

Date: Thu, 10 Feb 2005 13:23:55 -0500

From: Rumu.Sarkar <rumu.sarkar@obc.gov> [+] [📧 ✓]

To: patricia.walker <patricia.walker@obc.gov> [+]

Cc: "Christina Duffy" <christina.duffy@obc.gov> [+]

Subject: Re: FW: Question: Prompt Payment Act [📧 ✓]

Hi Pat and Christina:

Good work on the quick legal read. As you know, the Prompt Payment Act (PPA), 31 U.S.C. Secs. 3901-3906, mandates the payment of interest for unpaid bills owed by the federal government after a statutory grace period (usually 30 days) has expired. Christina was correct in pointing out that Congress has been specifically excluded from the PPA since it is not an "agency" covered by the PPA. The exclusion of Congress from the definition of "agency" under 5 U.S.C. Sec. 551(1)(A), as referred to in the PPA, is clear. For example, the GAO held in Honorable Stuart F. Balderson, Financial Clerk of the Senate, B-225123 (May 1, 1987), 1987 U.S. Comp. Gen. LEXIS 1191, that the Prompt Payment Act does not apply to the Senate. Therefore, interest on late paid telephone bills were not payable by the Senate.

Courts have liberally construed the exclusion for Congress under 5 U.S.C. Sec. 551(1), a part of the Administrative Procedure Act, to extend to the entire legislative branch. The same definition for "agency" under Section 551(1)(A) is used in FOIA, for example, and Courts have ruled that the entire legislative branch is exempt from FOIA as a result. (I won't bore you with the legal citations!) While an exclusion for the entire legislative branch under the PPA has not actually been decided by a court as far as I am aware, the OBC is part of the legislative branch. Therefore, the OBC may be construed to be exempt from the PPA since it is not an "agency" covered by the PPA.

While the PPA may not be strictly applicable to the OBC as a matter of law, it may still be a good idea for the OBC to pay its bills promptly as a matter of policy. If GSA has problems with the speedy payment of the OBC's bills, this should be discussed further with them. The OBC's use of its obligated funds should be unrestricted, so I am not sure why there may be a need to pay bills beyond a reasonable time. However, if this occurs for whatever reason, it may be argued that OBC is not liable to pay interest on the late payment of such bills.

Hope this helps, and please let me know if you have further questions. Thanks for consulting with me, Rumu

-----Original message-----

From: "patricia.walker" patricia.walker@obc.gov

Date: Thu, 10 Feb 2005 10:34:20 -0500

To: rumu_sarkar@netzero.net

Subject: FW: Question: Prompt Payment Act

> Rumu, can you do a quick read on this for us thanks

>

> Patricia J. Walker

> Executive Director, OSBC

> (703) 351-5289

> FAX: (703) 351-5295

> email: patricia.walker@obc.gov

> -----Original Message-----

> From: Christina Duffy [mailto:Christina.Duffy@obc.gov]

> Sent: Thursday, February 10, 2005 10:32 AM

> To: Patricia Walker

> Subject: Question: Prompt Payment Act

>

> Pat

> Our payment person at GSA asked if the Prompt Payment Act applies to the

> OSBC. I don't think it does according to the 31 USC Chapter 39

> definition of applicable agency. Off the top of your head, do you know

> the answer?
> http://assembler.law.cornell.edu/uscode/html/uscode31/usc_sup_01_31_08_I_II_10_39.html
>
> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-
> (A) the Congress;
> (B) the courts of the United States;
> (C) the governments of the territories or possessions of the United States;
> (D) the government of the District of Columbia;
>
> v/r
> Christina Duffy
> Regional Director
> Overseas Basing Commission
> (703) 351-5284
> FAX (703) 351-5295
> email: <<mailto:christina.duffy@obc.gov>> christina.duffy@obc.gov
> -----Original Message-----
> From: Liz Gabor [<mailto:Liz.gabor@obc.gov>]
> Sent: Thursday, February 10, 2005 9:39 AM
> To: Christina Duffy; Christina Duffy
> Subject: call from Shannon at GSA
> She said to call her back she has a question. Her number is
> 816-823-1627 or 1637 (couldn't really understand her on the voicemail).
>
> -----
> Liz Gabor
> Presidential Management Fellow
> Overseas Basing Commission
> 1655 Fort Myer Drive, Suite 700
> Arlington, VA 22209
> (703) 351-3300
>
>

Rumu Sarkar
General Counsel
Overseas Basing Commission
Tel: (703) 351-5283
Fax: (703) 351-5295


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From : "patricia.walker" <patricia.walker@obc.gov>
 To : <rumu_sarkar@netzero.net>, <Rumu.Sarkar@obc.gov>
 Cc : "Christina Duffy" <christina.duffy@obc.gov>
 Subject : FW: Question: Prompt Payment Act
 Date : Thu, 10 Feb 2005 10:34:11 -0500

Rumu, can you do a quick read on this for us thanks

Patricia J. Walker
 Executive Director, OSBC
 (703) 351-5289
 FAX: (703) 351-5295
 email: patricia.walker@obc.gov

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http://assembler.law.cornell.edu/uscode/html/uscode31/usc_sup_01_31_08_III_10_39.html

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 - (B) the courts of the United States;
 - (C) the governments of the territories or possessions of the United States;
 - (D) the government of the District of Columbia;

v/r

Christina Duffy
 Regional Director
 Overseas Basing Commission
 (703) 351-5284
 FAX (703) 351-5295
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-----Original Message-----

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January 17, 2005

MEMORANDUM OF LAW

TO: Executive Director, Patricia Walker

FROM: General Counsel, Rumu Sarkar

SUBJECT: Applicability of the Federal Advisory Committee Act (FACA) and Related Legislation

EXECUTIVE SUMMARY: This memorandum will examine the applicability of the Federal Advisory Committee Act (FACA), the Government in the Sunshine Act (the "Sunshine Act"), and the Freedom of Information Act (FOIA). In addition, the applicability of the Congressional Accountability Act (CAA) to the Overseas Basing Commission (the "Commission") will be considered.

In sum, this memorandum will set forth the reasons why FACA, the Sunshine Act, and FOIA do not apply to the Commission, and why the CAA does apply. A separate memorandum sets forth recommendations that are advisory in nature to provide practical guidance on conducting the Commission's affairs in an efficient and legally compliant manner. Records management and disposition as well as close-out procedures for the Commission upon its termination will be discussed separately in other memoranda.

DISCUSSION:

A. FACA: The U.S. Supreme Court has found that "FACA's principal purpose was to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them."¹ Congress passed FACA (made effective on 5 January 1973) to oversee and impose accountability on advisory committees "established or utilized" by the President, by a federal agency, or by Congress "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal government."²

¹ Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 458 (1989). The Court further found that FACA's "purpose was to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public be apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature." Id. at 446.

² See 5 U.S.C. app. 2 § 3.

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Thus, FACA deals exclusively with two types of advisory committees, those that advise the President, and those that advise the executive agencies of the Federal government. Moreover, the legislative history of FACA demonstrates that it was not intended to cover commissions or committees that are established solely to advise Congress.³

The question of whether the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 (2000), is applicable to commissions created solely to advise Congress has been considered before, and the U.S. Department of Justice, Office of Legal Counsel, has concluded that FACA does not apply to such commissions.

The Office of Legal Counsel considered the applicability of FACA to congressional advisory commissions in its opinion, *Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission*.⁴ In that case, a commission (the "Hawaiian Commission") was formed to publish a draft report and to distribute the draft to appropriate federal and state agencies, interested organizations, and the public in order to solicit their written comments. The Hawaiian Commission was then tasked with issuing a final report to the President and to two Congressional committees, making recommendations to Congress based on its findings and conclusions. The Office of Legal Counsel opinion closely considers whether sending a copy of the final report to the President makes the commission an advisory body to the President, thus triggering FACA.

The opinion concludes that:

Merely sending a copy of the [c]ommission's report to the President would not seem to make the [c]ommission advisory to the President when its recommendations are made only to Congress. Second, even if the final report itself could be characterized as "advice," it is unclear that such advice is really for the President where other factors and the underlying purpose of the study indicate that the [c]ommission was created to formulate policy recommendations to Congress for future legislation. That the President is to receive a copy of the study, perhaps simply as a courtesy or for his general information, does not mean the study was intended to "advise" him.⁵

Similarly, the Overseas Basing Commission has been tasked to "submit to the President and Congress a report which shall contain a detailed statement of the findings and conclusions of the Commission, together with recommendations for proposed legislation

³ See *Gannett News Service, Inc. v. Native Hawaiians Study Comm'n*, No. 82-0163, at *7, 1982 U.S. Dist. LEXIS 18398 (D.D.C. June 1, 1982). See also *Metcalf v. Nat'l Petroleum Council*, 553 F.2d 176, 178 n.14 (D.C. Cir. 1977) (stating that "FACA does not specifically mention Congressional advisory committees; presumably, the Congress can establish such committees for its own use.")

⁴ 6 Op. Off. Legal Counsel 39, 40 (1982).

⁵ *Id.* at 41; accord *Gannett News Service*, at *5; Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws, 13 Op. Off. Legal Counsel 285 (1989) (finding a commission to be advisory to Congress, not the President, even though the commission in question was statutorily required to submit its report to both the Congress and the President).

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and administrative actions as it considers appropriate.”⁶ This seems to indicate that the primary purpose of the Commission is to advise Congress on recommended legislation, rather than to advise the President. Indeed, it would raise constitutional questions if Congress appointed individuals to make such legislative proposals on behalf of the President, and required the submission of such proposed legislation to Congress.⁷ (Of course, all the Commissioners of the Commission have been appointed by members of Congress, rather than having been nominated or appointed by the President.)

The Hawaiians Study Commission opinion also closely examined the legislative history of the Hawaiian Commission’s organizational statute for further guidance. The opinion concludes that the legislative history supports the finding that the Hawaiian Commission was created to advise Congress, not the President and therefore, is not subject to FACA.⁸

The legislative history of the Overseas Basing Commission reveals that the executive branch itself considers the Commission to be a part of the legislative branch. The Office of Management and Budget (OMB), an integral part of the Executive Office of the President, issued a statement dated July 10, 2003, clearly indicating that the “Commission would be composed of members appointed by the Congressional leadership and would, therefore, be part of the Legislative Branch.”⁹

Finally, the Hawaiians Study Commission opinion also concludes that the Hawaiian Commission’s report will be not be “utilized” by a federal agency in a manner that triggers FACA.¹⁰ Under FACA’s definition of “utilized,” FACA “can only apply if the [advisory] committee is established, managed, or controlled for the purpose of obtaining advice or recommendations for the federal government.”¹¹ The Overseas Basing Commission is an independent, self-governing commission that is not influenced, managed or controlled by any federal agency or instrumentality. Therefore, there is no

⁶ Military Construction Appropriations Act, 2004, Pub. L. No. 108-132, § 128(b)(3)(A), 117 Stat. 1374 (2003).

⁷ In fact, the U.S. Justice Department has long recognized that under Article III, Section 3 of the U.S. Constitution, the President has “plenary and exclusive discretion” to submit legislative proposals to Congress. “Thus, Congress may not require executive branch officials to submit legislative proposals to the Congress.” *Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws*, 13 Op. Off. Legal Counsel, *supra* note 5, at 287. Moreover, the appointment by Congress of individuals tasked with making such legislative proposals for the executive branch may raise constitutional separation of powers questions. *Id.*

⁸ *Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission*, 6 Op. Off. Legal Counsel, *supra* note 4, at 46.

⁹ OMB Statement of Administration Policy, *S. 1357 – Military Construction Appropriations Bill, FY 2004*, July 10, 2003, at 2.

¹⁰ *Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission*, 6 Op. Off. Legal Counsel, *supra* note 4, at 46; *see also* Wash. Legal Found. v. U.S. Sentencing Commission, 17 F.3d 1446, 1450 (D.C. Cir. 1994) (stating that the word “utilized” in FACA is “a stringent standard, denoting something along the lines of actual management or control of the advisory committee.”) *Accord* Byrd v. U.S. Environmental Protection Agency, 174 F.3d 239, 246 (D.C. Cir. 1999); *see also* Sofamor Danek Group, Inc. v. Gaus, 61 F.3d 929, 936 (D.C. Cir. 1995).

¹¹ *Sofamor*, *supra* note 10, at 936.

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factual basis upon which to conclude that the Commission's work will be "utilized" by an executive branch agency within the narrowly defined context of FACA.

Nevertheless, section 128 of the Overseas Basing Commission's organizational statute does require the Commission's final report to "include a proposal by the Commission for an overseas basing strategy for the Department of Defense in order to meet the current and future mission of the Department." However, the inclusion of this proposed strategy does not automatically mean that it will be used to formulate policy or be adopted by the Department of Defense (DoD). Even if this were to be the case, at least one federal court has recognized that the subsequent use of a report of an advisory group by a federal agency does not trigger FACA.¹²

In conclusion, therefore, based on the above discussion and analysis, FACA does not apply to the Commission.¹³

B. Sunshine Act: The Sunshine Act was enacted in 1976 to "provide the public with information regarding the decision-making processes of the Federal Government 'while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.'"¹⁴ Accordingly, an agency subject to the Sunshine Act must give reasonable notice of its meetings and make its meetings open to public observation, unless the agency has properly decided to close the meeting, or a portion thereof, pursuant to one of the Act's ten exemptions,¹⁵ generally mirroring those exemptions found in FOIA.

The Sunshine Act applies to "any agency, as defined in section 552(e) of title [5] [i.e., FOIA], headed by a collegial body composed of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency."¹⁶

The Hawaiians Study Commission case, cited earlier, also examines at length the applicability of the Government in the Sunshine Act, 5 U.S.C. § 552b (2000). The opinion concluded that the Hawaiian Commission was: (a) not an advisory committee under FACA; (b) not an agency as defined by the Administrative Procedure Act (APA), 5

¹² *Id.* (finding that the "subsequent and optional" use of an advisory committee's work product by the Executive Branch does not implicate FACA).

¹³ On an additional note, the fact that the Overseas Basing Commission filed a charter with the General Services Administration (GSA) pursuant to FACA, and the fact that the funding for the Commission derives from the Military Construction Appropriations Act, 2004, a part of the appropriations bill for the DoD, an executive department, are not dispositive criteria in determining whether a commission should be part of the executive branch. See *Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws*, 13 Op. Off. Legal Counsel, *supra* note 5, at n. 11. In other words, these facts alone do not automatically transform the Overseas Basing Commission into a part of the executive branch.

¹⁴ *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 239 (D.C. Cir. 1981).

¹⁵ 5 U.S.C. § 552b(c). This section is also referenced in section 10 of FACA in recognition that meetings of FACA committees may be closed in accordance with the provisions of the Sunshine Act.

¹⁶ *Id.* at § 552b(a)(1).

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U.S.C. § 551, and FOIA, 5 U.S.C. § 552; and therefore, (c) not an agency for purposes of the Sunshine Act.¹⁷ The same conclusion applies to the Overseas Basing Commission.

In fact, the Sunshine Act does not apply to the Overseas Basing Commission for two reasons. First, none of its members were appointed by the President with the advice and consent of the Senate. As mentioned above, all of the Commissioners were appointed by members of Congress.

Secondly, the Commission is not an “agency” as defined by the Sunshine Act. The Sunshine Act incorporates the definition of “agency” as defined by FOIA, 5 U.S.C. § 552(e). FOIA, in turn, incorporates the definition of “agency” used in the APA, 5 U.S.C. § 551(1).

However, the APA specifically exempts Congress from its provisions under 5 U.S.C. § 551(1)(A). This section defines “agency” as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include— the Congress.” The exemption for Congress has been broadly construed to mean the entire legislative branch.¹⁸ Therefore, since the application of the Sunshine Act is defined by the scope of the APA, congressional advisory committees (as part of the legislative branch) are exempt from its coverage.

In conclusion, the Overseas Basing Commission is not subject to the Sunshine Act since its members were not Presidentially appointed and Senate confirmed. Further, it is not an “agency” within the scope of the APA or FOIA and consequently, does not fall within the scope of the Sunshine Act.

However, it is recommended that notices of public hearings and meetings of the Commission be published as notices in the Federal Register in a timely fashion, if not actually 15 days in advance of such meetings,¹⁹ in order to solicit public participation and make the proceedings of the Commission as transparent as practicable. This recommendation has already been implemented by the Commission.

¹⁷ *Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission*, 6 Op. Off. Legal Counsel, *supra* note 4, at 46.

¹⁸ See Wash. Legal Found., *supra* note 10, 17 F.3d at 1449 (holding that “the Library of Congress (part of the legislative branch but a separate entity from ‘the Congress’ narrowly defined) is exempt from the APA because its provisions do not apply to ‘the Congress’—that is, the legislative branch”). See also *Symons*, *supra* note 14, 670 F.2d at 243 (finding that Congress chose a narrow definition of “agency” and not a broad, all-encompassing definition when it enacted the Sunshine Act).

¹⁹ The General Services Administration (GSA) has promulgated regulations requiring that FACA committees provide 15 days advance notice of their meetings by publication in the Federal Register. See 41 C.F.R. § 105-54.301(i). Please note, however, that the Federal Register Act explicitly exempts entities in the judicial and legislative branches of the government from its provisions. The Act defines an “agency” to mean “the President of the United States, or an executive department . . . but not the legislative or judicial branches of the Government.” See 4 U.S.C. § 1501. See also *Washington Legal Foundation*, *supra* note 10, 17 F.3d at 1449.

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C. Freedom of Information Act (FOIA):²⁰ For the reasons discussed above, the Commission does not fall within FOIA's definition of "agency." In other words, for purposes of FOIA, the definition of "agency" does not include "Congress" since FOIA uses the same definition as the one used in the APA. The exception for "Congress" has been broadly interpreted to apply "to Congress and its institutions . . . for example, the Library of Congress has been considered to be exempt from FOIA under the 'Congress' exemption."²¹ In *Mayo v. U.S. Government Printing Office*, the Court held that the US Government Printing Office was exempt from FOIA since it is "clearly a unit of the legislative branch."²²

The Court further noted that quasi-congressional bodies and institutions such as the General Accounting Office, the Office of Technology Assessment, the Copyright Office and the Government Printing Office are part of the legislative branch and, therefore, exempt from FOIA.²³ Thus, as part of the legislative branch, the Overseas Basing Commission is exempt from the requirements of FOIA.

Nevertheless, federal courts have recognized a "common law right of access"²⁴ to public records of advisory committees that are not otherwise subject to FACA or FOIA. If the document being sought is a public record, then the court has established a balancing test weighing the government's interest in keeping the document secret against the public's interest in disclosure.²⁵

Upon further consideration in additional proceedings in the *Washington Legal Foundation* case, the Court examined the documents that were not initially disclosed by the Sentencing Commission and found that the documents were preliminary or incidental to the commission's work. Although the commission was statutorily obligated to "consult with authorities" on various aspects of the federal criminal justice system, the Court held that the commission was not required to keep a record of its proceedings or its research. The records sought, therefore, were not public records and thus, were beyond the scope of the common law right of access. Thus, the Court did not rule on the

²⁰ FOIA, 5 U.S.C. § 552, establishes a presumption of law that all records of governmental agencies are accessible to the public, unless they are specifically exempted from disclosure by FOIA or another statute. Section 552(a)(2) requires that agencies make available for public inspection or copying (or for sale) certain basic agency records that are to be made available in agency reading rooms and, for records created on or after November 1, 1996, in "electronic" reading rooms accessible by computer. Finally, all other records, unless exempt from required disclosure under section 552(b) or excluded from FOIA coverage under section 552(c), must be disclosed to the public upon request.

²¹ *Mayo v. U.S. Gov't Printing Off.*, 839 F. Supp. 697 (N.D. Cal. 1992) (citing *Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985)). See also *Ostheimer v. Chumbley*, 498 F. Supp. 890, 892 (D. Mont. 1980) (holding that the U.S. Tax Court was established by Congress as an Article I court in 1969, thus becoming a part of the legislative branch of government and, therefore, exempt from FOIA).

²² 839 F. Supp. at 700.

²³ *Id.*

²⁴ See, e.g., *Nixon v. Warner Comm., Inc.*, 435 U.S. 589 (1978).

²⁵ See *Washington Legal Foundation, supra*, note 10, 17 F.3d at 1451-52. *Accord*, *Pentagon Techs. Int'l, Ltd. v. Comm. on Appropriations of the U.S. House of Representatives*, 20 F. Supp.2d 41, 45 (D.D.C. 1998).

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balancing test, and did not require the Sentencing Commission to disclose the records in question.²⁶

While the Commission's records may not necessarily be "public records" subject to disclosure to the public under a common law right of access, it is recommended, however, that the official records of the Commission be made available to the public in a public reading room that has already been established on the Commission's premises, and that further, such documents also be made available as e-documents accessible on the Commission's website. These recommendations have already been implemented.

In addition, a separate memorandum will examine the scope of the application of the Federal Records Act, 44 U.S.C. §§ 3101-3107, and provide guidance on setting up a records management system, if required. Disposition and retirement of federal records will also be addressed. (This is a separate issue from the requirements of disclosing federal records to the public under FOIA.)

D. Congressional Accountability Act: And finally, to be noted in this context, the Congressional Accountability Act (CAA) of 1995, makes certain laws applicable to the legislative branch.²⁷ While advisory groups like the Commission are not specifically covered,²⁸ it is worthwhile to simply note for the record that the following laws, among others, have been made applicable to the legislative branch pursuant to 2 U.S.C. § 1302: (1) Fair Labor Standards Act of 1938, 29 U.S.C. § 201, et seq.; (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; (3) Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.; (4) Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. ; (5) Family and Medical Leave Act of 1993, 29 U.S.C. § 2611 et seq.; (6) Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ; and (7) Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq..

The CAA also established the Office of Compliance to oversee implementation of the Act and additional information is available on their website at <http://www.compliance.gov.html>. While this may not have any immediate relevance to the Commission's mission and the conduct of its work, it is hereby noted for the record.

CONCLUSION: As part of the legislative branch, the Commission is exempt from the provisions of FACA, the Sunshine Act and FOIA for the reasons discussed above. It is nevertheless recommended, and discussed in further detail in a separate memorandum, that Federal Register notices continue to be issued in a timely manner giving public notice of the Commission's meetings and that, further, official records be made available for public inspection and copying. These practices will, to the extent practicable, provide public access to the Commission's proceedings and official documents.

²⁶ *Washington Legal Foundation v. U.S. Sentencing Comm'n.*, 89 F.3d 897, 907 (D.C. Cir. 1996).

²⁷ 2 U.S.C. § 1301 (2000).

²⁸ *Id.*

1 of 1 DOCUMENT

The Honorable Stuart F. Balderson, Financial Clerk of the Senate

B-225123

Comptroller General of the United States

1987 U.S. Comp. Gen. LEXIS 1191

May 1, 1987

HEADNOTES:

[*1]

Comprehensive analysis of general rules applied to federal, state and local taxes, late payment charges and other service charges appearing on telephone bills shows that some charges are payable by the United States Senate, while others are not. Tentative opinions are offered as to the validity of 14 taxes itemized on sample telephone bills sent for analysis, but when doubt exists as to whether a particular tax is payable, the Senate Financial Clerk is advised to initiate a practice of requiring telephone companies to demonstrate that taxes or other charges are payable by the Federal Government.

OPINION:

Dear Mr. Balderson:

Your letter of October 22, 1986 requested guidance on whether the Senate should pay a myriad of special charges and taxes listed on invoices for telephone service provided to Senators' home state offices. Apparently, no Federal agency maintains a master list of those state taxes which the Federal Government should pay, and the General Services Administration advised you that it does not verify the Government's liability for the assorted state, local, and other taxes which appear on telephone bills. Accordingly, you need assistance in determining the Senate's liability [*2] for the taxes and other charges itemized on the bills. There is no one general rule that provides an answer to all the questions you have posed. However, we will group the various charges you have inquired about, and provide information about each type of charge or tax.

COSTS OF DELAYED PAYMENT

Many telephone companies have been permitted by their state regulatory bodies to charge customers a fee when payment is received after a certain date. We have held that the imposition of and the liability for late charges allowed by an authorized tariff is a matter of contract, and that the United States is responsible for payment according to the contract terms, including authorized late charges. *63 Comp. Gen. 517 (1984)*; B-173725, Sept. 16, 1971. Contractual late charges are in lieu of any statutory interest penalties under the Prompt Payment Act. See *63 Comp. Gen. at 519*.

For utilities that do not have tariffed late payment charges, the Federal Government is generally obligated under the Prompt Payment Act to add interest to its overdue bills paid after a statutory grace period. B-214479, Sept. 22, 1986, *65 Comp. Gen.* . However, the Prompt Payment Act does not apply to [*3] the Senate, and therefore, if the tariff does not provide for it you are not obliged to add interest to late paid bills. See *31 U.S.C. § 3901(a)(1)*; *5 U.S.C. § 551(1)(A)*.

FEDERAL EXCISE TAXES

Some of the bills you forwarded for our opinion show entries for Federal excise tax imposed by *26 U.S.C. § 4251*. The Secretary of the Treasury has determined (pursuant to statutory authority in *26 U.S.C. § 4293*) that telephone

1987 U.S. Comp. Gen. LEXIS 1191, *

services rendered to agencies of the Federal Government are exempt from excise tax. *Rev. Rul. 68-276, 1968-1 C.B. 493*. This exemption extends to a member's local office phone bills paid out of congressional funds. There is no exemption, however, when the member pays office telephone bills from personal funds. The members, therefore, are required to submit exemption certificates monthly, listing the amount of services to be paid from congressional funds and the amount of tax exemption claimed. *Rev. Rul. 73-319, 1973-2 C.B. 366-67*.

If the Senator files the exemption certificate, the calls to which the certificate applies are exempt from the tax. If the Senator does not submit the certificate, the presumption is that the charges were not exempt from taxation [*4] and that the Senator will pay the bill with private funds. In either event, you should not pay the excise tax.

STATE TAXES

The principle that the Federal Government is constitutionally immune from taxation by states and their inferior governmental units dates back to *M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)*. Much later the Supreme Court expounded on that rule in *Alabama v. King and Boozer, 314 U.S. 1 (1941)*. In doing so, the Court distinguished between state taxes imposed directly on the purchaser of goods or services and state taxes imposed directly on the seller or provider of the goods or services. The purchaser is known as the "vendee"; the seller or provider is called the "vendor".

In both cases, the amount of the tax is remitted by the vendee to the vendor. However, when the burden or "incidence" of the tax falls squarely on the vendee, the vendor acts solely as a collection agent for the state.

If the vendee happens to be the United States of America, its purchases are constitutionally immune from taxation, and no tax may be collected. See *55 Comp. Gen. 1358, 1359 (1976)*.

If, on the other hand, the incidence of the state tax is on the vendor, [*5] there is nothing to prevent him from passing on the financial burden of the state tax to his customers, including the United States, as an added cost of doing business. This is true even if he chooses to identify the cost separately as a state tax on the invoice he presents to the vendee. *55 Comp. Gen. at 1359*. The Federal Government may not claim its constitutional exemption since it is not being taxed directly by the state. Note that the hallmark of a vendor tax is that the seller is required to pay it even if he is unable or unwilling to collect it from the purchaser. See *63 Comp. Gen. 49*.

With regard to state-regulated public utilities, there is yet another element to consider in deciding whether a particular tax is payable by the United States. The public utility commission of the state must approve the inclusion of the tax as a part of the tariff. See, *45 Comp. Gen. 192 (1965)*. In that case, the Kentucky Veterans Bonus Sales and Use Tax, a "vendor" tax, was held to be not payable by the United States before the date on which the Public Utility Commission approved it as a part of the state tariff.

From time to time, public utility commissions also approve an [*6] added cost labeled as "tax surcharges". These are actually rate increases imposed to cover the additional operating expenses incurred by utilities because of tax increases imposed on them. B-171756, Feb. 22, 1971. In these instances, the increase, whether labeled "tax surcharge" or not, should be regarded as a vendor tax and is payable by all vendees as an added cost of doing business with the utility.

Although the general rules are simple, in order to make a definite ruling on a particular tax, it is necessary to examine in detail the law that imposes it. Labels and generalizations can be deceptive. With this in mind, we have attempted to resolve the vendor/vendee status as to the particular taxes itemized on the sample invoices you sent to us. These are listed in an attachment to this letter. We have not checked with the public utility commissions to determine whether these charges are a part of the tariff of the particular state. However, we assume that telephone company billing practices conform to state regulations.

"SERVICE CHARGES"

The Government's responsibility to pay 9-1-1 emergency number fees, itemized and denominated as service charges on some telephone bills, [*7] has been a recent subject of controversy. The mere fact that the fee is called a service charge does not determine its actual character. We have held that the charges cover the cost of a municipal service (access to police, fire and other emergency services) which local governmental units are typically obligated by law to provide to all their residents. As such, additional charges for such services constitute taxes from which the Federal Government is immune. *64 Comp. Gen. 655 (1985)*. In each case we have examined, the taxes have been imposed directly on the consumer, with the telephone company acting only as a collection agent. That makes them

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TITLE 31 > SUBTITLE III > CHAPTER 39 > § 3902

§ 3902. Interest penalties

Release date: 2003-05-15

(a) Under regulations prescribed under section 3903 of this title, the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due. The interest shall be computed at the rate of interest established by the Secretary of the Treasury, and published in the Federal Register, for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611), which is in effect at the time the agency accrues the obligation to pay a late payment interest penalty.

(b) The interest penalty shall be paid for the period beginning on the day after the required payment date and ending on the date on which payment is made.

(c)

(1) A business concern shall be entitled to an interest penalty of \$1.00 or more which is owed such business concern under this section, and such penalty shall be paid without regard to whether the business concern has requested payment of such penalty.

(2) Each payment subject to this chapter for which a late payment interest penalty is required to be paid shall be accompanied by a notice stating the amount of the interest penalty included in such payment and the rate by which, and period for which, such penalty was computed.

(3) If a business concern—

(A) is owed an interest penalty by an agency;

(B) is not paid the interest penalty in a payment made to the business concern by the agency on or after the date on which the interest penalty becomes due;

(C) is not paid the interest penalty by the agency within 10 days after the date on which such payment is made; and

(D) makes a written demand, not later than 40 days after the date on which such payment is made, that the agency pay such a penalty,

such business concern shall be entitled to an amount equal to the sum of the late payment interest penalty to which the

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contractor is entitled and an additional penalty equal to a percentage of such late payment interest penalty specified by regulation by the Director of the Office of Management and Budget, subject to such maximum as may be specified in such regulations.

(d) The temporary unavailability of funds to make a timely payment due for property or services does not relieve the head of an agency from the obligation to pay interest penalties under this section.

(e) An amount of an interest penalty unpaid after any 30-day period shall be added to the principal amount of the debt, and a penalty accrues thereafter on the added amount.

(f) This section does not authorize the appropriation of additional amounts to pay an interest penalty. The head of an agency shall pay a penalty under this section out of amounts made available to carry out the program for which the penalty is incurred.

(g) A recipient of a grant from the head of an agency may provide in a contract for the acquisition of property or service from a business concern that, consistent with the usual business practices of the recipient and applicable State and local law, the recipient will pay an interest penalty on amounts overdue under the contract under conditions agreed to by the recipient and the concern. The recipient may not pay the penalty from amounts received from an agency. Amounts expended for the penalty may not be counted toward a matching requirement applicable to the grant. An obligation to pay the penalty is not an obligation of the United States Government.

(h)

(1) This section shall apply to contracts for the procurement of property or services entered into pursuant to section 4(h) of the Act of June 29, 1948 (15 U.S.C. 714b (h)).

(2)

(A) In the case of a payment to which producers on a farm are entitled under the terms of an agreement entered into under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), an interest penalty shall be paid to the producers if the payment has not been made by the required payment or loan closing date. The interest penalty shall be paid—

(i) on the amount of payment or loan due; and

(ii) for the period beginning on the first day beginning after the required payment or loan closing date and ending on the date the amount is paid or loaned.

(B) As used in this subsection, the "required payment or loan closing date" means—

(i) for a purchase agreement, the 30th day after delivery of the warehouse receipt for the commodity

subject to the purchase agreement;

(ii) for a loan agreement, the 30th day beginning after the date of receipt of an application with all requisite documentation and signatures, unless the applicant requests that the disbursement be deferred;

(iii) for refund of amounts received greater than the amount required to repay a commodity loan, the first business day after the Commodity Credit Corporation receives payment for such loan;

(iv) for land diversion payments (other than advance payments), the 30th day beginning after the date of completion of the production adjustment contract by the producer;

(v) for an advance land diversion payment, 30 days after the date the Commodity Credit Corporation executes the contract with the producer;

(vi) for a deficiency payment (other than advance payments) based upon a 12-month or 5-month period, 91 days after the end of such period; or

(vii) for an advance deficiency payment, 30 days after the date the Commodity Credit Corporation executes the contract with the producer.

(3) Payment of the interest penalty under this subsection shall be made out of funds available under section 8 of the Act of June 29, 1948 (15 U.S.C. 714f).

(4) Section 3907 of this title shall not apply to interest penalty payments made under this subsection.

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TITLE 5 > PART I > CHAPTER 5 > SUBCHAPTER II > § 551

§ 551. Definitions

Release date: 2004-01-16

For the purpose of this subchapter—

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

- (A)** the Congress;
- (B)** the courts of the United States;
- (C)** the governments of the territories or possessions of the United States;
- (D)** the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

- (E)** agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (F)** courts martial and military commissions;
- (G)** military authority exercised in the field in time of war or in occupied territory; or
- (H)** functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641 (b)(2), of title 50, appendix;

(2) “person” includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) “party” includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations,

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costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which

reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

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§ 3901. Definitions and application

Release date: 2003-05-15

(a) In this chapter—

(1) "agency" has the same meaning given that term in section 551 (1) of title 5 and includes an entity being operated, and the head of the agency identifies the entity as being operated, only as an instrumentality of the agency to carry out a program of the agency.

(2) "business concern" means—

(A) a person carrying on a trade or business; and

(B) a nonprofit entity operating as a contractor.

(3) "proper invoice" is an invoice containing or accompanied by substantiating documentation the Director of the Office of Management and Budget may require by regulation and the head of the appropriate agency may require by regulation or contract.

(4) for the purposes of determining a payment due date and the date upon which any late payment interest penalty shall begin to accrue, the head of the agency is deemed to receive an invoice—

(A) on the later of—

(i) the date on which the place or person designated by the agency to first receive such invoice actually receives a proper invoice; or

(ii) on the 7th day after the date on which, in accordance with the terms and conditions of the contract, the property is actually delivered or performance of the services is actually completed, as the case may be, unless—

(I) the agency has actually accepted such property or services before such 7th day; or

(II) the contract (except in the case of a contract for the procurement of a brand-name commercial item for authorized resale) specifies a longer acceptance period, as determined by the contracting officer to be required to afford the agency a practicable opportunity to inspect and test the property furnished or evaluate the services performed; or

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(B) on the date of the invoice, if the agency has failed to annotate the invoice with the date of receipt at the time of actual receipt by the place or person designated by the agency to first receive such invoice.

(5) a payment is deemed to be made on the date a check for payment is dated or an electronic fund transfer is made.

(6) a contract to rent property is deemed to be a contract to acquire the property.

(b) This chapter applies to the Tennessee Valley Authority. However, regulations prescribed under this chapter do not apply to the Authority, and the Authority alone is responsible for carrying out this chapter as it applies to contracts of the Authority.

(c) This chapter applies to the United States Postal Service. However, the Postmaster General shall be responsible for issuing the implementing procurement regulations, solicitation provisions, and contract clauses for the United States Postal Service.

(d)

(1) Notwithstanding subsection (a)(1) of this section, this chapter, except section 3907 of this title, applies to the District of Columbia Courts.

(2) A claim for an interest penalty not paid under this chapter may be filed in the same manner as claims are filed with respect to contracts to provide property or services for the District of Columbia Courts.

(3)

(A) Except as provided in subparagraph (B), an interest penalty under this chapter does not continue to accrue for more than one year or after a claim for an interest penalty is filed in the manner described in paragraph (2), whichever is earlier.

(B) If a claim for an interest penalty is filed in the manner described in paragraph (2) and interest is not available for such claims under the laws and regulations governing claims under contracts to provide property or services for the District of Columbia Courts, interest will accrue under this chapter as provided in paragraph (A) and from the date the claim is filed until the date the claim is paid.

(4) Paragraph (3) of this subsection does not prevent an interest penalty from accruing on a claim if such interest is available for such claim under the laws and regulations governing claims under contracts to provide property or services for the District of Columbia Courts. Such interest may accrue on an unpaid contract payment and on the unpaid penalty under this chapter.

(5) Except as provided in section 3904 of this title, this chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract. A claim related to the dispute, and any interest payable for the period during which the dispute is being resolved, is subject to the laws and regulations governing claims under contracts to provide property or services for the District of Columbia Courts.

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The Honorable Glenn English, Chairman, Subcommittee on Government Information,
Justice, and Agriculture, Committee on Government Operations, House of
Representatives

B-223857

Comptroller General of the United States

1987 U.S. Comp. Gen. LEXIS 1531

February 27, 1987

HEADNOTES:

[*1]

1. In accordance with the Prompt Payment Act, *31 U.S.C. § 3901-3906*, the Commodity Credit Corporation (CCC) was required to pay interest to any contractor who did not receive timely payment for the meat it delivered to CCC under the red meat purchasing program the Department of Agriculture was authorized to carry out by section 104 of the Food Security Act of 1985. As specified in the contracts, CCC was obligated to pay interest to contractors under the Prompt Payment Act when payment was made more than 10 days after delivery, even though CCC was unable to make payment when due because of the temporary depletion of its borrowing authority.

2. Once the borrowing authority of the Commodity Credit Corporation (CCC) was depleted and it had no funds available to pay for the meat it had ordered under the red meat purchasing program authorized by section 104 of the Food Security Act of 1985, the Antideficiency Act required CCC to take action to mitigate or minimize the magnitude of a possible Antideficiency Act violation. To the extent CCC entered into new contracts with meat suppliers or required and accepted deliveries of meat on existing contracts during the period in which its borrowing [*2] authority was depleted, CCC violated the Antideficiency Act.

OPINION:

Dear Mr. Chairman:

This is in response to your letter of July 31, 1986, requesting a legal opinion from our Office as to whether actions taken by the United States Department of Agriculture (USDA) in implementing section 104 of the Food Security Act of 1985 (the Act), Pub. L. No. 99-198, 99 Stat. 1354, 1366 (1985) violate the Prompt Payment Act or any other applicable laws.

Under section 104 of the Act, the Secretary of Agriculture was authorized to purchase a total of 400 million pounds of red meat to minimize the adverse effect of the milk production termination program on beef, pork and lamb producers. USDA implemented the meat purchasing program through the Commodity Credit Corporation (CCC), a wholly owned Government corporation within USDA.

As a result of the depletion of its borrowing authority, CCC was unable to make payment when due on some of the contracts it had entered into with meat suppliers. In our view, CCC's subsequent refusal to pay any interest to contractors after funds became available and payment was made violated the Prompt Payment Act, *31 U.S.C. § 3901-3906*. Moreover, to the extent that CCC [*3] entered into any new contracts with suppliers or required and accepted deliveries on existing contracts during the period in which its borrowing authority was depleted and no other funds were available to pay the contractors, we think it also violated the Antideficiency Act.

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n1 Our Office has no authority under *15 U.S.C. § 714b(k)* to adjust or settle claims by or against the CCC since that power has been reserved conclusively for the CCC, nor can we accept an appeal from a contractor dissatisfied with the CCC's final settlement.

BACKGROUND

Section 104 of the Food Security Act of 1985 provides as follows:

"To minimize the adverse effect of the milk production termination program on beef, pork and lamb producers in the United States during the 18-month period for which such program is in effect under section 201(d) of the Agricultural Act of 1949 (*7 U.S.C. § 1446(d)*), in such period --

"(1) the Secretary of Agriculture shall use funds available for the purposes of clause (2) of section 32 of the Act * * * (*7 U.S.C. § 612c*), approved August 14, 1935, including the contingency funds appropriated under such section 32, and other funds available to the Secretary under the commodity [*4] distribution and other nutrition programs of the Department of Agriculture and including funds available through the Commodity Credit Corporation, to purchase and distribute 200,000,000 pounds of red meat in addition to those quantities normally purchased and distributed by the Secretary. Such purchases by the Secretary shall not reduce purchases of any other agricultural commodities under section 32.

"(2) the Secretary of Agriculture shall use funds available through the Commodity Credit Corporation to purchase 200,000,000 pounds of red meat, in addition to those quantities normally purchased and distributed by the Secretary, and to make such meat available --

"(A) to the Secretary of Defense * * *; or

"(B) for export * * *."

As the conference report on this legislation explains, section 104 provides that the Secretary "shall use funds available to purchase 400 million pounds of red meat in addition to the quantities normally purchased and distributed by the Secretary," with 200 million pounds to be distributed domestically and the other 200 million pounds to be made available for military consumption or for export purposes. See H.R. Rep. No. 447, 99th Cong., 1st Sess., [*5] 333 (1982). While funds available through the CCC were only one of several sources of funds the Secretary of Agriculture was directed to use to purchase the first 200 million pounds of red meat specified in section 104 of the Act, the Secretary of Agriculture apparently determined to purchase the entire 400 million pounds of meat using CCC funds. n2

n2 See letter to our Office dated September 10, 1986, from Rosina Bullington, Assistant General Counsel, Foreign Agriculture and Commodity Stabilization Division (copy enclosed). Although we requested USDA to provide us with data showing "the current status of available funding for the program," USDA's response did not indicate whether any of the other sources of funding identified in the statute, including *7 U.S.C. § 612c*, were available to pay for the meat being purchased. However, as mentioned above, the USDA informed us that the Secretary had determined that only the CCC borrowing authority would be used to purchase the entire quantity of meat. Also, we note that the last sentence of section 104(1) of the Food Security Act appears to restrict the ability of the Secretary to use funding available under *7 U.S.C. § 612c* to purchase meat under this program. Moreover, CCC is the only permissible source of funding for the 200,000,000 pounds of meat referred to in section 104(2). [*6]

The CCC is a wholly owned Government corporation within USDA that is "subject to the general supervision and direction of the Secretary of Agriculture." *15 U.S.C. § 714*. Under section 4 of the Commodity Credit Corporation Charter Act (Charter Act), *15 U.S.C. § 714b(i)*, the CCC is authorized to borrow funds, not to exceed a total of \$25 billion outstanding at any one time, for the purpose of carrying out its activities. See also *15 U.S.C. § 713a-4*. Section 2 of the Charter Act, *15 U.S.C. § 713a-11*, authorizes an appropriation for each fiscal year of "an amount sufficient to reimburse the Commodity Credit Corporation for its net realized losses incurred during such fiscal year * * *."

As the procuring agency for all of the red meat purchased by USDA under section 104 of the Act, CCC entered into contracts with meat suppliers. All of these contracts contained a paragraph stating that CCC would pay interest in accordance with the provisions of the Prompt Payment Act if payment was not made when due.

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By notice dated June 25, 1986, USDA advised CCC's red meat contractors that because CCC's borrowing authority had been depleted, invoices for payment could not be paid until [*7] supplemental funding authority, then pending in Congress, was approved.

In that notice, USDA also advised contractors that they were "obliged to continue performance on existing contracts" and that CCC would continue to receive bids and award contracts, notwithstanding the depletion of its borrowing authority and inability to pay for the meat. The notice further advised bidders and contractors that the CCC was not required to pay interest if any payments were not made on time because the Prompt Payment Act was "applicable to an agency's administrative failure to make timely payments on purchases, but does not extend to situations where an agency's inability to make payment is due to circumstances beyond the contracting agency's control such as occurred with respect to depletion of CCC's borrowing authority."

The Urgent Supplemental Appropriation Act, 1986, Pub. L. No. 99-349, 100 Stat. 210, 712, which was approved on July 2, 1986, provided CCC with \$5.3 billion "for capital restoration" (to reimburse it for net realized losses). Included in this amount were funds intended to allow the CCC to fulfill its obligations under the meat purchase program. See H.R. Rep. No. 301, 99th [*8] Cong., 2d Sess. 16-17 (1986). As explained in the letter we received from USDA dated September 10, 1986, the amounts appropriated "were credited to CCC's account thereby permitting CCC to again use its borrowing authority to obtain funds to make such payments." However, in accordance with USDA's position, as set forth in the June 25 notice to contractors and its letter to our Office, the CCC refused to pay any interest to contractors, claiming that the Prompt Payment Act was not applicable.

ISSUES AND ANALYSIS

Prompt Payment Act

The primary issue you ask us to address is whether CCC's refusal to pay interest to contractors in these circumstances is permissible under the Prompt Payment Act.

The Prompt Payment Act, 31 U.S.C. § § 3901-3906, requires Federal agencies to pay an interest penalty on the amount owed to contractors for the acquisition of property or services when the agency fails to make timely payment. See 62 Comp. Gen. 673 (1983). The contracts involved here contain a general provision that "interest shall be paid in accordance with the provisions of the Prompt Payment Act if payment is made beyond the 10th day (7 days plus 3 days grace period) after the [*9] date of delivery." While USDA's letter to us states that it is "questionable whether the Prompt Payment Act would have been applicable to these CCC contracts" if such a provision had not been included therein, there is no question in our view that the term "agency," as defined in the Prompt Payment Act, 31 U.S.C. § 3901(a)(1), includes the CCC. Moreover, even if the Prompt Payment Act was not otherwise applicable to the CCC, the contractual provision in question would require CCC to comply with the terms of that Act.

In its letter to us, USDA maintains that since CCC's delay in making payment on these contracts when due was not caused by any "fault or omission of CCC" but resulted from "the depletion of CCC's borrowing authority and lack of congressional action to restore this authority," the provisions of the Prompt Payment Act are not applicable. In support of its position, USDA cites our decision in Four Square Construction Company, 84-2 CPD 480, 64 Comp. Gen. 32 (1984), as an example of a similar situation in which we held that interest did not have to be paid because the Government agency was not at fault for failing to make timely payment to a contractor. We disagree [*10] with USDA's interpretation of the Prompt Payment Act as being applicable only to a failure to make timely payment caused by an agency's own "fault or omission." We also think that its reliance on our holding in the cited case is misplaced.

In Four Square Construction Company, our Office considered a situation in which the contracting agency (USDA's Forest Service) issued a check representing payment in full to the contractor several days after receiving the invoice. However, for unspecified reasons, the contractor never received that check. After the contractor advised the Forest Service that it had not received payment, the Treasury Department issued a substitute check approximately 3 months later. Our Office concluded that the contractor was not entitled to interest under the Prompt Payment Act because under the Act, the date on the original check is deemed to be the date of payment and therefore the invoice was paid on time.

In reaching this conclusion, our decision did contain certain language that USDA relies on to support its position in the instant case. We said:

1987 U.S. Comp. Gen. LEXIS 1531, *

"* * * The fact that Four Square did not receive the original payment was not the fault of the contracting [*11] agency. We do not think the Prompt Payment Act contemplated the payment of interest where the contractor's delay in receiving payment was outside the contracting agency's control."

However, as the complete text of the decision demonstrates, the reason we held that the contractor was not entitled to interest was because the Government had paid the contractor within the time limits prescribed by the Prompt Payment Act. Thus, the quoted language from that decision is not relevant to the completely different set of facts involved here.

Further, in *64 Comp. Gen. 835 (1981)*, we held that under the Prompt Payment Act an agency was required to pay interest for the period during which our Office had been considering the certifying officer's request for an advance decision. Our decision relied heavily on the fact that the Prompt Payment Act is "written in mandatory terms," as is Circular A-125, August 19, 1982, which was issued by the Office of Management and Budget (OMB) to implement the statute. See also *62 Comp. Gen. 673 (1983)*. Similarly, in the present case, we know of no exceptions that support USDA's position that compliance with the mandatory requirements of the Prompt [*12] Payment Act is not necessary if it is difficult or impossible for an agency to comply.

Finally, our decision in *63 Comp. Gen. 517 (1984)*, is also relevant. In that case we considered whether the contract payment terms specified in a public utility's tariff or the somewhat more liberal payment terms in the Prompt Payment Act were controlling for the purpose of determining when payment was due. While we recognized in our decision that it was "extremely difficult" for the Social Security Administration (SSA) to comply with the tariff payment provisions because of the processing time required to have the invoices certified, we held that "[b]oth the Prompt Payment Act and our cases require that SSA comply with the contract terms for remittance."

In the instant case, an even stronger argument can be made that CCC should pay interest since there was no conflict between the contract (which was drafted by the agency) and the Prompt Payment Act. The contract specified that interest would be paid in accordance with the provisions of the Prompt Payment Act if payment was made more than 10 days after delivery. Thus, it is our view that under the provisions of the Prompt Payment Act, CCC [*13] should have paid interest to any contractor that did not receive timely payment as specified in the contract.

THE ANTIDEFICIENCY ACT

The other issue in this case is whether CCC violated the Antideficiency Act in the period between June 4 and July 2, 1986, when it ordered its suppliers with existing contracts to continue to deliver meat, and may have entered into new contracts to purchase additional meat n3 even though its borrowing authority was depleted and all disbursements of CCC funds were suspended.

n3 While USDA did not furnish us with any information as to how many new contracts, if any, CCC entered into during the period in which its borrowing authority was depleted, USDA's letter to us states unequivocally that CCC had the legal right to do so.

The relevant provisions of the Antideficiency Act are as follows:

"An officer or employee of the United States Government * * * may not --

"(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

"(B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by [*14] law." *31 U.S.C. § 1341(a)(1)*.

In its letter to us of September 10, 1986, USDA maintains that the Antideficiency Act's prohibition against incurring obligations and entering into contracts in excess of -- or in advance of -- available appropriations does not apply to the CCC for two reasons. First, it argues that "CCC's funds are not made available prospectively by annual appropriations but by the use of its borrowing authority."

While we do not disagree with the CCC's description of the particular type of budget authority it uses to carry out its functions, the origin of its budget authority is not relevant in determining the applicability of the Antideficiency Act. Our Office has held that funds borrowed from the Treasury by a wholly owned Government corporation are

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appropriated funds. See B-192573, December 19, 1979. Therefore, since the funds borrowed by CCC to finance its operations are appropriated funds, "they are subject to the statutory controls and restrictions applicable to appropriated funds." *63 Comp. Gen. 285, 287 (1984)*. This includes the restrictions imposed by the Antideficiency Act.

Second, USDA maintains that the Antideficiency Act does not apply to the [*15] CCC because the CCC possesses contract authority. Contract authority is generally defined as statutory authority some agencies have that enables them to enter into contracts or other obligations prior to enactment of the applicable appropriation. See, e.g., *28 Comp. Gen. 163 (1948)* and B-164497(3), June 6, 1979.

USDA's letter of September 10, 1986, sets forth the basis for its contention that CCC has contract authority.

"In accordance with the Agricultural Act of 1949 and other legislation, CCC is required to make available loans and purchases to support the prices of agricultural commodities and to carry out other activities as directed by Congress, whether or not CCC is able to finance such activities through the use of its borrowing authority.

"The entering into of contracts for the purchase of red meat under Section 104 of the 1985 Act was such an activity.
* * *

"* * * Based upon Congressional acceptance over many years of this budgetary mechanism, as evidenced by Congressional appropriations for net realized losses incurred in CCC's exercise of this contract authority, it is our position that the entering into contracts by CCC to carry out its required activities [*16] during the period its borrowing authority was depleted is not contrary to law."

We agree that the Antideficiency Act does not apply to a situation in which an agency is exercising statutory contracting authority. The Antideficiency Act specifically "provides an exception for obligations which are authorized by law to be made in excess of or in advance of appropriations." B-196132, October 11, 1974. See also *65 Comp. Gen. 4, 9 (1985)* and *61 Comp. Gen. 586 (1982)*.

Whether or not CCC may possess contracting authority with respect to some of its activities as it claims, n4 it is clear in our view that CCC's purchase of meat under section 104 of the Act does not constitute a legitimate exercise of contract authority. The specific statutory language in section 104 directs the Secretary of Agriculture to "use funds available" from several permissible sources of funding to purchase 400 million pounds of meat. The Secretary chose CCC to fund these purchases using its borrowing authority, which in turn is subject to a statutory maximum. It is our understanding that no other sources of funding identified in the statute were then available to pay for this meat. Once CCC determined [*17] that sufficient funds were not available to pay for the meat it had ordered because its borrowing authority had been depleted, until its authority to borrow additional funds was restored, the Antideficiency Act required CCC to do what it could to mitigate or minimize the magnitude of a possible Antideficiency Act violation. See *55 Comp. Gen. 768 (1976)*.

n4 We have not attempted to resolve the question of whether CCC possesses contract authority with respect to any of its other statutory responsibilities since the facts of this case do not require us to do so.

Thus, for existing contracts, CCC should have directed contractors to suspend further deliveries and, if necessary, could have terminated the contracts for the convenience of the Government. See Federal Acquisition Regulation (FAR), 48 C.F.R. § § 12.5 and 49 (1986). Instead, it informed contractors about the funding shortage but insisted that they continue to make deliveries anyway. Moreover, CCC clearly had no authority to award new contracts during the period in which its borrowing authority was depleted and it had no funds that were then available to pay for the meat it was obligating itself to purchase. [*18] See FAR, 48 C.F.R. § 32.702.

Accordingly, it is our view that once CCC's borrowing authority was depleted, CCC violated section 1342 of the Antideficiency Act by directing contractors to continue to deliver meat that it could not pay for. To the extent that any new contracts for the purchase of additional meat were awarded during this period when no budgetary resources were available, the CCC also violated section 1341 of the Antideficiency Act.

We trust that this information will be helpful to you. In accordance with the agreement reached with a member of your staff, we will make this opinion generally available 5 days from today.