscal law timing issues connected to these Economy Act transactions are discussed in Subsection C.6 of this Guidebook.

B.12—QUESTIONABLE EXPENSES – "RED FLAGS"

As emphasized throughout this Guidebook, fiscal law is focused on ensuring that agencies are using federal funding in accordance with the rules and conditions set out by Congress. In addition, it is important that all National Guard members not lose sight of the fact that appropriated funds are taxpayer dollars. Although our agency is responsible for the stewardship of *billions* of dollars of taxpayer dollars, wasteful or questionable spending of *any amount* of our precious resources can lead both Congress and the public to question our ability to provide effective fiscal stewardship.

As clearly stated in the "principles of ethical conduct" for federal government employees, "public service is a public trust" and "employees shall not use public office for private gain." Additionally, "employees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards." With ethical principles in mind, this section explores "questionable expenses" that all National Guard leaders should see as "red flags" that can easily lead to fiscal law violations.

The majority of issues in this area focus on the dividing line between what types of employee expenses are costs that should be borne by the taxpayer, as compared to those that should be borne by the government employee. These issues tend to be on a spectrum. For example, on the one hand, the taxpayer should not be charged for a government employee's daily coffee that he or she buys on the way to his or her regularly scheduled place of government business. Rather, just like almost every other worker in the U.S., that is considered to be a "personal expense" that the employees should pay out of their own pocket. On the other extreme, we would not expect an employee to use their own funds to buy an expensive piece of machinery that is required for them to perform their government job—an office photocopying machine for example. Rather, office supplies and office equipment are generally supplied at the employer's expense.

The following is a list of the types of expenses that tend to raise these issues in the National Guard. Each type of purchase has a brief explanation of relevant statutes, regulations, and/or GAO decisions. That said, this list is not exhaustive—rather it is demonstrative in nature. Any issue that raises the question of whether or not a NG member should be using their own funds (as opposed to public funds) for a particular expenditure should always be raised to the appropriate NG oversight official (*e.g.*, USPFO, Judge Advocates, NGB-HCA/SCO, etc.).

Clothing

The issue regarding clothing is separate and distinct from military uniforms—which have a statutory basis. Rather, the issue of clothing generally arises when a National Guard unit or member is seeking to have taxpayer dollars pay for clothing (*e.g.*, T-shirts, jackets, hats, etc.). Over the years this has come up in many contexts, including unit T-shirts, cold weather gear, personal protective equipment, apparel for youth program participants, etc. The general rule is that appropriated funds may not be used for personal expenses, and clothing is typically a personal expense. Statutory exceptions to this rule exist, including special clothing needed to perform hazardous duties (**5 U.S.C. § 7903**), uniforms for civilians that are required to wear a uniform prescribed by law or regulation (**10 U.S.C. § 1593**), and protective clothing required by

the Occupational Safety and Health Administration (**29 U.S.C. § 668**). Additionally, the GAO has allowed other limited exceptions for out-of-the ordinary circumstances that are required by the nature of an employee's duties (**3 Comp. Gen. 433** (1924)). Examples include caps and gowns for hospital workers (**2 Comp. Gen. 652** (1923)), wading trousers for survey engineers (**4 Comp. Gen. 103** (1924)), and aprons for laboratory use (**2 Comp. Gen. 382** (1922)). Notably, the rules discussed above only apply to government employees. The necessary expense doctrine is the appropriate framework to analyze clothing expenditures for other individuals (*e.g.*, contractors or children in youth programs) (**GAO Red Book, Ch 3. p. 3-37**).

Food

As with clothing, the issues regarding the purchase of food are generally disconnected from authorized meals for Soldiers and Airmen while training. Subsistence and per-diem rules are statutory (*e.g.*, Basic Allowance for Subsistence (**37 U.S.C. § 402**), per diem during travel (**5 U.S.C. § 5702**), and subsistence for field exercises (**32 U.S.C. § 503**)). Rather, issues regarding the purchase of food with taxpayer dollars generally involve food that is not materially connected to performance of the agency's mission. As food is generally a personal expense, it is generally impermissible to use appropriated funds for its purchase. Rare exceptions to this rule exist when "the incidental purchase of food may contribute materially to the conduct of official business" (**GAO Red Book, Ch 3, p. 3-68**). One example of such a rare exception includes work at an official duty station under an *extreme* emergency. The GAO has also authorized a limited exception for light refreshments at conferences, though NGB policy forbids such expenditures "unless the refreshments are nonsegregable and nonnegotiable." (Para. 8a.(4) of Enclosure F of **CNGBI 8100.01**)

Additionally, exceptions may be available for training of civilians (**5 U.S.C. § 4109**) and service members (**10 U.S.C. § 9301**). Meals may be provided under these authorities when it is "necessary to achieve the objectives of a training program" (**B-317423**). Auditors will closely scrutinize events to ensure they are valid programs of instruction (**B-249795**). The training exception can also be used to provide food samples at ethnic and cultural awareness programs (**B-199387** and **B-301184**). The Air Force requires that the samples be of "minimal proportion," rather than sized as meals or refreshments (para. 4.28.1.2 of **AFMAN65-605v1**).

Bottled Water

Similar to food, the purchase of bottled water does not materially contribute to mission accomplishment. As such, it's generally a personal expense. Limited exceptions to this

rule exist (1) where water is unpotable, (2) in response to legitimately anticipated emergencies that may interrupt water service, or (3) where duty is in a remote area with no access to potable water. In the last case, the agency must determine that bottled water is the best way to provide water, rather than another means of delivery. Service regulations (para. 5-19 of **AR 30-22** and para. 4.58 of **AFMAN 65-605v1**) provide further guidance on the purchase of bottled water. Finally, water coolers may generally not be purchased with appropriated funds. However, if a facility is not equipped with chilled water fountains or refrigerators that dispense chilled water or ice and when the primary benefit accrues to the organization, agencies may use appropriated funds for their purchase.

Workplace Food Storage and Preparation Equipment

In limited circumstances, the GAO has found that the purchase of food preparation and storage equipment with appropriated funds is permissible. Such an expenditure is only allowable if the primary benefit of the equipment accrues to the agency and the equipment is placed in common areas where it is available for use by all personnel. GAO found that disposable cups, plates, and cutlery are a personal expense (**B-326021**).

Air Force regulations allow for the purchase of "appliances" in limited circumstances. However, the use of appropriated funds for "food preparation/serving items" is prohibited (para 4.48 of **AFMAN 65-605v1**).

Office Furniture and Equipment

The purchase of necessary items such as desks, filing cabinets, and other ordinary office equipment using appropriated funds is proper (**Red Book, Ch. 3, p. 3-211).** However, equipment that only serves the needs of a single individual or specific group of individuals is a personal expense, even if the equipment is essential to a particular employee (**B-203553**). Exceptions to this rule include equipment available on the Federal Supply Schedule (**B-215640**) as well as statutory authority for handicapped individuals (**29 U.S.C. § 701 et. seq**.). Additional guidance is available regarding the DoD Computer/Electronic Accommodations Program (**DoDI 1000.31**).

Entertainment

The provision of entertainment does not materially contribute to mission performance and is therefore generally considered a personal expense. There are very few exceptions to this rule. They include statutory exceptions under the Foreign Assistance

Act (**B-182357**) and for the National Park Service programs (**B-234298**), as well as GAO guidance allowing for entertainment as part of EEO (**B-200017**) and cultural awareness events (**B-278805**). Additionally, ORF may be used for entertainment expenses of authorized guests IAW **AR 37-47.**

Alcohol

There is generally no authority to purchase alcohol with appropriated funds. The only exception is using Official Representation Funds for gifts to civilian or military dignitaries and officials of foreign governments (**para. 2-9 of AR 37-47**).

Decorations

GAO has approved the use of appropriated funds for office decorations, provided they are modestly priced and consistent with work-related objectives (**B-226011**). The purchases must not be primarily for the personal convenience or personal satisfaction of a government employee (**B-217869**). Federal regulations provide additional guidance on the purchase of decorations (41 C.F.R. § 101-26.103-2). Additionally, Constitutional law must be considered if a proposed purchase involves religious decorations.

Business Cards

While the GAO has determined that agencies may purchase commercial business cards with appropriated funds, service policies restrict such purchases. Army regulations allow for the printing of business cards at government expense when necessary to perform official duties and to facilitate mission-related business communications. No special hardware, software, or card stock may be acquired to produce cards. The procurement of commercially-produced business cards at government expense requires approval by a brigadier general or SES equivalent. (para. 5-8 of **AR 25-30**).

Air Force regulations allow for the printing of business cards (using agency computers, software, and card stock) for use in connection with official communications. Commercially-printed business cards may only be authorized for recruiting personnel and USAFA liaison officers. Each State's TAG is the approval authority for ANG recruiters within that state (**para. 4.44 of AFMAN 65-605, Vol. 1**).

Fine and Penalties

The payment of personal fines and penalties does not materially contribute to the completion of an agency's mission. Such payments are generally a personal expense

of the employee (**B-321981** and **B-250880**). Payment may be appropriate as a necessary expense if an employee is forced by their agency to take an action that results in a fine (**B-147769**).

Payment of a fine may also be appropriate if levied on the agency itself and Congress has waived sovereign immunity.

Licenses and Certificates

Licenses and certificates, even those that enable an employee to carry out their duties, are considered a personal expense and not a necessary expense of the government (B-29948). The Air Force allows limited exceptions for licenses and certificates of military members (**para 4.60 of AFMAN 65-605v1**) as well as professional credentials of military members and civilians (**para. 4.60.1 of AFMAN 65-605v1**). Additionally, the GAO has allowed such expenses when a license is primarily for the benefit of the government and not to qualify the employee for their position (**B-257895**, **B-307316**).

Statutory authority also exists that allows for agencies to pay for certain credential and licenses for civilians (**5 U.S.C. § 5757**) and military members (**10 U.S.C. § 2015**). These authorities do not provide an entitlement, but rather authorize agencies to pay for such expense if the agency so chooses.

Awards

The authority to purchase awards for service members is provided by statute (**10 U.S.C. § 1125**). That statute has been implemented in Army (**AR 600-8-22**) and Air Force (**AFI 36-2803**) regulations. Authority to provide awards to civilians resides in multiple statutes, though the most commonly cited is **5 U.S.C. § 4503**. While the statute seems to only allow for cash awards, the GAO has approved the use of appropriated funds for non-monetary awards as well (**B-271511**). Such awards must be made IAW **DoDI 1400.25**, vol 451 and **DoD FMR, vol. 8, ch.3**. The Army provides additional guidance through **AR 672-20** and the Air Force through **AFI 36-1004**.

Coins

Coins may be procured using appropriated funds under statutory authority for recognition of accomplishments (**10 U.S.C. § 1125**) or as agency awards (**5 U.S.C. § 4503**). Army (**DA Memo 600-70**) and Air Force (para. **AFMAN 65-605v1**) regulations provide further guidance and restrictions on the purchase and presentation of coins.

Those references do not apply to the presentation of coins procured with nonappropriated funds, ORF, personal funds, or by private organizations.

C. THE AVAILABILITY OF NG APPROPRIATIONS AS TO TIME

C.1 KEY TERMINOLOGY REGARDING FISCAL LAW TIMING RULES

This section focuses on the "time" prong of the PTA analysis. In order to understand this concept, we must first revisit some key terminology in this area from earlier in this Guidebook (Section A.4). The following are the most important terms as applied to the fiscal law timing rules:

- **Fiscal Year.** The Federal Government's fiscal year begins on 1 October and ends on 30 September. For example, Fiscal Year 2019 began on 1 October 2018 and will end on 30 September 2019.

- **Period of Availability.** The period of time in which budget authority is available for the original obligation.

- **Commitment.** An administrative reservation of allotted funds, or of other funds, in anticipation of their obligation. Commitments are important to ensuring that the subsequent entry of an obligation will not exceed available funds. Commitments in the Army National Guard are typically accomplished in the form of a DA Form 3953, "Purchase Request and Commitment," (often referred to as a "PR" or a "PR&C."

- **Expired Funds.** Once a period of availability ends, the funds in that appropriation become "expired." Expired funds can be used to adjust prior obligations under certain circumstances, but they are generally not available for new obligations.

- **Obligation.** An obligation is any act that legally binds the government to make payment. Obligations are amounts representing orders placed, contracts awarded, services received, and similar transactions that will require payment.

- **Subject to the Availability of Funds.** This generally refers to a clause that an agency may place into contracts before funds become available, usually to

ensure the timely delivery of goods or services. It this clause is used, the Government shall not accept supplies or services until the contracting officer has given the contractor written notice that funds are available. The primary FAR clauses in this area are 52.232-18 and 52.232-19.

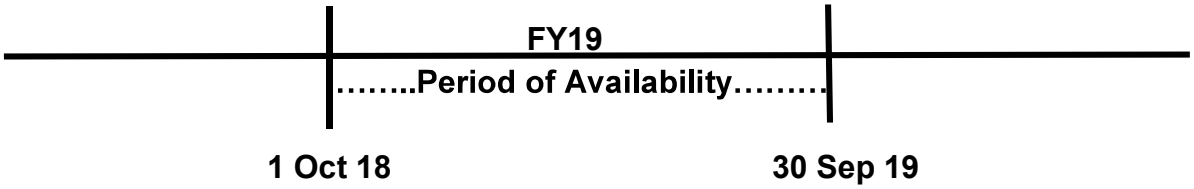
C.2—THE GENERAL CONCEPT

As stated multiple times in this Guidebook, the three main prongs of fiscal law are "Purpose, Time and Amount." This section focuses on the "Time" prong. As a general matter, this is a very straightforward aspect of fiscal law and is based on the fact that most appropriations can only be used ("obligated") during a specific time frame. For the National Guard, our military personnel and O&M appropriations have a one-year "period of availability." As a "procurement" appropriation, our NGREA funds have a three-year period of availability. Finally, our military construction funding has a five-year period of availability. Once the period of availability expires, the funds enter an "expired" status for five years—during which time they can only be obligated for limited purposes. Once the five years ends, the funds enter into a "closed" status and are no longer available for *any* obligation.

Timing violations occur when an obligation is made either too early or too late for that particular appropriation. For example, our current Fiscal Year 2019 the Army National Guard O&M Appropriation has a "period of availability" that started on 1 October 2018 and will end at midnight on 30 September 2019. Accordingly, as a general rule, a National Guard contracting officer could not have obligated those FY19 ARNG O&M funds on a contract *before* 1 October 2018, and generally cannot obligate those funds *after* midnight on 30 September 2019 (except in certain limited circumstances explained below). Once the period of availability expires, the funds enter into an "expired status" which only allows them to be obligated in specific circumstances. Finally, after those five years expire, the appropriation is "closed" and not available for any further obligation.

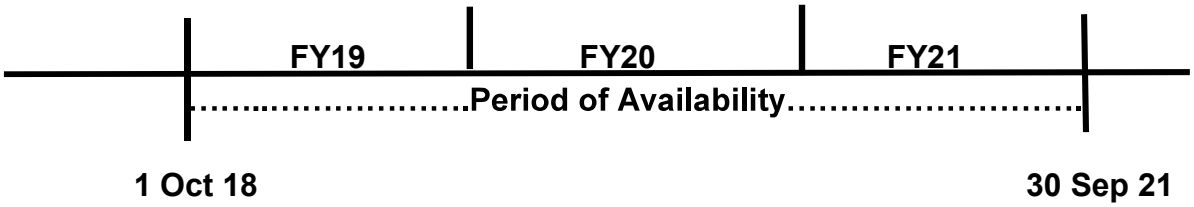
The time question focuses on whether the *obligation* in question is properly made during the appropriation's "period of availability." That is, Congress expressly states (in the appropriations acts) how long a particular appropriation is "available" for obligation. For example, the National Guard's military personnel and O&M appropriations have a "one-year" period of availability. This is graphically depicted for FY19 as follows:

FY19 Military Personnel and Operation and Maintenance (O&M) Appropriations—One Year Period of Availability:

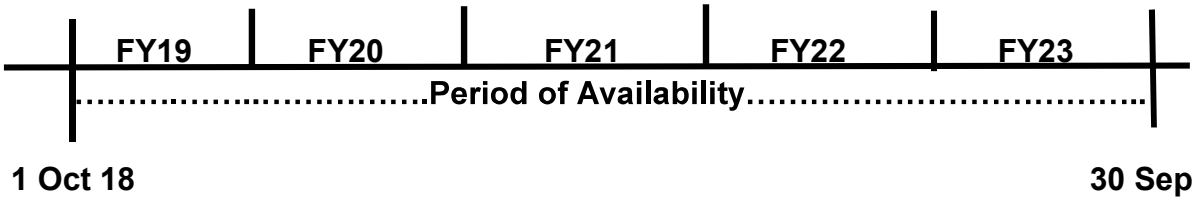


The one year period is based on the federal "fiscal year" which begins on 1 October and ends on 30 September. There are also "multiple year" appropriations, which simply means that the period of availability stretches across two or more fiscal years. For example the National Guard and Reserve Equipment Appropriation (NGREA) has a three-year period of availability, and the National Guard's military construction (MILCON) appropriations have a five-year period of availability. They are depicted graphically as follows:

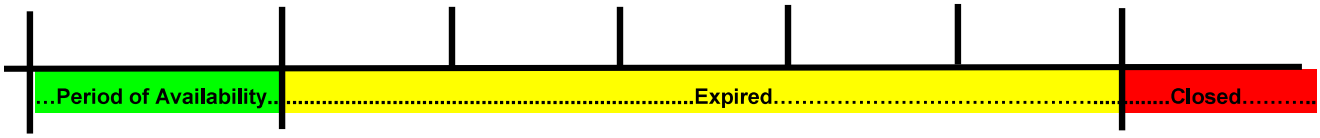
FY19 National Guard and Reserve Equipment Account (NGREA): Three Year Period of Availability



FY 19 Military Construction (MILCON): Five-Year Period of Availability



Once the periods of availability for these appropriations end, the funds "expire," meaning that they are no longer available for "new" obligations, but can be used to adjust obligations that were previously made. The funds stay in that "expired" status for five years. After those five years, the appropriation is "closed," meaning that they are no longer available for obligation or expenditure for any purpose. This is depicted as follows:



With this basic understanding of the various periods of availability for our NG appropriations, we can now move into an explanation of how this is applied in terms of obligations for NG requirements. This is referred to as the "bona fide needs" analysis, which is set out immediately below.

Crosswalk Links 	**GAO Red Book**	**Availability of Appropriations: Time, Third Edition, Ch. 5, 2004. (See also Annual Update).**
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 3: Availability of Appropriations as to Time**
	U.S. Code	**31 U.S.C. § 1502a (The Bona Fide Needs Statute)**

C.3—THE BONA FIDE NEEDS RULE

The *bona fide* needs rule focuses on *when* an agency's need for a particular supply or service arises. It is rooted in a statute—31 U.S.C. § 1502(a)— also referred to as "the *bona fide* needs statute. It is important at the outset to note that the term "bona fide need" is a legal "term of art,"—unique to fiscal law—that varies from the ordinary/everyday use of that term. That is, it is strictly a fiscal law *timing* concept, and has nothing to do with whether or not a particular service or supply purchased by the

government is a *legitimate* or *wise* decision. Perhaps a more accurate label would be "Timing of the Need Rule." Regardless, it is a rule that is designed to ensure that the Government is obligating the correct fiscal year's funds for a particular requirement.

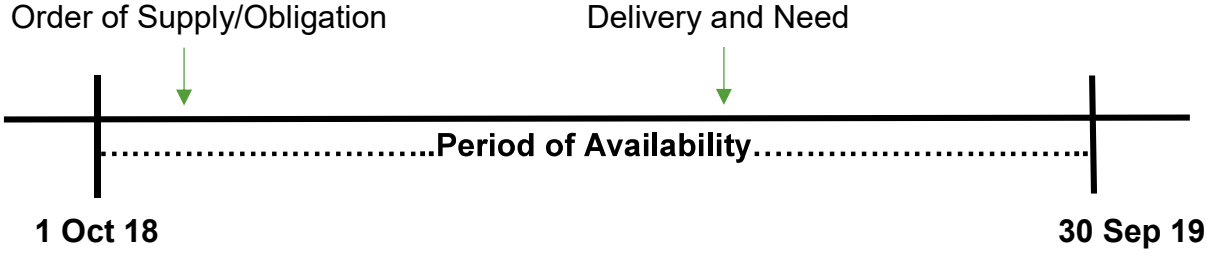
The *bona fide* needs rule holds that an appropriation is available for obligation only to fulfill a genuine or *bona fide* need of the agency during the appropriation's "period of availability." Accordingly, agencies may only obligate funds to fill a requirement once the bona fide need exists, and may only use funds current while the bona fide need exists. This is often phrased as "current year money for current year needs." This means that the payment is chargeable to the fiscal year in which the obligation is incurred as long as the need arose, or continued to exist, in that year.

As a general rule, an agency has a need to acquire goods or services when it requires the use or benefit of those goods or services. This is almost always a fact-dependent inquiry, and often requires the exercise of judgment. A practical way to approach this analysis is as follows:

(1) Classify what is being acquired (i.e., is it a service or supply). This is important because the rules differ depending on the type of acquisition involved.
(2) Analyze the time in which the need for the service, supply or construction arose, and the time period it continued. If the need first arose during the current fiscal year and current year funds are being used, there is no violation of the bona fide needs rule.
(3) Consider any exceptions. These exceptions are set out immediately below.

<u>Supplies</u>

Generally, the bona fide need for a supply is determined by when the government actually requires the supplies being acquired. That is, "when can the government actually use the widget?" Agencies should obligate funds from the fiscal year in which the supplies will be used. Here is a simple example:



In the above situation, FY19 O&M funding would be the appropriate funding source from a timing perspective because both the need and the obligation (order) occurred in the same fiscal year.

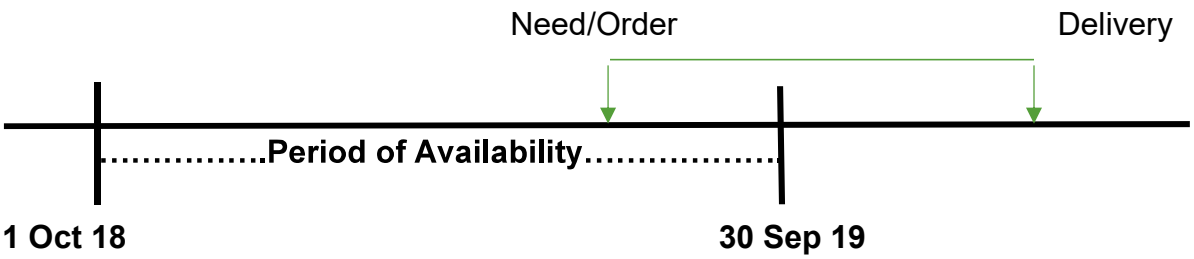
The more difficult situation arises towards the end of the fiscal year, when a supply cannot be delivered until *after* the fiscal year. There are two important exceptions that apply in this situation. The first is called the "delivery lead time" exception, which allows an agency that has a need in "Fiscal Year 1" to use Fiscal Year 1 funds even though the normal delivery time will prevent the item from arriving until Fiscal Year 2. As long as the agency (1) had a bona fide need for the item in Fiscal Year 1, (and would have taken possession of the item in FY1 if possible) and (2) did not receive the item until FY2 because of a delivery lead time issue, the obligation is not objectionable. This is a limited exception, and the time between contracting and delivery must not be excessive. A simple graphical depiction of this situation (assuming a normal 30-day delivery) is as follows:

In this above example, the agency would have preferred to receive the supply item in FY19, however the normal delivery time for this item is 30 days and therefore the agency was not able to take receipt of the item until the first few weeks of FY20. In this situation, since the obligation was made in FY19, the use of FY19 dollars were not objectionable from a timing perspective.

A very similar exception is known as the "production lead time" exception. This exception allows the agency to consider the normal production lead-time in determining the proper funds to obligate for the requirement. For example, if a specialized piece of equipment (under the expense/investment threshold) requires 6-months to produce in the industry, this exception allows the agency to place the order (obligating the funds) in Fiscal Year 1, even though the item will not be produced and delivered until Fiscal Year 2. If this exception did not exist, agencies would be in the very difficult position of having to wait until they crossed into a new fiscal year to place the order, thereby unnecessarily delaying their use of the supply item. This exception allows the agency to

avoid that unnecessary delay. Here is an example assuming a six-month production lead time for the item:

Production Lead Time Exception



In this above example, the agency would have preferred to receive the specialized piece of equipment in FY19, however the normal production lead time for this item is six months, and therefore the agency was not able to take receipt of the item until several months into FY20. In this situation, since the obligation was made in FY19, the FY19 dollars were not objectionable from a timing perspective.

However, these exceptions are entirely dependent on the facts. For example, if an item has a normal 4-month production lead time, but is not needed by the agency until 8 months into FY2, then FY1 funds would not be available. Rather, the agency would need to wait until FY2 to place the order for the item with FY2 dollars. Additionally, the Government cannot usually instruct a contractor to deliver the item *beyond* the delivery or production lead time in the above-referenced situations, because that would bring into question whether the need appropriately arose in the first fiscal year. Since the fact scenarios in this area are endless, any doubt should be resolved with the assistance of the National Guard's judge advocates and full-time civilian attorneys as appropriate. Because this is an area that is fact-dependent and requires some subjectivity, the underlying analysis should be documented for auditability purposes.

Finally, there is a "stock-level exception" when it comes to supplies. Although the general rule is "current year supplies paid out of current year dollars," GAO explains:

> We do not mean to suggest that an agency may purchase only those supplies that it will actually use during the fiscal year. Agencies normally maintain inventories of common use items. The *bona fide* needs rule does not prevent maintaining a legitimate inventory at reasonable and historical levels, the 'need' being to maintain the inventory level so as to

avoid disruption of operations. The problem arises when the inventory crosses the line from reasonable to excessive.

Accordingly, the "stock-level exception" permits agencies to purchase sufficient readily available common-use standard type supplies to maintain adequate and normal (reasonable) stock levels. The government may use current year funds to replace stock consumed in the current fiscal year, even though the government will not use the replacement stock until the following fiscal year. The purpose of this exception is to prevent interruption of on-going operations between the fiscal years. This does not allow for end of the fiscal year "stockpiling"—buying supplies in excess of usage requirements. Again, responsible agency officials should document the underlying analysis of questionable purchases along these lines for auditability.

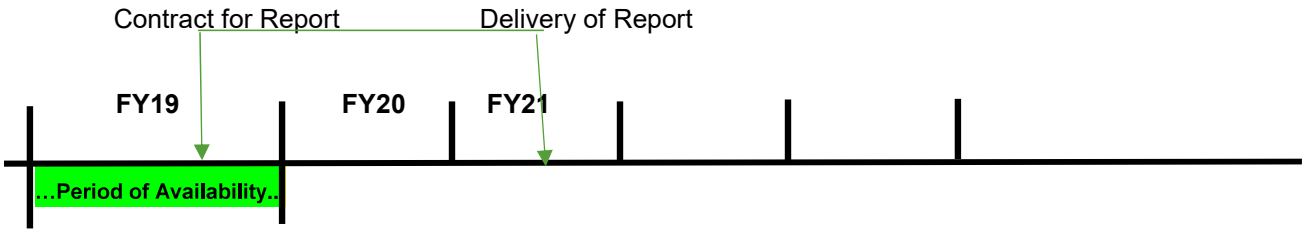
Services

As a general rule, the *bona fide* need for services does not arise until the services are rendered. Accordingly, the general rule is that services must be funded with funds current as of the date the service is performed. This is also an area where the exceptions are almost as important as the general rule. There are two main exceptions in this area—one for "severable services" and one for "non-severable" services.

Before explaining those exceptions, it is important to define those two terms. A "severable services" contract is one that can be separated into components that independently meet a need of the agency. The most common type of services that are used as a prime example of a severable services contract is a janitorial services contract. In a janitorial services contract, the agency is enjoying the benefits of those services on a daily, weekly and monthly basis. There typically is no "end state" or "end product" that will be produced at the end of a janitorial services contract. Rather, the services are "severable" into units of time and the agency gets essentially the same benefit every day.

A non-severable services contract, by contrast, is one that is focused on a unified outcome, product, or report that cannot be subdivided. For example, if DoD enters into a contract seeking a study (or report) on PTSD that will require two-years of data collection leading up the final report, the department is ***not*** getting a daily or weekly benefit from that report. Rather, the Government is seeking the final report, not a partial collection of data, notes, interviews, etc. That is, unlike a janitorial services contract that provides complete daily services, a non-severable contract is one where the real benefit to the Government is an end product.

In light of the above, the first step in applying a timing analysis to a service is to categorize it as either severable or non-severable. If it is non-severable (such as the PTSD report mentioned above) the entire service must be funded with dollars that are available for obligation at the time the contract was executed. Contract performance may cross fiscal years. That is, using the PTSD report example, the agency can enter into a contract in FY19 with FY19 O&M dollars to fund the entire report, even though the final report will not be delivered to the Government until FY21. Here is a graphical depiction:



Since the report is "non-severable" it is not objectionable to fund the report with FY19 dollars. If, however, the Government significantly changes the scope of the report in FY20, for example, the analysis would need to follow the rules explained in Subsection C.5 focused on the appropriate funding for contract modifications. The above example assumes that the Performance Work Statement (PWS) or Statement of Work (SOW) for the report was set in FY19 and carried through the completion of the contract (culminating in the delivery of the report).

Turning to "severable" services, the timing exception in this area is statutory. That is, 10 U.S.C. § 2410a allows DoD agencies to obligate funds current at the time of contract award to finance a severable services contract with a period of performance that does not exceed one year—regardless of whether or not it crosses a fiscal year. In other words, it is a statutory exception that swallows the general rule.

Because of this statute, DoD agencies can award the 12-month janitorial services contract referred to earlier in this section on 15 September 2019 with FY19 funds—even though the period of performance will run until midnight on 14 September 2020. In this hypothetical, 11.5 months of performance will actually take place in FY20, but that year will be entirely funded with FY19 O&M. Under 10 U.S.C. § 2410a that is completely acceptable. However, if services under that same contract do not start until 1 October 2019, FY20 funding must be used. That is, there must be genuine severable services starting at some point in FY19 in order to use the FY19 funds. The statutory exception

found at 10 U.S.C. § 2410a is designed to give flexibility so that all contracts do not have to end on 30 September of any given fiscal year.

Crosswalk Links 	**GAO Red Book**	**Availability of Appropriations: Time, Third Edition, Ch. 5, 2004. (See also Annual Update).**
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 3: Availability of Appropriations as to Time**
	U.S. Code	**31 U.S.C. § 1502a (The Bona Fide Needs Statute)**

C.4—TIMING RULES AND INTERAGENCY ACQUISITIONS

Interagency Acquisitions are a process by which a federal agency needing supplies or services (the requesting agency) obtains them through another federal agency (the servicing agency.) There are generally two types of interagency acquisitions: (1) Direct Acquisitions, and (2) Assisted Acquisitions. In a "direct" interagency acquisition, the requesting agency places an order directly against a servicing agency's contract. An "assisted" interagency acquisition, by contrast, describes a situation where the servicing agency and the requesting agency enter into an interagency agreement pursuant to which the servicing agency performs acquisition activities on behalf of the requesting agency.

Interagency acquisitions trigger certain documentation requirements stemming from the FAR, DoD FMR, and DoD Regulations. The primary documents involved in an Economy Act transaction are as follows: (1) The Determination and Findings (D&F) of Best Procurement Approach, (2) Economy Act D&F, (3) DD Form 1144, "support agreement" (which may reference an attached MOA), (4) Purchase Request documentation (DA Form 3953 or AF Form 9), and (5) the MIPR (DD Form 448).

The use of an interagency acquisition to satisfy a National Guard requirement does not alter the fiscal law analysis. That is, the fiscal law rules are the same regardless of whether a contract is awarded through NGB/USPFO contracts, or by leveraging another federal agency's contract. Accordingly, the "purpose analysis" is unaltered—meaning that if ARNG O&M funding is being used for the interagency

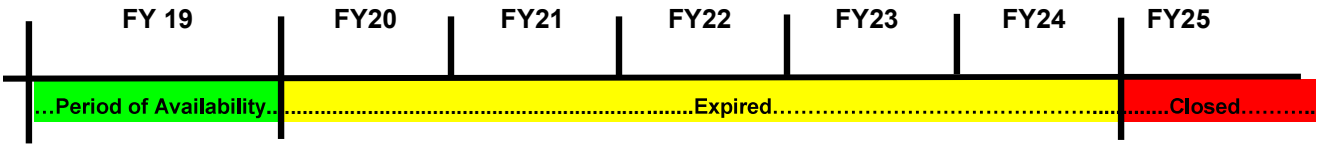
acquisition, the resulting supplies or services must be those that are in accordance with the purpose for which we receive ARNG O&M funding.

The fiscal law trouble area for interagency acquisition are usually focused on the "timing" of the obligation. That is, in an interagency acquisition, there is usually a transfer of funds (via a Military Interdepartmental Purchase Request called a "MIPR") from "Federal Agency A" to "Federal Agency B." That transferring of funding is not the equivalent of an "Obligation," as that term is used in a fiscal law "timing" analysis. Rather, the "obligation" is the point in time in which the underlying contract (or task order) is signed between the contracting officer and the prime contractor. Accordingly, if NGB were to MIPR Fiscal Year 2019 ARNG O&M funding to another agency (*i.e.,* a Navy contracting office for example), that MIPR is not the relevant "obligation," from a fiscal law perspective. Rather, the meaningful "obligation" is the point in time that the warranted contracting officer (*i.e.*, a warranted Navy contracting officer) signs the contract (or task order) with the prime contractor. This is important because if NGB MIPRs funding that is not obligated within those funds' period of availability, the funds will "expire," and will likely have to be returned to NGB. See DoD FMR Volume 14, Chapter 2, Paragraph 020402.

Crosswalk Links 	**GAO Red Book**	**Availability of Appropriations: Time, Third Edition, Ch. 5, 2004. (See also Annual Update).**
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 6: Interagency Acquisitions**
	U.S. Code	**31 U.S.C. § 1502a (The Bona Fide Needs Statute)**

C.5—USE OF "EXPIRED" AND "CLOSED" NATIONAL GUARD APPROPRIATIONS

As explained earlier in this Guidebook, appropriations can be broken down into the following three categories as applied to time: (1) current, (2) expired, and (3) "closed" or "cancelled." The final year of availability is often referred to as the "cancelling year" of an appropriation. As a simple example, Fiscal Year 2019 Army National Guard O&M appropriations would be as follows:



This section focused on the ways that the "expired" funds can be obligated. The authority to obligate funds while they are expired stems from 31 U.S.C. § 1553, which allows expired funds to be used for "adjusting … obligations properly chargeable to that account." The exceptions allowing expired funds to be used for obligations is primarily focused on contracting actions. There are four important exceptions:

(1) Contract Modifications
(2) Bid Protests
(3) Terminations for Default
(4) Terminations for Convenience (limited)

Contract Modifications

Turning first to contract modifications, the general rule is that if a contract modification results in an increase in the contract price, and the modification occurs after the original funds' period of availability has expired, then proper funding of the modification is subject to the *bona fide* needs rule. This means that we must examine the modification to determine whether or not it is connected to the government's pre-existing liability from the contract as awarded. Generally, if the modification is within the scope of the *Changes Clause* of the contract, then the modification is within the "scope" of the original contract and can be funded with the same funds that funded the original contract.

The determination of whether a contract change is "in scope" is highly fact specific and depends on the application of multiple factors. (For a more complete discussion, refer to the Army JAG School's Contract Attorneys Deskbook). The question focuses on the *materiality* of the product or service as changed. This includes (1) changes to the function/type of work, (2) changes in quantity, (3) the number and cost of changes, and (4) changes to the time of performance.

A contract change is generally within the scope of contract's changes clause if either of the following two tests is met:

(1) Offerors (prior to award) should have reasonably anticipated this type of contract change based on what was in the solicitation. In other words, the field of

competition for this contract, as modified, is not significantly different from that obtained for the original contract; **or**

(2) The contract, as modified, is for essentially the same work as the parties originally bargained for. That is, the contract, as modified, could "be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into."

As seen above, if the modification is due to the Government pre-existing liability—an "in scope change"—then expired funds may be available to fund the modification. If, however, the modification simply represents a *new* requirement that was not required in the contract as awarded, then current year funds (at the time of the modification) must be used. For example, an O&M-funded contract for 100 widgets is awarded in FY19, it can be modified in FY20 to add an additional 20 widgets. However, since the additional 20 widgets were not part of the government's pre-existing liability, the proper funding source for the additional 20 widgets would be FY20 O&M funds. See Volume 3, Chapter 8 of the DoD FMR for more guidance on the proper funding source for contract modifications that add a quantity of supplies or services.

Further, if the obligation of expired funds from that appropriation are needed to cover a contract change for a program/project/activity in excess of $4M, it must be sent to the Under Secretary of Defense (Comptroller), "USD(C)" for approval. If the amount exceeds $25M, the USD(C) must notify Congress and wait 30 days before obligating the funds.

Bid Protests

A bid protest is a legal challenge to a contract award or the terms of a solicitation. Protests can be filed in three separate venues: (1) the agency itself, (2) the GAO, or (3) the Court of Federal Claims. Protests often trigger a legal requirement for the agency to either stay award of the contract, or, if already awarded, to stay performance of that contract. The stay is often not lifted until the protest is resolved. That can cause foreseeable problems with the funding that was planned to be used for the contract. For example, if a solicitation was timely protested to GAO on 1 Sep 19, it would trigger an automatic stay under the Competition in Contracting Act (CICA, pronounced "seek-ah") that would prevent that contract from being awarded for up to 100 days. If there was not a statutory exception here, that would prevent the Government from using the FY19 funds for that requirement.

Fortunately Congress recognized this problem and passed **31 U.S.C. § 1558** which allows funds that were available at the time the protest was filed to remain available for 100 calendar days after the date on which a final ruling was made on the protest. This rule is implemented in the **DoD FMR in Volume 3, Chapter 8, Paragraph 081303.**

Termination for Default

Another important exception to the *bona fide* needs rule is a GAO-sanctioned exception that allows a replacement contract to be funded with an originally obligated appropriation for the now-defaulted contract. The logic is similar to that of bid protests in that we want to prevent actions of third parties from disrupting the Government's budgetary planning and operations.

If a contract or order is terminated for default (or "for cause" in commercial items contracts) and the *bona fide* need still exists, then the originally obligated funds remain available for obligation for a "reprocurement," even if they would have otherwise expired. The reprocurement contract must be substantially similar in scope and size as the original contract and awarded without delay. This is set out in the DoD FMR at **Volume 3, Chapter 8, Paragraph 080303.D.** If additional funds are required for the replacement contract, and the funds have otherwise expired, then under certain circumstances, the original year's funds may be used to fund the additional cost. See DoD FMR, Volume 3, Chapter 10, Paragraph 1002308.

Termination for Convenience

As a general rule, if a contract is terminated "for the convenience of the government," after the original funds on the contract have expired, there there is usually no authority to obligate expired funding for a replacement contract. See DoD FMR, Vol 3, Chapter 10, Paragraph 100308. There are a few very limited exceptions to this rule for contracts that are terminated as a result of:

(1) a court order;

(2) a determination by the contracting officer that the contract award was improper due to explicit evidence that the award was erroneous; or

(3) a determination by another competent authority (*e.g.* a Board of Contract Appeals) that the contract award was improper.

Before using expired funding in a termination for convenience scenario, the contracting officer and resource manager should consult with a NG Judge Advocate or NG civilian attorney and document any such decision with appropriate findings of fact and law.

Crosswalk Links 	**GAO Red Book**	**Availability of Appropriations: Time, Third Edition, Ch. 5, 2004. (See also Annual Update).**
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 6: Interagency Acquisitions**
	U.S. Code	**31 U.S.C. § 1502a (The Bona Fide Needs Statute)**
	DoD FMR	**Vol. 3, Ch.8: Standards for Recording and Reviewing Commitments and Obligations**

D. THE AVAILABILITY OF NG APPROPRIATIONS AS TO AMOUNT

D.1—THE GENERAL CONCEPT

As discussed in this Guidebook, Congress exercises its power of the purse by legislating the *purpose* for which funds may be used, as well as the *time* period in which they must be obligated. This section focuses on the third major way that Congress exercises this power—restrictions relating to *amount.* As GAO explains:

> **It is not enough to know what you can spend appropriated funds for and when you can spend them. You must also know how much you have available for a particular object.**

See GAO Red Book, Vol. II, Page 6-4.

The main enforcement mechanism that Congress has enacted to ensure that agencies do not spend more than they have legally available is the ***Antideficiency Act***

(ADA), which we will discuss later in this section. However, it is important to note that the ADA is the only fiscal statute that includes both civil *and criminal* penalties for violations.

Crosswalk Links 	**GAO Red Book**	**Chapter 6: Availability of Appropriations: Amount**
	GAO's "Antideficiency Act Resources"	
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 4: The Antideficiency Act**
	DoD FMR	**Volume 14, Administrative Control of Funds and Antideficiency Act Violations**

D.2—KEY TERMINOLOGY FOR AMOUNT ISSUES

- **Appropriation Account.** The basic unit of an appropriation generally reflecting each unnumbered paragraph in an appropriation act. An appropriation account typically encompasses a number of activities or projects and may be subject to restrictions or conditions applicable to only the account, the appropriation act, titles within an appropriation act, other appropriation acts, or the government as a whole.

- **Administrative Control of Funds.** The process that restricts obligations and expenditures to the amount available at the apportionment, allotment, suballotment and allocation levels. Apportionments, allotments, suballotments, allocations and other formal administrative subdivisions of funds designated by a DoD Component are subject to the provisions of the Antideficiency Act. Therefore, obligations and disbursements of funds that exceed these limitations are violations of the ADA.

- **Apportionment.** The action by which the Office of Management and Budget (OMB) distributes amounts available for obligation in an appropriation for a fund account. An apportionment divides amounts available for obligation by specific time periods (usually quarters), activities, projects, objects, or a combination thereof. The amounts so apportioned limit the amount of obligations that may be incurred. An apportionment may be further subdivided by an agency into allotments, suballotments and allocations. The apportionment process is

designed to (1) prevent the obligation of amounts available within an appropriation or fund account in a manner that would require deficiency or supplemental appropriations, and (2) achieve the most effective and economical use of amounts made available for obligation.

- **Allotment.** An authorization by either the agency head (*e.g.* SECDEF) or another authorized employee (*e.g.*, USD(C)) to their subordinates to incur obligations within a specified amount. Each agency makes allotments pursuant to specific procedures it establishes within the general apportionment requirements stated in OMB Circular No. A-11. The amount allotted by an agency cannot exceed the amount apportioned by OMB. An allotment is part of an agency system of administrative control of funds whose purpose is to keep obligations and expenditures from exceeding apportionments and allotments. The USD(C) must make allotments of apportioned amounts, in writing, to the heads of DoD Components. The service secretaries (or designees) must make further allotments of apportioned amounts, in writing, to the heads of operating agencies (*e.g.* NGB).

- **Suballotments.** A subdivision of an allotment. Amounts allotted may be suballoted to major subordinate commands.

- **Allocations.** Subdivisions of suballotments.

- **Informal Subdivisions of Funds.** Subdivisions of appropriations by agencies at lower levels, *e.g.*, within a USPFO office that do not create an absolute limitation on obligational authority. Often these are referred to as "funding targets," or "allowances." These limits are not formal subdivisions of funds and incurring an obligation in excess of them is not necessarily an ADA violation. However, incurring obligations exceeding these informal subdivisions of funds may still require reporting. See DFAS-IN Reg. 37-1, Ch. 4, Para. 040204.L.1 (March 2017).

- **Augmentation.** An action by the agency that increases the effective amount of funds available in an agency's appropriation. Generally, this results in expenditures by the agency in excess of the amount originally appropriated by Congress.

D.3—THE ANTIDEFICIENCY ACT

As GAO explains, "The Antideficiency Act [ADA] is one of the major laws in the statutory scheme by which Congress exercises its constitutional control of the public purse." The roots of the ADA stretch back to the Civil War era. The ADA prohibits the following:

- Making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. **31 U.S.C. § 1341(a)(1)(A)**.

- Involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law. **31 U.S.C. § 1341(a)(1)(B).**

- Accepting voluntary services for the United States, or employing personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property. **31 U.S.C. § 1342**.

- Making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. **31 U.S.C. § 1517(a).**

The ADA imposes prohibitions at three levels: (1) the appropriation level, (2) the apportionment level, and (3) and the formal subdivision level. Of these three, the appropriations level is rather straightforward. That is, a government employee is prohibited from making or authorizing an obligation or expenditure in "excess of" or "in advance of" an amount available in an appropriation or fund. As stated earlier, in FY19, the ARNG received approximately $7.2B of O&M funding. If a NG official/employee entered into a contract (or expended funds) that exceeded the remaining "amount available" in that appropriation (the "unobligated balance"), the ADA will have been violated.[5] Likewise, a NG official and employee could not have made an obligation of O&M funding "in advance of" the passage of the FY19 Defense Appropriations Act.

Turning to the "apportionment" level, it is important to understand that even though the National Guard receives "lump sum" appropriations in the annual appropriations acts, that amount is "apportioned" by OMB. For the National Guard (as well as most of DoD) this happens on a quarterly basis. This "apportioning" is required by law **(31 U.S.C. § 1512**). The purpose behind the apportionment requirement is to prevent an agency from obligating funding too quickly in the fiscal year and basically running out of

money. Accordingly, obligating funds in excess of an apportionment would violate the ADA.

Finally, the third level of fiscal controls—formal subdivisions—are required by **31 U.S.C. § 1514**, which require agency heads to establish administrative controls that: (1) restrict obligations or expenditures to the amount of apportionments; and (2) enable the agency to fix responsibility for exceeding an apportionment. Formal subdivisions of funds are known as "allocations" and "allotments." These are separate from "informal" subdivisions of funds such as "allowances" and "targets." Although spending in excess of an informal subdivision of funds may violate agency regulations, they do not translate into ADA violations.

In addition to the "amount" violations set out above, ADA violations are also triggered by "purpose" and "time" violations. The most common way in which *potential* ADA violations arise in the National Guard is when a requiring activity obligates funds in violation of the Purpose Statute (**31 U.S.C. § 1301(a)**) which was addressed in Section B.1 earlier in this Guidebook. A violation of the Purpose Statute *may* lead to an ADA violation, but a violation of the Purpose Statute is not an automatic ADA violation because often times Purpose Statute violations can be "corrected," which prevents them from violating the ADA. The DoD FMR provides that even if the wrong appropriation was charged, the ADA is not violated unless the proper funds were not available at the time of the obligation and at the time of correction. See DoD FMR, Vol. 14, Ch. 2, Para 020102. This correction process involves de-obligating the improper funds, and obligating the proper funds. That said, if the violation cannot be corrected, the ADA will have been violated. Common potential ADA violations focused on the Purpose Statute include the following:

- Obligating O&M funding for construction that exceeds a statutory threshold. See Subsection F.2 of this Guidebook, below.
- Obligating O&M funds for an effort that required a different type of funding (e.g., an effort that required RDT&E appropriations)
- Obligating O&M funding for investment items costing more than $250,000. Sometimes this is due to the purchase of separate components that are all part of one integrated "system" that exceeds $250,000—even though the individual components of that system are each under the $250,000 cap.

Additionally, timing violations can also lead to *potential* ADA violations. As with Purpose Statute violations, timing violations may be correctable in the same way that Purpose Statute violations are correctable. Common potential ADA violations focused on the timing rules include the following:

- Funding "out of scope" contract changes with prior year funding when current year funds were required. This is the corollary to the rule that "within scope" changes must be funded with the appropriation initially obligated by the contract.
- Entering into contracts that include terms that exceed the period of availability of an appropriation. For example, entering into a contract for a photocopier service that three-year base period, because it would be obligating the Government in advance of appropriations for that second and third year. (Note: A bona fide needs violation of this sort is likely uncorrectable because the proper funds are "future year" funds that are not yet available.)

Additional situations that can lead to ADA violations are as follows:

- Entering into contracts (or other agreements with third parties) that contain "open ended" indemnification provisions. GAO and the Courts have ruled that such provisions violate 31 U.S.C. § 1341 unless there is a specific statutory exception that allows for them.
- When an agency augments its appropriations by retaining funds from outside sources without statutory authority. This can lead to a situation where an agency obligates and expends funding in an amount that is "in excess" of the amount available in its appropriation. See GAOs decision in ***Unauthorized Use of Interest Earned on Appropriate Funds*, B-283834 (2000).**
- Accepting voluntary services. "Voluntary Services" are those services that are rendered without a prior contract for compensation" or without a "gratuitous services agreement." The ADA prohibits the acceptance of voluntary services at 31 U.S.C. § 1342. There are two exceptions (1) when the voluntary services are authorized by law, or (2) for emergencies involving the safety of human life or the protection of property. Note: Voluntary services are distinguished from "gratuitous services," in which there is an advance written agreement stating that the services are offered without the expectation of payment, and waives any future pay claims against the government. However, the acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes it. All gratuitous services agreements should be reviewed by a servicing Judge Advocate or NG civilian attorney.

Potential ADA violations must be reported in accordance with Volume 14 of the DoD FMR. The reports are sent through command channels to the appropriate comptroller for review. Suspected violations must be reported within two weeks of

the possible violation. The DoD FMR sets out the specific data points that must be entered as part of the reporting process.

ADA Investigations are conducted in accordance with the guidance set out in Volume 14 of the DoD FMR. The FMR sets out a "preliminary review" process, which may require a subsequent "formal investigation." The time frames for ADA investigations are set forth in the FMR.

ADA violations can result in penalties for the individuals found to be responsible. This includes adverse personnel actions and even criminal penalties as a Class E felony. A review of GAO's reported ADA violations demonstrate that criminal prosecutions under the ADA are exceedingly rare, however adverse personnel actions are common.

Crosswalk Links 	**GAO Red Book**	**Chapter 6: Availability of Appropriations: Amount**
	GAO's "Antideficiency Act Resources"	
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 4: The Antideficiency Act**
	DoD FMR	**Volume 14, Administrative Control of Funds and Antideficiency Act Violations**

D.4—AUGMENTATION OF NG APPROPRIATIONS

As a general rule, augmentation of appropriations from non-Congressional sources is not permitted unless expressly allowed by law. An augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. This *may* result in obligations and expenditures by the federal agency in excess of the amount originally appropriated by Congress. See GAOs decision in ***Unauthorized Use of Interest Earned on Appropriate Funds*, B-283834 (2000).**

The central statute that governs this area is the "miscellaneous receipts statute" [31 U.S.C. § 3302(b)] which states that "*except as [otherwise provided], an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without any deduction for any charge or claim."*

One type of augmentation occurs when a federal agency uses one appropriation to pay the costs associated with the purposes of another appropriation. For example, if travel for Air National Guard Personnel for a purely ANG mission was paid for out of *Army* National Guard appropriations, there would be a Purpose Statute violation on the ARNG side, and impermissible augmentation of the ANG side.

That said, there are two types of exceptions to the miscellaneous receipts statute that *could* allow an agency to retain certain funds to the credit of its own appropriation: (1) Statutory exceptions and (2) GAO-sanctioned exceptions. In terms of the first exception, an agency may retain moneys it receives if it has statutory authority to do so. There are a number of statutory exceptions to the miscellaneous receipts statute. The most often cited exception is the Economy Act at 31 U.S.C. § 1535 and 1536 which authorizes interagency orders between federal agencies. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. Section 1536 specifically indicates that the servicing agency should credit monies received from the ordering agency to the "appropriation or fund against which charges were made to fill the order." This is further explained in the DoD FMR at Vol. 11A, Ch. 3.

Non-statutory (GAO-sanctioned) exceptions are generally "refunds" in which the receipt is "directly related to, and is a direct reduction of, a previously recorded expenditure." See the discussion in the **GAO Red Book, Chapter 6, starting on Page 6-171**. "Refunds" are "repayments for excess payments." For example, if a NG contracting officer accidentally overpays a contractor, the contractor would be required to return the amount overpaid as a "refund." That money could be legally returned to the appropriation that was originally charged.

Refunds, however, are not the same as "reimbursements." Reimbursements are "sums received as a result of commodities sold or services furnished to the public or to another government account." Reimbursements require statutory authority in order to retain the funding to the credit of NG appropriations. As GAO explains, "The mere fact that the reimbursement is related to the prior expenditure … is not itself sufficient to remove the transaction from the scope of [the Miscellaneous Receipts Act]." Reimbursements must generally, absent statutory authority to the contrary, be deposited as miscellaneous receipts. NGB-JA cautions against retaining reimbursements to the credit of National Guard appropriations without a specific statutory citation and a legal review from NGB-JA.

Crosswalk Links 	**GAO Red Book**	**Chapter 6: Availability of Appropriations: Amount**
	GAO's "Antideficiency Act Resources"	
	Army JAG School Fiscal Law Deskbook (2019)	**Chapter 4: The Antideficiency Act**
	DoD FMR	**Volume 14, Administrative Control of Funds and Antideficiency Act Violations**

E. FISCAL LAW AND NG COOPERATIVE AGREEMENTS

E.1—THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT (FGCAA)

As stated earlier in this Guidebook, the National Guard Bureau carries out a significant amount of services through "cooperative agreements."[2] A National Guard cooperative agreement is a legal instrument that is entered into between the Grantor (NGB) and Grantees (the States). Although it is somewhat similar to a contract, it is actually an "assistance agreement" in which the "principal purpose" is to transfer funds to the state in order to enable the state to effectively operate its National Guard. In this way, it is similar to a grant. The main difference is that unlike a grant, a cooperative agreement anticipates "substantial involvement" between the Grantor and the Grantee, unlike a typical grant scenario.

The central statutory authority that establishes criteria for federal agencies (*e.g.* NGB) to determine whether a requirement should be carried out through a contract, cooperative agreement or a grant is the Federal Grants and Cooperative Agreement Act (FGCAA) set out at 31 U.S.C. §§ 6301-6308. This is directly implemented by DoD at DoD Directive 3210.06, *Defense Grant and Agreement Regulatory System (DGARS)* which states:

[2] There is relatively new statutory authority for Intergovernmental Support Agreements ("IGSA") at **10 U.S.C. § 2679**, however that statute has not yet been implemented in regulation at the NGB level. It focuses on sole-source agreements with State and local governments for "installation support services," More information on IGSAs on the **Air Force side is available at here**. The Services regulate this area differently as reflected in this **GAO report**.

> It is DoD policy that Grants and cooperative agreements may be used only for purposes that are in accordance with chapter 63 of Title 31, United States Code (Reference (e)), also known as "The Federal Grant and Cooperative Agreement Act of 1977." Exceptions may be made where statute permits otherwise.

See Paragraph 3(a) of DoDD 3210.06.

The GAO Red Book provides an excellent explanation of the FGCAA in Chapter 10. The FGCAA was enacted in 1977 based on "long-standing confusion and concern over federal agency use of grant relationships [including cooperative agreements] versus procurement [contracts]." The legislative history from the Senate Committee on Homeland Security and Government Affairs in the late 1970s observed:

> No uniform statutory guideline exists to express the sense of Congress on when executive agencies should use either grants, cooperative agreements, or procurement contracts. Failure to distinguish between procurement and assistance relationships has led to both the inappropriate use of grants [and cooperative agreements] to avoid the requirements of the procurement system, and to unnecessary red tape and administrative requirements in grants.

As seen above, the FGCAA was originally enacted because Congress was frustrated by what they saw as an unprincipled use of these very different legal instruments. Without the FGCAA, agencies could use grants and cooperative agreements inappropriately—solely to sidestep detailed (and policy-laden) procurement regulations (*e.g.*, the FAR). On the other hand, Congress also did not want the federal government to use the highly-regulated contracting system for assistance agreements.

The FGCAA explains that agencies *shall* use a procurement contracts when:

> (1) the principal purpose of the instrument is to acquire … property or services for the direct benefit or use of the United States Government; or
> (2) the agency decides in a specific instance that the use of a procurement contract is appropriate.
> 31 U.S.C. § 6303.

By contrast, the FGCAA explains that agencies *shall* use a cooperative agreement when:

> (1) The principal purpose of the relationship is to transfer a thing of value to the State … or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring … property or services for the direct benefit or use of the United States Government; and (2) substantial involvement is expected between the executive agency and the State government … when carrying out the activity contemplated in the agreement.

31 U.S.C. § 6305. Under the provisions cited above, an agency's decision to select a contract or a cooperative agreement turns on the "principal purpose" of the relationship or instrument. The question is whether the "principal purpose" of the services are (1) to acquire services for the federal government's direct benefit or use, or (2) to transfer funding to the states to carry out a public purpose of support or stimulation authorized by a law.

As applied to the NG, the above test does not always lead to a clear answer. The unique federal and state nature of the National Guard can make the application of the FGCAA's "principal purpose" test particularly difficult for certain National Guard programs and activities. That said, when the National Guard Bureau selects either a federal contract or a federal procurement contract to carry out a particular program, the Office of Primary Responsibility and the Grants Officer must be able to defend their decision in light of the language in the FGCAA.

Of course, Congress can enact legislation *mandating* that the National Guard carry out a program through a cooperative agreement. An example is seen in the enabling legislation for the National Guard's Youth Challenge Program—32 U.S.C. § 509. Subsection (c)(1) of that statute explains that "[t]o carry out the Program in a State, the Secretary of Defense shall enter into an agreement with the Governor of the State or, in the case of the District of Columbia, with the commanding general of the District of Columbia National Guard, under which the Governor or the commanding general will establish, organize, and administer the Program in the State." This is a clear example of Congress requiring that a DoD/National Guard Program be carried out through a cooperative agreement. Additionally, as seen in Section F, below, our military construction authorities prescribe when the NG is to use a federal contract or a cooperative agreement for a particular construction project.

E.2—NATIONAL GUARD COOPERATIVE AGREEMENTS: THE LEGAL FRAMEWORK

Once the National Guard Bureau (Grantor) and the State (Grantee) determine that a cooperative agreement is the correct legal instrument under the FGCAA for a particular program or project, it is important to understand the hierarchy of laws that govern this area. As stated in subsection A.1., federal laws and regulations follow a hierarchical structure. Although a specific statute always trumps inconsistent regulations, the legal framework for cooperative agreements is largely *regulatory.* The following is the general hierarchical structure of the authorities for National Guard Cooperative agreements, in order of importance:

1. The Federal Grant and Cooperative Agreement Act (FGCAA) codified at 31 U.S.C. §§ 6301-6308.
2. The OMB "Supercircular" codified at 2 C.F.R. Part 200.
3. The DoD Grant and Agreement Regulations (the "DoDGARS," pronounced "DoDgers"). The DoDGARS is currently in a state of transition from Title 32 of the C.F.R. to Title 2, as explained below.
4. DoD Directive 3210.06, Defense Grant and Agreement Regulatory System (DGARS)
5. National Guard Regulation 5-1, National Guard Grants and Cooperative Agreements
6. The Terms of the Cooperative Agreement

As seen above, the last category is the "terms of the cooperative agreement." Those terms must be in accordance with the higher-level authorities listed above, unless an exception to policy has been granted. A brief description of each of the above authorities is set out immediately below; however anyone involved in National Guard cooperative agreements should familiarize themselves with the actual source material—all of which can be quickly accessed at the "crosswalk links" at the bottom of this subsection.

OMB "Super Circular"—2 C.F.R. Part 200

The OMB "Super Circular" at 2 C.F.R Part 200 became effective at the end of calendar year 2013—consolidating a host of stand-alone OMB regulations that governed this area prior to 2013. The unofficial term "Super Circular" reflects the fact that OMB merged a wide range of these stand-alone regulations (called "circulars") into one all-encompassing regulation. These changes were designed to consolidate and

streamline the regulations governing the award and administration of grants and cooperative agreements across the federal government.

The OMB Super Circular sets out guidance that covers the life cycle of a grant or cooperative agreement—from pre-award, through administration, to closeout and auditing. It starts with a long list of definitions of terms that are used throughout the Super Circular. It also sets out the general guidance regarding the handling of disputes and alleged noncompliance with the agreement. In our office's experience, the majority of the legal issues in this area focus on the portion of the Super Circular that sets out the "cost principles," that includes both general language (*e.g.*, whether a specific item of cost is "allocable, allowable and reasonable," in addition to a laundry list of specific cost items (*e.g.*, alcoholic beverages, salaries, fringe benefits, taxes, etc.).

The DoD Grant and Agreement Regulations at 32 C.F.R. Subchapter C, Parts 21 through 37 (DoDGARS).

The DoDGARS has traditionally been codified in Title 32 of the Code of Federal Regulation (C.F.R.). This should not be confused with Title 32 of the U.S. Code, which focuses exclusively on the "National Guard." Rather Title 32 of the C.F.R. is focused on a wide range of regulations governing the entirely of DoD, including portions that are Service-specific. The DoDGARS is applicable across the entirety of DoD, and is not NG-specific.

The DoDGARS is currently comprised of eight separate "Parts" within 32 C.F.R., Subchapter C—Parts 21, 22, 26, 28, 32, 33, 34, and 37. Of those parts, the two most important for the NG are Parts 21 and 22. Part 21 is entitled, "General Matters," and Part 21 is entitled "Award and Administration."

The DoDGARS has been undergoing a major transition since the implementation of the Super Circular in late 2013. For the last several years, DoD has been in the process of updating the DoDGARS to reflect the changes in the Super Circular. The majority of the DoDGARS provisions are transitioning from Title 32 of the C.F.R. to Title 2—in order to be collocated with the Super Circular, which is also set out in Title 2 of the C.F.R. The initial change to the DoDGARS was set out in an "interim implementation" of the Super Circular in 2014, which was replaced by a "revised interim implementation" of the Super Circular in November of 2016. That 2016 guidance is in the form of a sequence of six "notices of proposed rulemaking," or "NPRMs." As of the date of this Guidebook, DoD's "final rule" in this area has not yet been promulgated.

DoD Directive 3210.06, Defense Grant and Agreement Regulatory System (DGARS)

DoDD 3210.06 is a relatively short DoD regulation that is designed to update established policy and assign responsibilities for the DGARS. This Directive sets out general policy goals for DoD's use of grants and cooperative agreements. It clarifies that the primary responsibility for overall DoD policy in this area is the Assistant Secretary of Defense for Research and Engineering—ASD(R&E).

National Guard Regulation 5-1, National Guard Grants and Cooperative Agreements

NGR 5-1 is the NG's implementing regulation for the above-referenced authorities. It sets out policy and procedural guidance to be followed during the formation, administration and closeout of NG cooperative agreements. It explains the duties and responsibilities of NGB's grants officers, including the reporting requirements for cooperative agreements. It also explains the three main types of cooperative agreements: (1) the Master Cooperative Agreement (MCA) and its "appendices," (2) Special Military Project Cooperative Agreements, and "Military Construction Cooperative Agreements." It should be noted that the MCA itself is not a funded agreement. Rather, it sets common terms and conditions for the funded "appendices" connected to the MCA.

The current appendices to the Master Cooperative Agreement (MCA) are broken down into ARNG and ANG requirements as follows:

Army National Guard Appendices		**Air National Guard Appendices**	
Appendix 1	Facilities Program	Appendix 21	Facilities Operation and Maintenance
Appendix 2	Environmental Program Resource Management	Appendix 22	Environmental Program Management
Appendix 3	Security Guard Activities	Appendix 23	Security Guard Services
Appendix 4	Electronic Security System Management, Installation, Operation & Maintenance	Appendix 24	Fire Protection Activities
Appendix 5	Command, Control, Communication,	Appendix 25	Natural and Cultural Resource Management

	Computer and Information Management		
Appendix 6	N/A	Appendix 26	Air Traffic Control Activities
Appendix 7	Training Support System (TSS) Program	Appendix 27	Logistics Activities
Appendix 8	Full Time Dining Operations	Appendix 28	ANG Services Resources Management
Appendix 10	Anti-Terrorism Program Management Activities	Appendix 30	CRTC Base Operating Support
Appendix 11	ARNG Emergency Management Program Coordinator Activities		
Appendix 14	Administrative Services Activities		
Appendix 15	Surface Petroleum		
Appendix 17	Aviation Reimbursable Maintenance Operations		
Appendix 40	ARNG Distance Learning		
Appendix 41	State Family Programs Activities (Joint)		

Crosswalk Links 	**U.S. Code**	**Federal Grants and Cooperative Agreements Act (FGCAA) 31 U.S.C. § 6301-6308**
	2 C.F.R. Part 200—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards	
	DoD Directive 3210.06, Defense Grant and Agreement Regulatory System (DGARS)	
	NGR 5-1, National Guard Cooperative Agreements	
	NGB Directorate of Acquisitions Website	

E.3—PURPOSE ISSUES AND NG COOPERATIVE AGREEMENTS

As explained above, a cooperative agreement is a legal instrument reflecting the agreement between NGB (as the grantor) and the states (as the grantees) regarding the terms and conditions of the assistance agreement. The use of a cooperative agreement does not change the *purpose* analysis from a fiscal law perspective. That is, a cooperative agreement cannot allow federal funds to be used in a manner that would violate the Purpose Statute (31 U.S.C. § 1501). The analysis used to determine whether a particular expenditure is in accordance with the Purpose Statute is the same as any other National Guard expenditure—which was addressed throughout Section B of this Guidebook. Accordingly, a grants officer (usually a USPFO) cannot agree to reimburse a state for a particular expenditure if doing so would violate the Purpose Statute. That said, the majority of denials of reimbursement under cooperative agreements are typically more focused on the terms of the cooperative agreements in light of the legal framework discussed above as opposed to on purely fiscal law grounds.

Crosswalk Links 	**U.S. Code**	**Federal Grants and Cooperative Agreements Act (FGCAA): 31 U.S.C. § 6301-6308**
	2 C.F.R. Part 200: The OMB "Super Circular"	
	DoD Directive 3210.06, Defense Grant and Regulatory System (DGARS), Incorporating Change 2, October 15, 2018	
	32 C.F.R. Subchapter C—DoD Grant and Agreement Regulations	
	NGR 5-1, National Guard Cooperative Agreements, 28 May 2010	

E.4—TIMING ISSUES AND NG COOPERATIVE AGREEMENTS

Although the use of a cooperative agreement does not alter the fiscal law *purpose* analysis, there is an important distinction in terms of the "time" prong of the PTA analysis for cooperative agreements that differentiates them from services received through federal contracts. This is due to a line of Comptroller General Decisions that has shaped this issue over many years. The development of this rule by GAO over the years is beyond the scope of this Guidebook; however, readers can click on the crosswalk link to the GAO Red Book, where this topic is covered in detail in Chapter 10, Federal Assistance: Grants and Cooperative Agreements, Pages 10-39 to

10-43. The rule is this: In cooperative agreements the federal funds must be obligated by the grantor (NGB) within their period of availability, regardless of when the grantees (states) use the funds once it has received them. However, GAO warns that "the grantor agency may impose time limits on the grantee's use of funds."

As seen above, in terms of time, the GAO views cooperative agreements differently than federal services contracts. That is, GAO does not apply a "severability" test to cooperative agreements, but rather focuses on whether the grantor agency (NGB) properly obligates the funds in question during those fund's period of availability. For example, if NGB enters into a cooperative agreement with a state using FY19 O&M funds, then GAO is only concerned with ensuring that the agreement between NGB and the state is properly signed during the FY19 period of availability—thereby properly obligating those funds. However, GAO also notes that agencies have the authority to require the grantee's subsequent expenditures of those funds to occur during a specific time period by regulation. Currently, Paragraphs 3-2 and 11-2 of NGR 5-1, tie most National Guard O&M-funded cooperative agreements to the same timing restrictions as would be found in federal contracts.

Finally, it is important to note that an *obligation* for a NG cooperative agreement occurs when a funded agreement (*e.g.*, a funded appendix or funded modification) is actually signed by the USPFO and the TAG. A mere reservation of funds (*e.g.*, a commitment within GFEBS or DEAMS) is not tantamount to an actual obligation. See NGR 5-1, Para 3-5(e) and Para 11-2.

Crosswalk Links	**U.S. Code**	**Federal Grants and Cooperative Agreements Act (FGCAA): 31 U.S.C. § 6301-6308**
	**2 C.F.R. Part 200: The OMB "Super Circular"**	
	DoD Directive 3210.06, Defense Grant and Regulatory System (DGARS), Incorporating Change 2, October 15, 2018	
	32 C.F.R. Subchapter C—DoD Grant and Agreement Regulations	
	NGR 5-1, National Guard Cooperative Agreements, 28 May 2010	

E.5—AMOUNT ISSUES AND NG COOPERATIVE AGREEMENTS

There is nothing special about cooperative agreements in terms of an "amount" analysis in fiscal law. The same amount restrictions that apply to federal contracts also apply to cooperative agreements. Accordingly, a cooperative agreement cannot lawfully be used to obligate an amount of federal funds that would be in excess of an appropriation, an apportionment or a formal subdivision of funds. Additionally, the standard NG Master Cooperative Agreement template includes the following statement:

> The allowability of costs has no effect on the maximum funding level of this cooperative agreement. NGB has no liability to reimburse any cost over and above the maximum amount of funding obligated in each appendix to this cooperative agreement, even if such cost would otherwise be allowable.

The above provision is critical in terms of fiscal controls in that it sets an absolute maximum amount of NGB's financial liability under the agreement. That said, the MCA also explains that within NGB's discretion, NGB may "unilaterally increase the maximum funding limitation at any time." See Sections 304(c) and 401(d) of the current MCA template.

Crosswalk Links	**U.S. Code**	**Federal Grants and Cooperative Agreements Act (FGCAA): 31 U.S.C. § 6301-6308**
	**2 C.F.R. Part 200: The OMB "Super Circular"**	
	DoD Directive 3210.06, Defense Grant and Regulatory System (DGARS), Incorporating Change 2, October 15, 2018	
	32 C.F.R. Subchapter C—DoD Grant and Agreement Regulations	
	NGR 5-1, National Guard Cooperative Agreements, 28 May 2010	

F. FISCAL LAW AND NATIONAL GUARD CONSTRUCTION PROJECTS

This section of the Guidebook is designed to provide a broad overview of NG construction authorities, and some of the main fiscal law pitfalls in this area. It is not intended to be an in-depth examination of the statutory and regulatory framework governing this area. Military Construction is a highly regulated area. As an example, the primary Army regulation in this area (AR 420-1, Army Facilities Management) is almost 500 pages in length! That said, a basic understanding of this area as reflected in the comparatively high number of **Antideficiency (ADA) violations that are reported by GAO** in this area.

The comparatively high number of ADA violations in this area is due, in part, to the various statutory thresholds that govern minor construction projects and unspecified construction projects. These thresholds are ever changing—with major changes to them made in the relatively recent 2018 NDAA, discussed below. Once a project crosses a threshold in terms of cost, it may be impossible to "correct" that ADA violation. Unfortunately, due to the length of time that it takes to plan/program/budge/execute a MILCON project, requiring activities are often incentivized to try to split the projects to allow the use of O&M or to use relocatable buildings in a prohibited manner. A 2018 report by the Congressional Research Service explained:

> When adding the time required for congressional authorization and appropriations, implementation of the federal contracting process, and the physical construction of the project, the end-to-end military construction process—beginning with the realization of the need for a facility to the opening of its doors for occupancy—may span seven years or more.

As a result of this lengthy process, requiring activities are incentivized to take actions that lead to ADA violations, including (1) using O&M (or procurement/NGREA) funding for projects that required MILCON funding, (2) improperly "splitting" projects to artificially stay under a Congressional threshold, and (3) improperly using relocatable buildings to get around the lengthy MILCON process. Before turning to those specific fiscal law issues, we first set out the legal framework governing NG construction.

F.1—OVERVIEW OF NATIONAL GUARD CONSTRUCTION AUTHORITIES

The ARNG and the ANG carry out construction projects with their respective O&M and military construction ("MILCON") funding—depending, primarily, on the dollar amount of the project. These projects are carried out by either federal contracts or cooperative agreements. There is a popular belief that the NG uses cooperative agreements when the project is on state land, and a federal contract when the project is on federal land. As explained below, that is somewhat of an oversimplification, and the selection of a contract or cooperative agreement really turns on the "purpose" of the project as explained below.

Title 32 is silent in terms of the National Guard's construction authority. Rather, as explained below, the National Guard's construction authority is rooted in Subtitle E, Chapter 1803 of Title 10. It is important to note at the outset that our NG construction authorities are separate from the authorities for the Army and the Air Force respectively. The Services construction authorities are found in Subtitle A, Chapter 169 of Title 10—"Military Construction and Military Family Housing."

10 U.S.C. Chapter 1803, "Facilities for Reserve Components," is comprised of 12 sections set forth at 10 U.S.C. §§ 18231-18240. The three most important sections from an authorities perspective are 10 U.S.C. §§ 18233, 18236 and 18237. These sections set up a system in which the legal instrument (*i.e.*, cooperative agreement or federal contract) turns on the "purpose" of the construction project in question, as opposed to simply the (state v. federal) nature of the interest in the real property. That said, in order to use a military construction cooperative agreement (MCCA), the state must have an adequate real property interest (*e.g.*, a license that allows the construction project). Accordingly, if the construction project is on purely federal land (that is not licensed/leased to the state), a federal contract would be required. Further, Section 18236 establishes when there is a 75% limitation on federal funding for armories and readiness centers, thereby requiring "matching funds."

As a general observation, the Air National Guard tends to use more federal contracts than cooperative agreements since most of their projects are for a purpose set out in 10 U.S.C. § 18233(a)(1) and are on federal land. The Army National Guard, by contrast, performs a greater percentage of their projects through military construction cooperative agreements. This is because the ARNG's projects tend to be for a purpose spelled out in 10 U.S.C. § 18233(a)(2) – (6) and are either on state land or land where the state has a real property interest that allows for construction.

As reflected above, 10 U.S.C. § 18233 is central to the NG's legal framework for construction. It provides authority to SECDEF to construct NG facilities for the "proper development, training, operation, and maintenance" of the NG. Subsection (a) of that section focuses on the purpose of the construction project. It states as follows:

> … [The] Secretary of Defense may—
>
> (1) **acquire** by purchase, lease, or transfer, and construct, expand, rehabilitate, or convert and equip, such facilities as are authorized by law to carry out the purposes of this chapter;
>
> (2) **contribute to** any State such amounts as he determines to be necessary to expand, rehabilitate, or convert facilities owned by it or by the United States for use jointly by units of two or more reserve components of the armed forces or to acquire or construct facilities for such use;
>
> (3) **contribute to** any State such amounts as he determines to be necessary to expand, rehabilitate, or convert facilities owned by it (or to acquire, construct, expand, rehabilitate, or convert additional facilities) made necessary by the conversion, redesignation, or reorganization of units of the Army National Guard of the United States or the Air National Guard of the United States authorized by the Secretary of the military department concerned;
>
> (4) **contribute to** any State such amounts for the acquisition, construction, expansion, rehabilitation, or conversion by it of additional facilities as he determines to be required by any increase in the strength of the Army National Guard of the United States or the Air National Guard of the United States;
>
> (5) **contribute to** any State amounts for the acquisition, construction, expansion, rehabilitation, and conversion by such State of such additional facilities as the Secretary determines to be required because of the failure of existing facilities to meet the purposes of this chapter; and
>
> (6) **contribute to** any State such amounts for the construction, alteration, or rehabilitation of critical portions of facilities as the Secretary determines to be required to meet a change in Department of Defense construction

criteria or standards related to the execution of the Federal military mission assigned to the unit using the facility.

(Emphasis added.) As seen above Subsections (2) through (6) all use the term "contribute to," while Subsection (1) uses the term "acquire." The term "acquire" indicates a federal contract, whereas the term "contribute to" indicates that a cooperative agreement is the most appropriate legal instrument. In other words, the proper legal instrument for the project primarily turns on whether the project falls within the descriptions set out between 10 U.S.C. § 18233(a)(2) through (a)(6), in which case a MCCA would be the appropriate legal instrument. If it falls under 10 U.S.C. § 18233(a)(1), then a federal contract is the appropriate legal instrument.

The above-referenced statutory framework is further implemented in regulation by DoD at (1) DoD Directive 4270.5, "Military Construction," and (2) DoD Instruction 1225.08, "Reserve Component (RC) Facilities Programs and Unit Stationing." Para 4.3.4 of the DoDD explains that if the purpose of the construction is falls under 10 U.S.C. § 18233(a)(1), the NG "shall normally" use the USPFO for the federal contract. That same DoDD explains that if the project falls under 10 U.S.C. § 18233(a)(2) through (a)(6), the project "shall be accomplished according to the laws of the state … and under the supervision of its officials, subject to the inspection and approval of the DUSD(I&E)." That indicates that a cooperative agreement is the proper legal instrument.

DoDI 1225.08 is even more specific—particularly Enclosure 5. (Also note, this DoDI is very recent). It directly implements 10 U.S.C. § 18233 and explains it in further detail. It explains that if the purpose of the construction is IAW (a)(2) through (a)(6) it "must" be done according to state law and under the supervision of State officials. It goes on to state, however, that "at a State's request" a DoD construction agent may be used for supervision of design and construction of federally-funded NG facilities on federal land." It also clarifies that "a DoD construction agent" may be used for projects on State-owned land, provided a State Attorney General's written opinion for that project affirms that the use of a federal agent is not contrary to state law. That Enclosure 5 to the DoDI also sets out the list of criteria that a state must meet—including that "it has a perfected title to, or other adequate property interest in, acceptable real estate located in the area where local laws and ordinances allow the intended use." When using state contracts that same Enclosure explains the significant amount of federal oversight required ... see Para 3 of Encl. 5.

In sum, the use of a federal contract or an MCCA is not strictly based on whether it will be performed on federal-owned v. state-owned land. Rather, the use turns on the

underlying purpose of the construction. That said, a state must have an "adequate real property interest" in order to allow the use of state procedures. If they do not have that real property interest (*e.g.* pure federal land) then a federal contract would be required.

Crosswalk Links 	**10 U.S.C. Chapter 1803, Facilities for Reserve Components**
	DoD Directive 4270.5, Military Construction, Incorporating Change 1, August 31, 2018
	DoD Instruction 1225.08, "Reserve Component (RC) Facilities Programs and Unit Stationing

F.2 STATUTORY DOLLAR THRESHOLDS FOR NG CONSTRUCTION PROJECTS

As stated in the introduction to this section, the central fiscal law issue as applied to NG construction projects is ensuring that the allocable costs of the project do not exceed Congressionally-mandated thresholds. These thresholds, set out at 10 U.S.C. § 2805, were significantly increased in the **FY18 NDAA**. They are broken out into the following three main categories: (1) O&M-Funded Minor Construction Projects, (2) Unspecified Minor Military Construction (UMMC) Projects, and (3) Specified Military Construction Projects. These thresholds are currently as follows:

O&M-Funded Unspecified Minor Construction (UMMC) Projects: 10 U.S.C. § 2805(c). Currently, the National Guard may use its ARNG and ANG O&M funding for minor construction projects equal to, or less than, $2M, however O&M-funded construction projects with a cost between $750K and $2M must receive approval from the Service Secretary (or his designees) before O&M can be used for such projects. A construction project with an estimated cost greater than $2M requires the use of military construction (MILCON) funding. As seen immediately below, MILCON funding can be used for "unspecified" and "specified" construction projects.

MILCON Funded Unspecified Minor Military Construction (UMMC) Projects. Currently, the National Guard may use its military construction funding for unspecified minor military construction projects with a funded costs that is equal to, or less than, $6M. That said, before beginning a UMMC project with an approved cost greater than $2M, the Secretary concerned must approve the project. In addition, the Secretary concerned must: (a) Notify the appropriate committees of Congress; and (b) wait 14

days. The $6M limit for projects within the United States will be adjusted (upward only) using the DoD area cost factor for military construction published during the fiscal year prior to award for the project location. This project cost after adjustment may not exceed $10M. A UMMC project includes all construction work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. See 10 U.S.C. § 2805(a).[3]

Specified Military Construction Projects. In addition to the types of construction projects listed above, the National Guard carries out military construction projects that are specifically authorized by law. These projects are referred to as "specified military construction projects," or "specified MILCON projects." Congress typically authorizes these projects in the annual Military Construction Authorization Act. The conference report accompanying the Military Construction Authorization Act breaks down project authorizations by project. Congress typically authorizes only those military construction projects that exceed the UMMC threshold—currently $6M. Stated differently, the National Guard may not carry out a military construction project expected to exceed $6M without Congressional authorization and approval.

F.3—RELOCATABLE BUILDINGS

As reflected in GAO's annual Antideficiency Act (ADA) Reports, the use (or misuse) of relocatable buildings carries a high risk of ADA violations. Often this happens because a requiring activity uses relocatable buildings as a workaround to the lengthy MILCON planning process. For DoD, this topic is governed by DoD Instruction 4165.56, "Relocatable Buildings," (Incorporating Change 2, August 31, 2018). That Instruction defines the term "relocatable building," and explains that relocatable buildings can be used in only three circumstances:

> (1) When they are the most feasible and economical means of satisfying short-term, interim facility requirements pending the availability

[3] NGB/A4 submits UMMC request in the PBS as a lump sum in the J-Book, for an estimated 5-8 projects annually. This allows for more flexibility in developing which projects to include once the request has been authorized and appropriated. NGB/A4 constantly reviews UMMC prioritization, design status, and execution. While the focus of prioritizing funding is to execute the most vital projects based on the MILCON scoring model, at times the ability to execute trumps scoring. If there are projects that can execute quickly within the funding constraints, they stand a better chance of being selected for funding. Selected projects are then submitted to SAF/IEE for approval, as delegated by SECAF and SAF/IE, and electronic 2805 Congressional notification in-turn. SAF/IEE-approved projects can be awarded only after the statutory 14-day waiting period after notification has elapsed without comment. UMMC projects are executed identically to MILCON with respect to scope, and funds follow the same period of availability, i.e. 5-years to obligate inclusive of appropriation year, and 5-years to expense; before the funds are cancelled. Unlike MILCON, UMMC projects can never exceed the amount specified on the 2805.

of permanent space in existing facilities or through the construction of a permanent conventional facility.

(2) When they are used instead of conventional, permanent construction when the duration of the requirement is uncertain such as in a contingency operation as defined in 10 U.S.C. § 101.

(3) When they are used instead of conventional, permanent construction when the space is known to have a recurring mobile requirement, such as the need to move a field office to different sites on a training range.

In addition to the DoDI, the Army and the Air Force further regulate this area. Army Regulation 420-1 includes a "20% rule" meaning that the sum of building disassembly, repackaging, and non-recoverable building components, including typical foundation costs must not exceed 20% of the purchase cost of the relocatable building. The Air Force regulates relocatable buildings at AFI 32-1021, Chapter 6 and AFI 32-9005. The latter explains that relocatable buildings are "used to fulfill temporary requirement (less than five years)." It also explains that "a structure physically capable of being moved does not alone qualify it as a 'relocatable building.'" It states that "current Air Force policy is to keep temporary facilities to an absolute minimum; as short-term as possible, and only in use until the permanent facility is built or no longer requires their use."

Crosswalk Links 	**DoD Instruction 4165.56, "Relocatable Buildings," (Incorporating Change 2, August 31, 2018)**
	Army Regulation 420-1, Army Facilities Management, 24 August 2012
	Air Force Instruction 32-9005, Real Property Accountability and Reporting, 4 March 2015
	Air Force Instruction 32-1021, Planning and Programming Military Construction (MILCON) Projects, 24 April 2018

G. CONTINUING RESOLUTIONS AND LAPSES IN APPROPRIATIONS

G.1—OVERVIEW

As stated at the outset of this Guidebook, the "appropriations clause" of the Constitution states that, "*[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.*" This section focuses on some unique fiscal law issues that arise when Congress fails to pass (or the President vetoes) a defense appropriation act. In this situation there is either (1) a "lapse in appropriations" (also colloquially called a "funding gap," or a partial "Government Shutdown") or (2) a "continuing resolution" that funds operations for less than the full fiscal year—essentially kicking the can down the road.

G.2—KEY TERMINOLOGY

- **Continuing Resolution**. An appropriation in the form of a joint resolution, that provides budget authority for federal agencies, specific activities, or both to continue operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year.

- **Lapse in Appropriation.** The time period during which no appropriation or continuing resolution exists.

- **New Start.** Initiation, resumption, or continuation of any project, subproject, activity, budget activity, program element, and subprogram within a program element for which an appropriation, fund, or other authority was not available during the previous fiscal year.

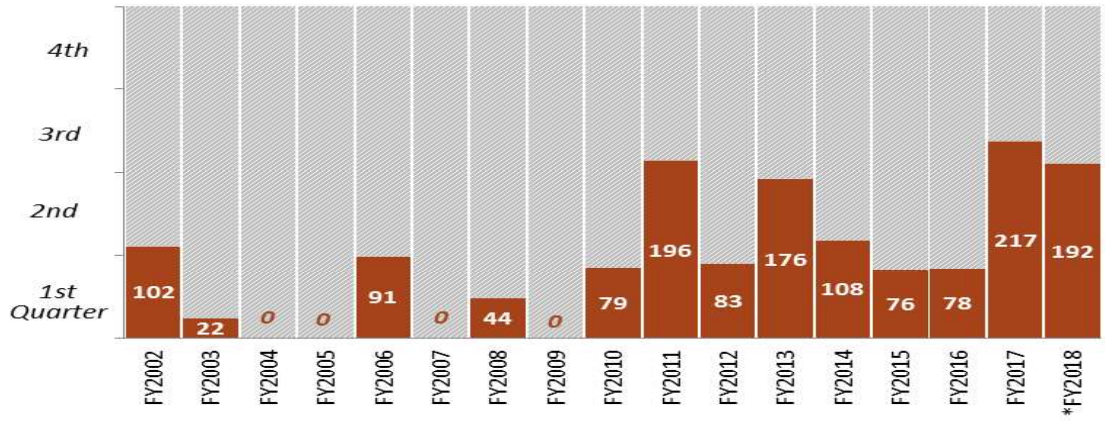
- **Expired Funds.** Once a period of availability ends, the funds in that appropriation become "expired." Expired funds can be used to adjust prior obligations under certain circumstances, but they are generally not available for new obligations.

G.3—CONTINUING RESOLUTIONS

For Fiscal Year 2019, DoD enjoyed a normal appropriation process in that both the Defense Appropriation Act and the National Defense Authorization Act were both passed prior to the start of the fiscal year. That ideal situation had not occurred since

FY 2009. Unfortunately, each of the last nine fiscal years has involved at least one continuing resolution.

Days under a Continuing Resolution: Department of Defense (FY02-FY18)



Source: CRS Report R44636, *Defense Spending under an Interim Continuing Resolution*, by Clinton T. Brass.

This section explains this unique type of legislation, and some of the fiscal law concerns involved therein. A "continuing resolution" is an "appropriation in the form of a joint resolution of Congress that provides *budget authority* for federal agencies, specific activities, or both to continue operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year." Once the continuing resolution passes both houses of Congress and is signed by the President, it becomes a "public law" with the same force and effect as any other statute.

Appropriations acts appropriate specified sums of money, whereas continuing resolutions specify a "*rate*" based on the last fiscal year's appropriations. For example, Section 101(a) of the FY18 continuing resolution appropriated "such amounts as may be necessary, at a rate for operations as provided in the applicable appropriation Acts for Fiscal Year 2017 …." The CR, in the absence of an appropriation act, provides authority for agencies to continue current operations. CRs are subject to OMB's *apportionment* in the same manner as a regular appropriation. CRs also have a specific lifespan—which could be for as little as a week or two, or up to several months.

A hot topic that always arises when there is a continuing resolution focuses on the concept of a "new start." A new start is the "initiation, resumption, or continuation of any project, activity, operation or organization for which appropriations, funds, or other authority was not available during the previous fiscal year." The basic concept is that a

continuing resolution does not authorize a project or activity that requires the type of specific approval that is found in a traditional appropriations act. This topic has been somewhat resolved in recent years by Congress providing a more detailed explanation of "new starts" in the text of the Continuing Resolution itself. For example, in Section 102(a) of the FY18 continuing resolution, Congress explained:

> No appropriation or funds made available [in this continuing resolution] shall be used for: (1) the new production of items not funded for production in fiscal year 2017 or prior years; (2) the increase in production rates above those sustained with fiscal year 2017 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization … for which appropriations, funds, or other authority were not available during fiscal year 2017.

Based on the text above, the "new start" concept is that the same supplies/services (and *types* of supplies/services) that could have been funded in the prior fiscal year can continue to be funded during a continuing resolution—regardless of whether or not the agency *actually* funded them in the prior FY. However, those "new starts" that would require specific approval from an appropriation act cannot be funded under a Continuing Resolution. That is, a "new start" is something the agency did not have budget authority to do under the last appropriation. Based on our office's experience, we rarely experience a true "new start" as applied to either our military personnel or O&M accounts. However, it can affect our use of NGREA and specified military construction projects because they both involve projects that require specific Congressional approval.

Finally, this is another area where Congress could add language to a future CR to further define a "new start," or OMB or DoD could promulgate specific guidance. Accordingly, the primary purpose of this portion of the Guidebook is to alert the reader to this issue generally. Accordingly, anyone dealing with this issue should find out what legislation or guidance has been put out in any future CRs.

In terms of the "Time" prong of "Purpose, Time and Amount," a continuing resolution provides budget authority for three potential time periods: (1) until a fixed cut-off date specified in the continuing resolution, (2) until an appropriations act (or a new CR) replaces it, or (3) for the entire fiscal year if no appropriations act is passed.[6]

Crosswalk Links	GAO Red Book, Ch. 8, Continuing Resolutions, GAO-06-382SP (3d ed. 2006) and Annual Update of the 3rd Edition, March 2015
	Army JAG School Fiscal Law Deskbook (2019), Chapter 9, Continuing Resolution Authority (CRA) & Funding Gaps

G.4—LAPSE IN APPROPRIATIONS: AN OVERVIEW

A "lapse in appropriations" for DoD occurs when no defense appropriation act or continuing resolution exists. This is often referred to colloquially as a "funding gap" or a partial "Government Shutdown." This Guidebook, however, uses the technically correct term of "lapse in appropriations."

If past is prologue, it is foreseeable that the National Guard (along with the rest of DoD) will experience funding gaps in the future. Accordingly, this subsection of the Guidebook is designed to explain the legal framework that governs this area. That said, when an agency like NGB experiences a lapse in appropriations, there are many policy documents that cascade down from OMB to DoD to the Services to NGB. NGB, in turn, provides further guidance to the TAGs and USPFOs across the 54 states and territories.

In light of all of the various documents setting out DoD, Service-level and NGB policy on a funding gap, it is important to organize and examine all of that guidance in order to properly apply it at the state/USPFO level. As a practical matter, NGB's J8 Directorate provides a SharePoint site designed to provide a single folder that contains all applicable guidance affecting the entire NG enterprise. Nothing in this Guidebook should be construed as providing an independent source of law—rather, it is designed to set out the overview of this area and provide context based on past experiences.

It is important to recognize that Congress passes 13 major appropriation acts per year. Sometimes a lot of these major bills are consolidated into one act—called an "omnibus" appropriation—which provides some legislative efficiencies as compared to voting on each bill separately. If only two (or a few) appropriations are combined, they are often referred to as a "minibus." (There is no precise definition for either an "omnibus" or a "minibus.") As a result, a "lapse in appropriations" can effect some departments and agencies (and the businesses and citizens connected to them) while others are unaffected. This happened this fiscal year in the form of a partial government shutdown that started on 22 December 2018 and ended on 25 January

2019. Since Congress had previously passed the defense appropriation act and the military construction appropriation, DoD (to include the National Guard) was not directly affected by the partial government shutdown.

The legal framework governing government shutdowns has evolved over the past four decades. Up until the late 1970s, lapses in appropriations were largely ignored by federal agencies—who viewed them more as an administrative inconvenience than an issue that actually required a cessation of Government activities. That situation changed with then-President Carter requested formal legal opinions from the Attorney General (Mr. Benjamin Civiletti). Those memoranda held that the language and history of the Antideficiency Act unambiguously prohibits agency officials from incurring obligations in the absence of appropriations, with some limited exceptions. Those memos were reaffirmed in 1995 by the Office of Legal Counsel within the Department of Justice.

The result of the legal memos referenced above was that the executive branch could no longer simply ignore lapses in appropriations as they had in the past. Rather, executive agencies were told that they needed to take immediate steps to cease normal operations. The legal opinions did include some "wiggle room" for those employees or functions that protect life and property in emergency situations. That is, there were some exceptions to the general rule.

Over time, DoD had to plan for several actual and nearly-avoided shutdowns. This resulted in **DoD guidance**, the most recent of which was set out in 2016. That DoD-level guidance set forth detailed guidance addressing what activities the military departments and other DoD agencies could perform during a funding gap. This guidance was further refined at the service-level and the NGB level. This Guidebook cannot stress enough that leaders and practitioners need to examine the *actual* guidance that is set forth in response to an actual shutdown as well as the authorities listed in the Crosswalk Links immediately below.

Crosswalk Links 	**GAO Red Book, Ch. 8, Continuing Resolutions, GAO-06-382SP (3d ed. 2006) and Annual Update of the 3rd Edition, March 2015**
	Army JAG School Fiscal Law Deskbook (2019), Chapter 9, Continuing Resolution Authority (CRA) & Funding Gaps
	DoD Guidance for Continuation of Operations During a Lapse in Appropriations, 9 December 2016 (Prior Policy Document)

END NOTES

[1] *Principles of Fed. Appropriations Law*, (commonly referred to as the "Red Book") 4th ed., Chapter 1, GAO-16-463SP (2016).
[2] *Atlantic City Electric Co. v. Federal Energy Regulatory Commission*, 295 F.3d 1, 8 (D.C. Cir. 2002). *See also* B-323449, Aug. 14, 2012; B-288266, Jan. 27, 2003.
[3] *Principles of Fed. Appropriations Law*, 4th ed., Chapter 3, GAO-16-463SP (2017).