

Chapter 2: Availability of Appropriations as to Purpose



CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

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CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

I. REFERENCES.

- A. [U.S. Constitution, Art. I, § 9.](#)
- B. [31 U.S.C. § 1301.](#) The Purpose Statute.
- C. Department of Defense Appropriations Acts and National Defense Authorization Acts (annual legislation found at: <http://thomas.loc.gov/>).
- D. DOD 7000.14-R, Financial Management Regulations (hereinafter “DOD FMR,” found at: <http://www.dod.mil/comptroller/fmr/>).
- E. Department of Air Force, Instr. 65-601, Volume I, ch. 2, para. 2.3, Budget Guidance and Procedures (24 Dec. 2002) [hereinafter AFI 65-601, vol. I], available at <http://www.e-publishing.af.mil/pubfiles/af/65/afi65-601v1/afi65-601v1.pdf>.
- F. Principles of Fed. Appropriations Law, (commonly referred to as the “Red Book”) 2d ed., vol. I, chs. 2-4, GAO/OGC 91-5 (July, 1991), found at: <http://www.gao.gov/special.pubs/og91005.pdf>.
- G. A Glossary of Terms Used in the Federal Budget Process, GAO/AFMD-2.1.1 (Jan. 1993) (found at: <http://161.203.16.4/t2pbat6/148403.pdf>).
- H. OMB Cir. A-11, Preparing, Submitting, and Executing the Budget (Jun. 2002), § 51 available at: <http://www.whitehouse.gov/omb/circulars/a11/02toc.html>.

II. CONSTITUTIONAL, STATUTORY, & OTHER BACKGROUND.

- A. [U.S. Constitution, Art. I, § 9](#) provides that “[N]o Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law.” As a result, Congress must annually pass and the President must sign Appropriations Acts before agencies can expend any money.
- B. The Supreme Court’s Fiscal Philosophy: “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.” [United States v. MacCollom](#), 426 U.S. 317 (1976).
- C. The Purpose Statute.
1. [31 U.S.C. § 1301\(a\)](#) provides:

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.
 2. Congress enacted this statutory control in the Act of March 3, 1809, 2 Stat. 535. This act, generally referred to as the “Purpose Statute,” was passed as part of a reorganization of the War, Navy, and Treasury Departments to limit the discretion of the Executive Branch in spending appropriations.
- D. Three-Part Test for a Proper Purpose. The Comptroller General has determined the following three conditions must be met in order to expend appropriated funds:
1. The expenditure of an appropriation must be for a particular statutory purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation.
 2. The expenditure must not be prohibited by law.
 3. The expenditure must not be otherwise provided for; it must not fall within the scope of some other appropriation.

See e.g., [Secretary of Interior](#), B-120676, 34 Comp. Gen. 195 (1954).

III. THE APPROPRIATION ACTS (WHAT ARE THE OBJECTS FOR WHICH THE APPROPRIATIONS WERE MADE?)

- A. An appropriation is a statutory authorization “to incur obligations and make payments out of the Treasury for specified purposes.” See [A Glossary of Terms Used in the Federal Budget Process](#), p.16, GAO/AFMD-2.1.1 (Jan. 1993).
- B. In recent years Congress has, on an annual basis, passed thirteen (13) appropriations acts. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. See generally, [Principles of Fed. Appropriations Law](#), 2d ed., vol. I, ch. 1, 1-14 – 1-15, GAO/OGC 91-5 (July, 1991). These annual appropriation acts are typically broken down as follows:
1. Department of Defense.
 2. Military Construction.
 3. Agriculture, Rural Development, Food and Drug Administration and Related Agencies.
 4. Commerce, Justice, and State, the Judiciary and Related Agencies.
 5. District of Columbia.
 6. Energy and Water Development.
 7. Foreign Operations and Export Financing and Related Programs.
 8. Interior and Related Agencies.
 9. Labor, Health and Human Services, and Education, and Related Agencies.
 10. Legislative Branch.
 11. Transportation and Related Agencies.

12. Treasury and General Government Appropriations.
 13. Veterans Affairs and Housing and Urban Development, and Independent Agencies.
- C. Optimally, each appropriation act is signed into law prior to the end of the preceding fiscal year. If that does not occur, consult Chapter 10 (Continuing Resolution Authority and Funding Gaps), *infra*, to determine the impact.
- D. Researching Appropriation Acts. In addition to LEXISTM- and WestlawTM-based research, one can utilize the Thomas website (<http://thomas.loc.gov/>) within the Library of Congress to conduct research on legislation enacted since 1973. This website also has a consolidated listing of appropriation legislation enacted since 1999 and a list of pending appropriation bills for the current or upcoming fiscal year.
- E. Defense Appropriations.
1. In each of the two annual appropriations acts devoted to DOD, Congress grants multiple appropriations. See e.g., [Department of Defense Appropriation Act for Fiscal Year 2004, Pub. L. No. 108-87, 117 Stat. 1054 \(Sept. 30, 2003\)](#) (providing 59 separate appropriations to DOD and 4 other appropriations to non-DOD entities); [Military Construction Appropriations Act for Fiscal Year 2003, Pub. L. No. 107-249 \(Oct. 23, 2002\)](#) (providing an additional 20 appropriations to DOD).
 2. Overview of the Major Defense Appropriations. The following is a list of the larger and more important defense appropriations followed by a general description, extracted from the appropriations acts themselves, of the purposes to which these appropriations may be applied.
 - a. Military Personnel. Used for “pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations”

- b. Ammunition Procurement. Used for “construction, procurement, production, and modification of ammunition, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including ammunition facilities authorized by section 2854 of title 10, United States Code, and the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes”

- c. Other Procurement. There are several other procurement appropriations given to the various services, including one for each of the following: aircraft, missiles, Weapons & Tracked Vehicles, and Shipbuilding and Conversion (Navy only). The language utilized in each of these appropriations is similar to that utilized in the Ammunition Procurement Appropriation above. There is also a residual catch-all procurement appropriation entitled “Other Procurement” which is used for “construction, procurement, production, and modification of vehicles; . . . communications and electronic equipment; other support equipment; spare parts, ordnance, and accessories therefor; specialized equipment and training devices”

- d. Research, Development, Test and Evaluation. Used for “expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment”

- e. Military Construction. Used for “acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property”

- f. Family Housing Construction. Used for “expenses of family housing for the [Service] for construction, including acquisition, replacement, addition, expansion, extension and alteration, as authorized by law”

Appropriation Type	Army	Navy	Marine Corps	Air Force	OSD
Military Personnel	21*2010	17*1453	17*1105	57*3500	N/A
Reserve Personnel	21*2070	17*1405	17*1108	57*3700	N/A
National Guard Personnel	21*2060	N/A	N/A	57*3850	N/A
Operations & Maintenance	21*2020	17*1804	17*1106	57*3400	97*0100
Operations & Maintenance, Reserve	21*2080	17*1806	17*1107	57*3740	N/A
Operations & Maintenance, National Guard	21*2065	N/A	N/A	57*3840	N/A
Procurement, Aircraft	21*2031	17*1506		57*3010	N/A
Procurement, Missiles	21*2032	17*1507 (not separate – the combined appropriation is entitled Weapons Procurement)	17*1109	57*3020	N/A
Procurement, Weapons & Tracked Vehicles	21*2033			N/A	N/A
Procurement, Other	21*2035			17*1810	57*3080
Procurement, Ammunition	21*2034	17*1508		57*3011	N/A
Shipbuilding & Conversion	N/A	17*1611		N/A	N/A
Research, Development, Test, & Evaluation	21*2040	17*1319		57*3600	97*0400
Military Construction	21*2050	17*1205		57*3300	97*0500
Family Housing Construction	21*0702	17*0703		57*0704	97*0706
Reserve Construction	21*2086	17*1235		57*3730	N/A
National Guard Construction	21*2085	N/A	N/A	57*3830	N/A

Table 2-1

* The asterisk in the third digit is replaced with the last number in the relevant fiscal year (i.e. Operations & Maintenance, Army funds for FY2004 would be depicted as 2142020).

** Source for the codes found in Table 2-1: [DOD FMR, vol. 6B, App. A \(Nov. 2001\)](#).

- g. Operations and Maintenance. Used for “expenses, not otherwise provided for, necessary for the operation and maintenance of the [Service], as authorized by law . . .”
- 3. Earmarks. An earmark occurs when Congress designates a portion of an appropriation for a particular purpose by way of legislative language within the appropriation. See GAO, [A Glossary of Terms Used in the Federal Budget Process](#), p.37, GAO/AFMD-2.1.1 (Jan. 1993).

Example: In the Operations and Maintenance, Army appropriation for FY2004, Congress gave the Army \$25,029,346,000. It also told the Army that out of that amount, “not to exceed \$11,034,000 can be used for emergencies and extraordinary expenses” and “not less than \$355,000,000 shall be made available only for conventional ammunition care and maintenance.” Both of these provisions are examples of earmarks. The first is a “ceiling” earmark meaning the Army may decide to spend less than \$11,034,000 for the designated purpose (emergencies and extraordinary expenses) whereas the second is a “floor” earmark meaning the Army must spend at least that amount on the designated purpose but may decide to spend more.

IV. LEGISLATION IMPACTING THE USAGE OF AN APPROPRIATION.

- A. Impacts Found Within the Actual Appropriation.
 - 1. Within the actual appropriation, Congress often provides specific direction on the uses to be made of that appropriation.
 - 2. Examples:
 - a. The language utilized in the “Ammunition Procurement, Army” appropriation, quoted on page 2-5 *supra*, narrowly defines the uses the agency can make of that appropriation. Clearly, we cannot use it to pay the salaries of military service members, even those who carry out the ammunition procurement. Likewise, we could not use those funds to buy engines for attack helicopters.

- b. By contrast, the language utilized in the “Operation And Maintenance, Army” appropriation, quoted on page 2-7 *supra*, only broadly prescribes the uses the agency can make of that particular appropriation. Thus, we can use it to pay any expense not covered by a more specific appropriation so long as we determine that expense is necessary and authorized by law.

B. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency that a subsequent appropriation act will fund. [Principles of Fed. Appropriations Law](#), vol. I, ch. 2, 2-33, GAO/OGC 91-5 (2d ed. 1991). This organic legislation provides the agency with authority to conduct the program, function, or mission and to utilize appropriated funds to do so.

1. Example: [10 U.S.C. § 111](#) establishes the Department of Defense as an executive department. Various statutes scattered mainly throughout Title 10 of the United States Code establish programs or functions that the department is to carry out. See e.g., [10 U.S.C. § 1090](#) (giving the Secretary of Defense the mission to “identify, treat, and rehabilitate members of the armed forces who are dependent on drugs or alcohol”).
2. Organic legislation may be found in appropriation acts, authorization acts, or “stand-alone” legislation. It may also be codified or uncodified.
3. Organic legislation rarely provides any money for the agency, program, or activity it establishes.

C. Authorization Act.

1. An authorization act is a statute, passed annually by Congress that authorizes the appropriation of funds for programs and activities. See GAO, [A Glossary of Terms Used in the Federal Budget Process](#), p.17, GAO/AFMD-2.1.1 (Jan. 1993).

2. There is no general requirement to have an authorization in order for an appropriation to occur. Congress has, by statute, created certain situations in which it must authorize an appropriation, however.

Example: [10 U.S.C. § 114\(a\)](#) states that “No funds may be appropriated for any fiscal year” for certain purposes, including procurement, military construction, and/or research, development, test and evaluation “unless funds therefore have been specifically authorized by law” (emphasis added).

3. An authorization act does not provide budget authority. That authority stems from the appropriations act.
 - a. Congress may choose to place limits in the authorization act on the amount of appropriations it may subsequently provide, however.

Example: In Section 101 of the [National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-117, 115 Stat. 2230 \(Jan. 10, 2002\)](#), Congress provided as follows:

Funds are hereby authorized to be appropriated for fiscal year 2002 for procurement for the Army as follows: (1) For aircraft, \$2,075,372,000. (2) For missiles, \$1,086,954,000. (3) For weapons and tracked combat vehicles, \$2,348,145,000. (4) For ammunition, \$1,187,233,000. (5) For other procurement, \$4,044,080,000.

- b. In the alternative, Congress may also authorize the appropriation of “such sums as may be necessary” for a particular program or function.

Example: In Section 1063 of [the National Defense Authorization Act for Fiscal Year 2002](#), Congress provided as follows:

Section 3(e) of the Radiation Exposure Compensation Act (42 U.S.C. 2210 note) is amended to read as follows: “(e) APPROPRIATION.—“(1) IN GENERAL.—There are appropriated to the Fund, out of any money in the Treasury not otherwise appropriated, for fiscal year 2002 and each fiscal year thereafter through fiscal year 2011, **such sums as may be necessary**, not to exceed the applicable maximum amount specified in paragraph (2), to carry out the purposes of the Fund (emphasis added).

- 4. Resolving Conflicts Between an Appropriation Act and an Authorization Act. [See generally, Principles of Fed. Appropriations Law](#), vol. I, ch. 2, 2-36 to 2-44, GAO/OGC 91-5 (2d ed. 1991).
 - a. The general rule regarding statutory construction is “that statutes should be construed harmoniously so as to give maximum effect to both whenever possible.” [Reduction of District of Columbia Superior Court's Appropriations](#), B-258163, 1994 U.S. Comp. Gen. LEXIS 746 (Sept. 29, 1994).
 - b. If there is an irreconcilable conflict between two statutes or if the latter of the two statutes is clearly intended to substitute for the prior statute, the more recent statute governs. The “intention of the legislature to repeal must be clear and manifest” in either case, however. [Posadas v. National City Bank](#), 296 U.S. 497, 503 (1936).

- c. Differences in Amount. In general, Congress enacts authorization acts before it enacts appropriation acts. Application of the above rules will therefore usually result in the agency being able to use the amount specified in the appropriation act, regardless of whether it is more or less than what is in the authorization act.

Example 1: For FY 2002, Congress authorized the appropriation of \$1,187,233,000 to the Army for the procurement of ammunition, but later actually appropriated \$1,200,465,000 to the Army. The Army may spend the entire \$1,200,465,000 for ammunition procurement.

Example 2: For FY 2002, Congress authorized the appropriation of \$2,075,372,000 to the Army for the procurement of aircraft, but later actually only appropriated \$1,984,391,000 for aircraft procurement. The Army may only spend the lower amount that was appropriated.

- d. Differences in Purpose. An authorization act provision will not expand the scope of availability of a particular appropriation beyond what is permitted by the terms utilized in the appropriation act. See generally, [Principles of Fed. Appropriations Law](#), vol. I, ch. 2, 2-43 to 2-44, GAO/OGC 91-5 (2d ed. 1991). An authorization act may decrease the scope of availability of an appropriation by placing further restrictions on the use of those funds, however.

D. Miscellaneous Statutory Provisions.

1. Congress often enacts statutes that expressly allow, prohibit, or place restrictions upon the usage of appropriated funds.

Example of Prohibition: [10 U.S.C. § 2246](#) prohibits DOD from using its appropriated funds to operate or maintain a golf course except in foreign countries or isolated installations within the United States.

Example of Authorization: [10 U.S.C. § 520b](#) permits DOD to use its appropriated funds “for the issue of authorized articles to applicants for enlistment.”

2. These permissions and restrictions may be either codified or uncodified.
3. The permissions and restrictions may also be either temporary or permanent. If the restriction arises out of a provision in an appropriation act that does not expressly state the duration of the restriction, an agency may presume the restriction is effective only for the fiscal year covered by the act. This presumption may be overcome if the restriction uses language indicating futurity, or if the legislation clearly indicates its permanent character. See Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, B-222097, 65 Comp. Gen. 588 (1986) (indicating that a restriction applicable to “this Act or any other Act” does not indicate futurity).

4. Locating Pertinent Statutes.

- a. The U.S. Code is broken down into titles which typically cover a given subject matter area.

Example: Statutes pertaining to DOD are typically found in **Title 10**, so if I want to find a statute dealing only with restriction on DOD’s use of its appropriations, it will likely be found in Title 10. Statutes dealing with all federal employees are generally found in **Title 5**, so if I want to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, I would probably start with Title 5.

- b. You can run a general boolean search on either a specialized legal database, such as LEXISTM or WestlawTM, or on the U.S. Code website (located at <http://www.access.gpo.gov/congress/cong013.html>).
- c. U.S. Code Annotated Index. This index contains a listing arranged by subject of the codified U.S. statutes.

E. Legislative History.

1. Legislative history is any Congressionally-generated document related to a bill from the time the bill is introduced to the time it is passed. In addition to the text of the bill itself, it includes conference and committee reports, floor debates, and hearings.
2. Legislative history can be very useful for resolving ambiguities or confirming the intent of Congress.
3. If the underlying statute clearly conveys Congress' intent, however, agencies will not be further restricted by what is included in legislative history. [Intertribal Bison Cooperative](#), B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001); [ANGUS Chem. Co.](#), B-227033, Aug. 4, 1987, 87-2 CPD ¶ 127 (stating that "there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into law that which is not there"); [SeaBeam Instruments, Inc.](#), B-247853.2, July 20, 1992, 92-2 CPD ¶ 30 (indicating that if Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions); [LTV Aerospace Corp.](#), B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203 (indicating the Navy was not bound by a provision within the conference report accompanying the 1975 Defense Appropriations Act stipulating that adaptation of the Air Force's F-14 to enable it to be capable of carrier operations was the prerequisite for the Navy's use of \$20 million in funds provided for a Navy fighter).
4. Legislative history may also not be utilized to justify an otherwise improper expenditure. [Alberto Mora](#), Gen. Counsel, U.S. Info. Agency, B-248284.2, Sept. 1, 1992 (unpub.) (agency violated the purpose statute when it utilized construction funds to host an overseas exhibit that should have been funded with salaries and expenses funds where the agency had only received informal written approval from the Chairmen of the House and Senate Subcommittees to reprogram the construction funds into salaries and expenses funds).

V. OTHER DOCUMENTS IMPACTING THE USAGE OF AN APPROPRIATION.

A. Budget Request Documentation.

1. Agencies are required to justify their budget requests. [OMB Cir. A-11, Preparing, Submitting, and Executing the Budget \(Jun. 2002\)](#), § 51.
2. Within DOD, Volumes [2A](#) and [2B](#) of the DOD FMR provides guidance on the documentation that must be generated to support defense budget requests. These documents are typically referred to as Justification Books, with a book generated for each appropriation. Within Volume 2A and 2B:
 - a. [Chapter 2](#) deals with justification documents supporting the Military Personnel Appropriations (also known as “M documents”).
 - b. [Chapter 3](#) deals with justification documents supporting the Operations Appropriations (also known as “O documents”).
 - c. [Chapter 4](#) deals with justification documents supporting the Procurement Appropriations (also known as “P documents”).
 - d. [Chapter 5](#) deals with justification documents supporting the Research, Development, Test and Evaluation Appropriations (also known as “R documents”).
 - e. [Chapter 6](#) deals with justification documents supporting the Military Construction Appropriations (also known as “C documents”).
3. The document is prepared by the actual end user of the funds and is filtered through agency command channels until it is ultimately reviewed by the Office of Management and Budget and submitted by the President as part of the federal government’s overall budget request.

4. These justification documents contain a description of the proposed purpose for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purpose requested, unless otherwise prohibited.
5. Agencies generally place their past and current year budget submissions onto the web.
 - a. The President's overall budget materials can be found at: <http://w3.access.gpo.gov/usbudget/index.html>.
 - b. The Defense-wide budget materials can be found at: http://www.dtic.mil/comptroller/fy2003budget/budget_justification/index.html.
 - c. The Army's budget materials can be found at: <http://www.asafm.army.mil/budget/fybm/fybm.asp>.
 - d. The Air Force's budget materials can be found at: <http://www.saffm.hq.af.mil/FMB/pb/2003/afpb.html>.
 - e. The Navy's budget materials can be found at: http://navweb.secnav.navy.mil/pubbud/03pres/db_u.htm.
 - f. The National Aeronautic and Space Administration's budget materials can be found at: <http://ifmp.nasa.gov/codeb/budget2004/>.
 - g. The Federal Aviation Administration's budget can be found at: http://www2.faa.gov/aba/html_budget/index.html.
 - h. The Environmental Protection Agency's budget materials can be found at: <http://www.epa.gov/ocfo/budget/budget.htm>.
 - i. The Department of the Interior's budget materials can be found at: <http://www.doi.gov/budget/>.

B. Agency Regulations. See generally, [Principles of Fed. Appropriations Law](#), vol. I, ch. 3, GAO/OGC 91-5 (2d ed. 1991).

1. Background. When Congress enacts organic legislation establishing a new agency or giving an existing agency a new function or program, it rarely prescribes exact details about how the agency will carry out that new mission. Instead, Congress leaves it up to the agency to implement the statutorily-delegated authority in agency-level regulations.
2. 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. [Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 \(Nov. 30, 2001\)](#).
3. Agency-level regulations may also place restrictions on the use of appropriated funds.

Example: The GAO has determined that all federal agencies may purchase commercially-prepared business cards using appropriated funds. Each of the defense services has determined it will only buy commercially prepared business cards for its recruiters and criminal investigators. Everyone else within DOD must buy card stock and prepare their own cards in-house. [See AR 25-30, The Army Publishing Program, para. 7-11 \(July 2002\)](#); [DOD Directive 5330.3/AFSUP1, Defense Automated Printing Service \(18 Feb. 1999\)](#); [AFI 65-601, vol. 1, para. 4.36](#); and Department of the Navy (Financial Management and Comptroller) memorandum, subject: Business Cards (9 Mar. 1999).

4. Researching Defense Regulations.
 - a. The DOD and each service has a website containing electronic copies of most of their regulations. Unfortunately, only the Air Force and Marine Corps websites allow you to perform a boolean search of the text of the regulations; the others only permit a search of the titles to the regulations.

(1) DOD Regulations: <http://www.dtic.mil/whs/directives/>.

- (2) Army Regulations: <http://www.usapa.army.mil/>.
 - (3) Air Force Regulations: <http://www.e-publishing.af.mil/>.
 - (4) Navy Regulations: <http://neds.nebt.daps.mil/>.
 - (5) Marine Corps Regulations:
<https://www.doctrine.quantico.usmc.mil/>.
- b. JAGCNET. Those individuals with a JAGCNET password may conduct a search of the text of all publications contained within the JAGCNET library of publications (found at: <https://www.jagcnet.army.mil/LaawsXXI/cds.nsf>).
 - c. There is also a very user-friendly, key word-searchable website dedicated to the DOD Financial Management Regulation, DOD 7000.14-R (found at: <http://www.dod.mil/comptroller/fmr/>).
 - d. By regulation, the DOD has assigned most types of expenditures to a specific appropriation. See e.g. [DFAS-IN Manual 37-100-XXXX](#), [The Army Management Structure \(July XXXX\)](#). The manual is reissued every FY. Note: XXXX= appropriate FY.
 - e. [Administrative Law Topic/Reference Index](#). JAGCNET contains a listing organized by subject matter which cross-references pertinent statutes and/or regulations.

VI. NECESSARY EXPENSE.

- A. The Purpose Statute does not require Congress to specify every item of expenditure in an appropriations act. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. See [HUD Gun Buyback Initiative, B-285066, May 19, 2000 \(unpub.\)](#). See also [Department of Labor—Interagency Agreement between Employment and Training Admin. and Bureau of Int'l Affairs, B-245541, 71 Comp. Gen. 402 \(1992\)](#); [Department of the Army—Purchase of Commercial Calendars, B-211477, 62 Comp. Gen. 566 \(1983\)](#).

- B. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. Secretary of State, B-150074, 42 Comp. Gen. 226, 228 (1962); Major General Anton Stephan, A-17673, 6 Comp. Gen. 619 (1927).
- C. In some instances, Congress has specifically authorized expenditures as “necessary expenses” of an existing appropriation. See e.g., [10 U.S.C. § 2241\(b\)](#) (authorizing DOD to use its appropriated funds for “all necessary expenses, at the seat of the Government and elsewhere, in connection with communication and other services and supplies that may be necessary for the national defense); [10 U.S.C. § 1124](#) (authorizing the Secretary of Defense to “incur necessary expense for the honorary recognition of a member of the armed forces” who increases the efficiency or improves operations); [5 U.S.C. §§ 4503-4504](#) (authorizing same for civilian employees).
- D. Necessary Expense Defined.
1. “[A]n expenditure is permissible if it is **reasonably necessary** in carrying out an authorized function or will **contribute materially** to the effective accomplishment of that function . . .” Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) (emphasis added).
 2. A necessary expense does not have to be the only way, or even the best way, to accomplish the object of an appropriation. Secretary of the Interior, B-123514, 34 Comp. Gen. 599 (1955). However, a necessary expense must be more than merely desirable. Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).
 3. Determinations are fact/agency/purpose/appropriation specific. See [Federal Executive Board—Appropriations—Employee Tax Returns—Electronic Filing](#), B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129; [Use of Appropriated Funds for an Employee Electronic Tax Return Program](#), B-239510, 71 Comp. Gen. 28 (1991).

VII. TYPICAL QUESTIONABLE EXPENSES.

- A. Agencies may have specific guidance about “questionable” expenditures. See, e.g., AFI 65-601, Budget Guidance and Procedures, vol. 1., ch. 4, §§ K-O (24 December 2002).
- B. Clothing. Buying clothing for individual employees generally does not materially contribute to an agency’s mission performance. Clothing is, therefore, generally considered a personal expense unless a statute provides to the contrary. See IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized).
1. Statutorily-Created Exceptions. See 5 U.S.C. § 7903 (authorizing purchase of special clothing, for government benefit, which protects against hazards); 10 U.S.C. § 1593 (authorizing DOD to pay an allowance or provide a uniform to a civilian employee who is required by law or regulation to wear a prescribed uniform while performing official duties); and 29 U.S.C. § 668 (requiring federal agencies to provide certain protective equipment and clothing pursuant to OSHA). See also Purchase of Insulated Coveralls, Vicksburg, Mississippi, B-288828, Oct. 3, 2002 (unpub.); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Eng’s, B-289683, Oct. 7, 2002 (unpub.) (both providing an excellent overview of each of these authorities).
 2. Opinions and Regulations On-point. See also White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (authorizing tuxedo rental or purchase); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (authorizing safety shoes); DOD FMR vol. 10, ch. 12, para. 120220; AR 670-10, Furnishing Uniforms or Paying Uniform Allowances to Civilian Employees, (1 July 1980).

- C. Food. Buying food for individual employees – at least those who are not away from their official duty station on travel status – generally does not materially contribute to an agency’s mission performance. As a result, food is generally considered a personal expense. See Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (determining coffee and donuts to be an unauthorized entertainment expense).
1. GAO-sanctioned exception where food is included as part of a facility rental cost. GAO has indicated that it is all right for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and comparably priced to the fees of other facilities that do not include food as part of their rental fee. See Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, Dec. 1, 1999 (unpub.).
 2. Regulatory-based “Light Refreshments” Exception. Through 27 January 2003, federal agencies commonly paid for “light refreshments” at government-sponsored conferences under a regulatory exception found in the travel regulations where a majority of the attendees were from a different permanent duty station than the sponsoring activity. See Federal Travel Regulation, Part 301-74. See also Joint Federal Travel Regulation (JFTR), ch. 2, para. U2550; Joint Travel Regulation (JTR), ch. 4, para. C4950. The JFTR as well as the JTR may be found at: <http://www.dtic.mil/perdiem/trvlregs.html>. That exception was recently overturned, at least with respect to paying for the refreshments given to any personnel not on travel status. See Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, Jan. 27, 2003 (unpub.).
 3. Statutory-based Exceptions.
 - a. Basic Allowance for Subsistence. Under 37 U.S.C. § 402, DOD may pay service members a basic allowance for subsistence.

- b. Formal Meetings and Conferences. Under [5 U.S.C. § 4110](#), the government may pay for meals while government employees are attending meetings or conferences if: 1) the meals are incidental to the meeting; 2) attendance of the employees at the meals is necessary for full participation in the meeting; and 3) the employees are not free to take meals elsewhere without being absent from the essential business of the meeting.
- (1) This exception does **not apply to purely internal business meetings or conferences sponsored by government agencies**. See [Pension Benefit Guar. Corp.—Provision of Food to Employees](#), B-270199, 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996); [Meals for Attendees at Internal Gov’t Meetings](#), B-230576, 68 Comp. Gen. 604 (1989).
 - (2) This exception also does **not apply to military members (it applies only to civilian employees)**. But see JFTR, ch. 4, para. U4510, which authorizes military members to be reimbursed for occasional meals within the local area of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside limits of the PDS.
- c. Training. Under [5 U.S.C. § 4109](#) (applicable to civilian employees) and [10 U.S.C. § 4301](#) and [10 U.S.C. § 9301](#) (applicable to service members), the government may provide meals if necessary to achieve the objectives of a training program. See [Coast Guard—Meals at Training Conference](#), B-244473, Jan. 13, 1992 (unpub.).
- (1) The GAO and other auditors will not merely defer to an agency’s characterization of a meeting as “training.” Instead, they will closely scrutinize the event to ensure it was a valid training activity and that the food was actually necessary to achieve the objectives of that training. See [Corps of Eng’rs—Use of Appropriated Funds to Pay for Meals](#), B-249795, May 12, 1993 (unpub.) (determining that quarterly managers meetings of the Corps did not constitute “training”); See also [Pension Benefit Guar. Corp.—Provision of Food to Employees](#), *supra*. (determining that food was not needed for employee to obtain the full benefit of training).

(2) This exception is often utilized to provide small "samples" of ethnic foods during an ethnic or cultural awareness program. See Army — Food Served at Cultural Awareness Celebration, B-199387, 1982 U.S. Comp. Gen. LEXIS 1284 (Mar. 23, 1982). See also AFI 65-601, vol. 1, para. 4.26.1.2.

d. Award Ceremonies. Under 5 U.S.C. §§ 4503-4504 (civilian incentive awards) and 10 U.S.C. § 1124 (military cash awards), federal agencies may “incur necessary expenses” including purchasing food to honor an individual that is given an award made on the basis of one or more of the above statutory authorities.

(1) Relevant GAO Opinions. Defense Reutilization and Mktg. Serv. Award Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997) (authorizing the agency expending \$20.00 per attendee for a luncheon given to honor awardees under the Government Employees Incentive Awards Act); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies [applies to both 5 U.S.C. § 4503 and 10 U.S.C. § 1124] which expressly permit agency to “incur necessary expense for the honorary recognition. . .”).

(2) Relevant Regulations. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DoD 1400.25-M, subchapter 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993). For Air Force civilians, the award must also be made in accordance with AF Pam 36-2861, Civilian Recognition Guide (1 June 2000). See also AFI 65-601, vol. 1, para. 4.31.

- (3) **NOTE:** [10 U.S.C. § 1125](#) governs the Secretary of Defense's (SECDEF) authority to award medals, trophies, badges, etc. to service members. This statute does not have the express "incur necessary expense" language of 5 U.S.C. § 4503 or 10 U.S.C. § 1124. Therefore, food may not be purchased with appropriated funds and served at an awards ceremony conducted solely under the authority of 10 U.S.C. § 1125.
 4. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to pay for receptions for distinguished visitors. See discussion *infra* Part **X** of this chapter for an overview.
- D. Bottled Water. Bottled water generally does not materially contribute to an agency's mission accomplishment. It is therefore generally a personal expense.
 1. GAO-Sanctioned Exception Where Water is Unpotable. Agencies may use appropriated funds to buy bottled water where a building's water supply is unwholesome or unpotable. See [United States Agency for Int'l Dev.—Purchase of Bottled Drinking Water](#), B-247871, 1992 U.S. Comp. Gen. LEXIS 1170 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed "maximum contaminant level" and justified purchase of bottled water until problems with system could be resolved).
 2. Relevant Regulations. See also [DOD FMR, vol. 10, ch. 12, para. 120203](#) (permitting the purchase of water where the public water is unsafe or unavailable); [AFI 65-601, vol. 1, para. 4.45](#) (discussing the same); [AR 30-22, para. 5-19](#) (discussing the need to obtain approval from HQDA prior to purchasing bottled water, even in the context of a deployment / contingency).

- E. Workplace Food Storage and Preparation Equipment (i.e. microwave ovens; refrigerators; coffee pots). Buying food storage and/or preparation equipment generally does not materially contribute to an agency's mission performance. As a result, these items are generally considered to be a personal expense. Under a "necessary expense" analysis, the GAO has sanctioned the use of appropriated funds to buy food storage and preparation equipment when the purchase is "reasonably related to the efficient performance of agency activities, and not just for the personal convenience of individual employees."
1. This scenario generally arises when there are no commercial eating facilities proximately available. See e.g., Central Intelligence Agency- Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230 (determining that commercial facilities were not proximately available when the nearest one was a 15-minute commute away from the federal workplace). See also Letter to Mr. Jerome D. Fallon, B-180272, 1974 U.S. Comp. Gen. LEXIS 1820 (July 23, 1974) (approving purchase of sink and wall cabinet); Letter to Mr. R.J. Schullery, B-173149, 1971 U.S. Comp. Gen. LEXIS 2302 (Aug. 10, 1971) (approving purchase of utensils).
 2. Another possible scenario in which food storage and/or preparation equipment may be purchased is where an employee is forced to work extended hours during which there is no open and proximately located restaurant available. See Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (determining commercial facilities were unavailable when employees worked 24 hours a day, seven days a week and restaurants were not open during much of this time).

F. Personal Office Furniture and Equipment. Ordinary office equipment is reasonably necessary to carry out an agency's mission so appropriated funds may be used to purchase such items so long as they serve the needs of the majority of that agency's employees. If the equipment serves the needs of only a single individual or a specific group of individuals, then it is considered a personal expense rather than a "necessary expense" of the agency. This is true even if the equipment is essential for a particular employee to perform his or her job. Under such a scenario, it is the needs of that particular individual(s) that causes the item to be necessary. The item is not "essential to the transaction of official business from the Government's standpoint." Internal Revenue Service—Purchase of Air Purifier with Imprest Funds, B-203553, 61 Comp. Gen. 634 (1982) (disapproving reimbursement for air purifier to be used in the office of an employee suffering from allergies); See also Roy C. Brooks—Cost of special equipment-automobile and sacro-ease positioner, B-187246, 1977 U.S. Comp. Gen. LEXIS 221 (Jun. 15, 1977) (disapproving reimbursement of special car and chair for employee with a non-job related back injury); Cf. Office of Personnel Mgt.—Purchase of Air Purifiers, B-215108, July 23, 1984, 84-2 CPD ¶ 194 (allowing reimbursement for air purifiers to be used in common areas thus benefiting the needs of all building occupants).

1. Federal Supply Schedule Exception. If the desired equipment is available from off of the Federal Supply Schedule, the agency may use appropriated funds to purchase it even if the chair does not serve the needs of the majority of workers. See Purchase of Heavy Duty Office Chair, B-215640, 1985 U.S. Comp. Gen. LEXIS 1805 (Jan. 14, 1985) (allowing reimbursement for a heavy-duty office chair normally used only by air traffic controllers since the chair was available from off of the Federal Supply Schedule).

2. Exception Based Upon Statutory Authority. The Rehabilitation Act of 1973, found at [29 U.S.C. § 701 et seq.](#), requires federal agencies to implement programs to expand employment opportunities for handicapped individuals. The regulations implementing this Act require agencies to make “reasonable accommodations” to include purchasing special equipment or devices in order to carry out these programs. [See 29 C.F.R. 32.3](#). Thus, agencies may use appropriated funds to purchase equipment for its **qualified handicap employees** if doing so is a reasonable accommodation. [See Use of Appropriated Funds to Purchase a Motorized Wheelchair for a Disabled Employee](#), B-240271, 1990 U.S. Comp. Gen. LEXIS 1128 (Oct. 15, 1990) (authorizing purchase); [see also Equal Employment Opportunity Commission—Special Equipment for Handicapped Employees](#), B-203553, 63 Comp. Gen. 115 (1983) (affirming prior opinion in which GAO had determined agency could not purchase air purifiers for person with allergies since the agency had not demonstrated the person met the regulatory definition of a handicap individual).
- G. Entertainment. Entertaining people generally does not materially contribute to an agency’s mission performance. As a result, entertainment expenses are generally considered to be a personal expense. [See HUD Gifts, Meals, and Entm’t Expenses](#), B-231627, 68 Comp. Gen. 226 (1989); [Navy Fireworks Display](#), B-205292, Jun. 2, 1982, 82-2 CPD ¶ 1 (fireworks unauthorized entertainment).
1. Statutory-based Exceptions. Congress does occasionally provide permanent or one-time authority to entertain. [See Claim of Karl Pusch](#), B-182357, Dec. 9, 1975 (unpub.) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club—twice); [Golden Spike Nat’l Historic Site](#), B-234298, 68 Comp. Gen. 544 (1989) (discussing authority to conduct “interpretive demonstrations” at the 1988 Annual Golden Spike Railroader’s Festival).
 2. Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. [Internal Revenue Serv.—Live Entm’t and Lunch Expense of Nat’l Black History Month](#), B-200017, 60 Comp. Gen. 303 (1981) (determining a live African dance troupe performance conducted as part of an Equal Employment Opportunity (EEO) program was a legitimate part of employee training).

3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to entertain distinguished visitors to the agency. See discussion *infra* Part X of this chapter for an overview. See also To The Honorable Michael Rhode, Jr., B-250884, March 18, 1993 (unpub.) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).
- H. Decorations. Under a “necessary expense” analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. See Department of State & Gen. Serv. Admin.—Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (modest expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee proper); But see The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (determining Christmas cards were not a proper expenditure because they were for personal convenience). See also AFI 65-601, vol. 1, para. 4.26.2. NOTE: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, Hanukkah, etc.)
- I. Business Cards. Under a “necessary expense” analysis, the GAO has recently sanctioned the use of appropriated funds to purchase business cards for agency employees. See Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, B-280759, Nov. 5, 1998 (purchase of business cards with appropriated funds **for government employees who regularly deal with public or outside organizations** is a proper “necessary expense”).
1. This case “overturned” a long history of Comptroller General’s decisions holding that business cards were a personal expense because they did not materially contribute to an agency’s mission accomplishment. See, e.g., Forest Serv.—Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).

2. More Restrictive Agency Level Regulations. The military departments have implemented policies that permit only recruiters and criminal investigators to purchase commercially prepared business cards. All others are permitted to use appropriated funds to purchase card stock and printer ink and then use in-house computing resources to print their own business cards. [See AR 25-30, The Army Publishing and Printing Program, para. 11-11 \(21 June 1999\)](#); [DOD Directive 5330.3/AFSUP1, Defense Automated Printing Service \(18 Feb. 1999\)](#); [AFI 65-601, vol. 1, para. 4.36](#); Department of the Navy (Financial Management and Comptroller) memorandum, subject: Business Cards (9 Mar. 1999); [but see Department of Defense memorandum, dated 15 July 1999 and Department of the Army memorandum, dated 2 August 1999 \(indicating agencies may procure commercially prepared business cards from the Lighthouse for the Blind if the cost of procuring the cards is equivalent to or less than the cost of producing the cards on a personal computer\).](#)
- J. Telephones. Even though telephones might ordinarily be considered a “necessary expense,” appropriated funds may not generally be used to install telephones in private residences or to pay the utility or other costs of maintaining a telephone in a private residence. Congress decided to prohibit government phones in personal residences because their use was subject to great abuse. [See 31 U.S.C. § 1348](#). [See also Centers for Disease Control and Prevention—Use of Appropriated Funds to Install Tel. Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180 \(appropriated funds may not be used to install telephone lines in Director’s residence\)](#); [Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker, B-240276, 70 Comp. Gen. 643 \(1991\) \(agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate\).](#)
1. Exceptions for DOD and State Department. The above prohibition does not apply to the installation, repair, or maintenance of telephone lines in residences owned or leased by the U.S. Government. It also does not apply to telephones in private residences if the SECDEF determines they are necessary for national defense purposes. [See 31 U.S.C. § 1348\(a\)\(2\) and \(c\)](#). [See also Timothy R. Manns—Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 \(1989\) \(telephone in temporary quarters allowed\)](#). DOD may install telephone lines in the residences of certain volunteers who provide services that support service members and their families, including those who provide medical, dental, nursing, or other health-care related services as well as services for museum or natural resources programs. [See 10 U.S.C. § 1588\(f\)](#).

2. Exception for data transmission lines. If the phone will be used to transmit data, the above prohibition does not apply. [See Federal Communications Comm'n—Installation of Integrated Servs. Digital Network, B-280698, Jan. 12, 1999 \(unpub.\)](#) (agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency's commissioners to agency's local area network).

3. Cell Phones. The above prohibition only applies to phones installed in a personal residence and therefore does not prevent an agency from purchasing cell phones for its employees, if they are otherwise determined to be a necessary expense. Agencies may also reimburse their employees for the costs associated with any official government usage of personal cell phones, but such reimbursement must cover the actual costs – not the estimated costs – of the employee. [See Reimbursing Employees' Government Use of Private Cellular Phones at a Flat Rate B-287524, Oct. 22, 2001 \(unpub.\)](#) (indicating that the agency may not, however, pay the employees a flat amount each month – in lieu of actual costs – even if the calculation of that flat amount is made using historical data); [see also Nuclear Regulatory Commission: Reimbursing Employees for Official Usage of Personal Cell Phones, B-291076, March 6, 2003 \(unpub.\)](#).

4. Exception for teleworking. In 1996, Congress authorized federal agencies to install telephones and other *necessary equipment* in personal residences for purposes of teleworking. [See Pub. L. No. 104-52, § 620](#). Congress also required the Office of Personnel Management (OPM) to develop guidance on teleworking that would be applicable to all federal agencies. That guidance may be found at: <http://www.opm.gov/wrkfam/telecomm/telecomm.htm>. The Air Force also has some additional guidance found in [AFI 65-601, vol I, para 4.24.6](#).

- K. Fines and Penalties. The payment of a fine or penalty generally does not materially contribute towards an agency's mission accomplishment. Therefore, fines and penalties imposed on government employees and service members are generally considered to be their own personal expense and not payable using appropriated funds.
1. Exception Based Upon "Necessary Expense" Rule. If, in carrying out its mission, an agency forces one of its employees to take a certain action which incurs a fine or penalty, that fine or penalty may be considered a "necessary expense" and payable using appropriated funds. Compare To The Honorable Ralph Regula, B-250880, Nov. 3, 1992 (military recruiter is personally liable for fines imposed for parking meter violations because he had the ability to decide where to park and when to feed the meter); with To The Acting Attorney Gen., B-147769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee forced to act pursuant to agency regulations and instructions).
 2. Note: Agencies may also pay fines imposed on the agency itself if Congress waives sovereign immunity. See, e.g., 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).
- L. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that an employee incurs to obtain a license or certificate enabling them to carry out their duties are considered a personal expense rather than a "necessary expense" of the government. See A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable). See also AFI 65-601, vol. 1, para. 4.47.
1. Exception—When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency—Request for Advance Decision, B-257895, Oct. 28, 1994 (unpub.) (drivers' licenses for scientists and engineers to perform security testing at remote sites); Air Force—Appropriations—Reimbursement for Costs of Licenses or Certificates, B-252467, June 3, 1994, (unpub.) (license necessary to comply with state-established environmental standards).

2. Potential Legislative Exception. [Section 1112 of the 2002 National Defense Authorization Act, Pub. L. No. 107-107, 115 Stat. 1654 \(2001\)](#), adds [5 U.S.C. §5757](#) permitting agencies to reimburse the following expenses that their **competitive service employees** incur:
 - a. professional accreditation;
 - b. state-imposed professional licenses;
 - c. professional certification; and
 - d. the costs of any examinations required to obtain such credentials.

NOTE: To date, there has been no regulatory implementation of this statutory authorization.

M. Awards (Including Unit or Regimental Coins and Similar Devices). Agencies generally may not use their appropriated funds to purchase “mementos” or personal gifts. See [EPA Purchase of Buttons and Magnets, B-247686, 72 Comp. Gen. 73 \(1992\)](#)(requiring a direct link between the distribution of the gift or memento and the purpose of the appropriation in order to purchase the item with appropriated funds). Congress has enacted various statutory schemes permitting agencies to give awards, however. These include:

1. Awards For Service Members. Congress has provided specific statutory authority for SECDEF to “award medals, trophies, badges, and similar devices” for “excellence in accomplishments or competitions.” [10 U.S.C. § 1125](#).
 - a. The Army has implemented this statute in [AR 600-8-22, Military Awards \(25 Feb. 1995\)](#). The bulk of this regulation deals with the typical medals and ribbons issued to service members (i.e. the Army Achievement Medal, the Meritorious Service Medal, the Purple Heart, etc).

- b. Chapter 11 of the regulation allows the presentation of other nontraditional awards for “excellence in accomplishments and competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, that is, tank gunnery, weapons competition, military aerial competition.”
- c. These awards must “be made on a one time basis where the achievement is unique and clearly contributes to increased effectiveness.” See [AR 600-8-22, para. 11-2](#).
- d. Theoretically, these awards could be made in the form of a coin, a trophy, a plaque, or a variety of other “similar devices.” The MACOM commander or head of the principal HQDA agency must approve the purchase of the particular item to be awarded, however. See [AR 600-8-22, para. 1-7d](#). See also [Air Force Purchase of Belt Buckles as Awards for Participants in a Competition](#), B-247687, 71 Comp. Gen. 346 (1992) (approving the use of appropriated funds to purchase belt buckles as awards for the annual "Peacekeeper Challenge").
- e. Specific Issues Concerning Unit or Regimental Coins. For a detailed discussion of the issues related to commanders’ coins, see [Major Kathryn R. Sommercamp, *Commanders’ Coins: Worth Their Weight in Gold?*, ARMY LAW., Nov. 1997, at 6](#).
- f. The Air Force and Navy/Marine Corps have similar awards guidance. See generally [AFPD 36-28, Awards and Decorations Programs](#), (1 Aug. 1997); [SECNAVINST 3590.4A, Award of Trophies and Similar Devices in Recognition of Accomplishments](#) (28 Jan. 1975). See also [AFI 65-601, vol. 1, para. 4.29](#); [OpJAGAF 1999/23, 1 Apr. 1999](#).

2. Awards For Civilian Employees. Congress has provided agencies with various authorities to pay awards to their employees. [See Chapter 45 of Title 5](#) of the U.S. Code. The most often utilized authority used as a basis to issue an award to a civilian employee is that found at [5 U.S.C. § 4503](#), permitting
 - a. Regulatory Implementation of this Authority. Awards to civilian employees must be made in accordance with [5 C.F.R. Part 451](#). Awards to DOD civilians must also be done in accordance with [DoD 1400.25-M, subchapter 451](#) as well as [DOD FMR, vol. 8, ch. 3, para. 0311 \(Aug. 1999\)](#). For Army civilians, the award must also be made in accordance with [AR 672-20, Incentive Awards \(29 January 1999\)](#) and [DA Pam 672-20, Incentive Awards Handbook \(1 July 1993\)](#). For Air Force civilians, the award must also be made in accordance with [AF Pam 36-2861, Civilian Recognition Guide \(1 June 2000\)](#).
 - b. Non-Cash Awards. The statute technically states that the “head of an agency **may pay a cash award** to, and incur necessary expense for the honorary recognition of” one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. The agency regulations each expressly permit non-cash awards, however. Curiously, the GAO has sanctioned the giving of non-cash awards to civilian employees. [See Awarding of Desk Medallion by Naval Sea Sys. Command, B-184306, Aug. 27, 1980 \(unpub.\)](#) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements). As discussed *supra*, the GAO has also sanctioned the purchase of food as one of the expenses that it deems could be necessary to honor the awardees accomplishments. In such circumstances, the award is not the food just an incidental expense incurred to honor the awardee.
3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to purchase mementoes for their distinguished visitors. [See discussion *infra* Part X](#) of this chapter for an overview.

- N. Use of Office Equipment. [Use of Office Equip. in Support of Reserves and Nat'l Guard, B-277678, Jan. 4, 1999](#) (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See Office of Personnel Management memorandum, subject: Use of Official Time and Agency Resources by Federal Employees Who Are Members of the National Guard or Armed Forces Reserves (3 June 1999), which provides general guidance to assist federal agencies in determining under what circumstances employee time and agency equipment may be used to carry out limited National Guard or Reserve functions. An electronic copy of this memorandum may be found at: http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/OPMReserves.htm. See also CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, RESERVE OFFICERS ASS'N L. REV., May 2001 (providing a good overview of this authority).
- O. Expenditures for New or Additional Duties.
1. If during the middle of a fiscal year, legislation or an executive order imposes new or additional duties upon an agency and Congress does not provide that agency with a supplemental appropriation specifically covering that new function, may current appropriations be charged?
 2. Test: Are the new duties sufficiently related to the purpose of a previously enacted appropriation? The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); Director, Nat'l Sci. Found., B-158371, 46 Comp. Gen. 604 (1967).

VIII. IS THE EXPENDITURE OTHERWISE PROVIDED FOR IN A SEPARATE APPROPRIATION?

- A. If there is another, more specific appropriation available, it must be used in preference to the more general appropriation. [The Honorable Lane Evans, B-289209, 2002 U.S. Comp. Gen. LEXIS 145 \(May 31, 2002\)](#); [The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 \(1984\)](#) (may not use O&M funds when foreign assistance funds available).

Example: The Air Force is planning to buy air-to-air missiles. Arguably, these missiles are a form of “ammunition” enabling it to purchase the missiles with its “Procurement, Ammunition, Air Force” appropriation. There is, however, a more specific appropriation that the Air Force receives called “Procurement, Missiles, Air Force” that should be used instead.

1. That a specific appropriation is exhausted is immaterial. [Secretary of Commerce, B-129401, 36 Comp. Gen. 386 \(1956\)](#).
 2. General appropriations may not be used as a back-up for a more specific appropriation. [Secretary of the Navy, B-13468, 20 Comp. Gen. 272 \(1940\)](#).
 3. Limitation applies even if specific appropriation is included in the more general appropriation. [Secretary of the Interior, B-14967, 20 Comp. Gen. 739 \(1941\)](#).
- B. If there are two appropriations equally available:
1. The agency may choose either appropriation. [Payment of SES Performance Awards of the R.R. Ret. Board’s Office of Inspector Gen., B-231445, 68 Comp. Gen. 337 \(1989\)](#). Agency discretion is not questioned generally. [Secretary of Agric., A-96689, 18 Comp. Gen. 285, 292 \(1938\)](#).

2. **BUT**, once the election is made, the agency must continue to use the selected appropriation to the exclusion of any other, during the current fiscal year. [See Funding for Army Repair Projects, B-272191, Nov. 4, 1997](#). The election is binding even after the chosen appropriation is exhausted. [Honorable Clarence Cannon, B-139510, May 13, 1959 \(unpub.\)](#) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).
3. If Congress specifically authorizes the use of two accounts for the same purpose, the agency is not required to make an election between the two and is free to use both appropriations for the same purpose. [See Funding for Army Repair Projects, supra](#); [See also 10 U.S.C. § 166a](#) (CINC Initiative Funds are in addition to amounts otherwise available for an activity).

C. Investment/Expense Threshold.

1. Expenses are costs of resources consumed in operating and maintaining DOD, and are normally financed with O&M appropriations. [See DOD FMR, vol. 2A, ch. 1, para. 010201](#). Common examples of expenses include:
 - a. Labor of civilian, military, or contractor personnel;
 - b. Rental charges for equipment and facilities;
 - c. Food, clothing, and fuel;
 - d. Maintenance, repair, overhaul, and rework of equipment; and
 - e. Utilities.

2. Investments are “costs to acquire capital assets” or which have costs that will benefit both current and future periods and generally have a long life span. [DOD FMR, vol. 2A, ch. 1, para. 010201.D.2](#). Investments are normally financed with procurement appropriations.
3. Exception Permitting Purchase of Investments With O&M Funds. In each year’s Defense Appropriation Act, Congress has permitted DOD to utilize its Operation and Maintenance appropriations to purchase investment items having a unit cost that is less than a certain threshold. [See e.g., Department of Defense Appropriation Act for Fiscal Year 2004, Pub. L. No. 108-87, § 8040, 117 Stat. 1054, 1081 \(Sept. 30, 2003\)](#) (establishing that threshold at \$250,000). Previous appropriation acts established that threshold at \$100,000 or less. [See, e.g., The Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8040 \(Oct. 23, 2002\)](#) (establishing that threshold at \$100,000); [See also Division M, § 106 of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7 \(Feb. 20, 2003\)](#) (sanctioning use of the expanded \$250,000 threshold for purchases made after 20 February 2003); [DOD FMR, vol. 2A, ch. 1, para. 010201.D.1](#) (which has not yet been updated to reflect the expanded \$250,000 threshold); as well as [DFAS-IN Manual 37-100-03, Appendix A, Expense/Investment Criteria](#) (indicating all Army purchases made prior to 20 February 2003 should utilize the old \$100,000 threshold and all purchases after 20 February 2003 should use the new \$250,000 threshold to determine the proper source of funding).
4. Systems. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the investment/expense threshold. This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.
 - a. Agencies must consider the “system” concept when evaluating the procurement of items. The determination of what constitutes a “system” must be based on the **primary function** of the items to be acquired, as stated in the approved requirements document.
 - b. 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.

- c. Agencies may purchase multiple end items of equipment (e.g., computers), and treat each end item as a separate “system” for funding purposes, only if the primary function of the end item is to operate independently.
- d. Do not fragment or piecemeal the acquisition of an interrelated system of equipment merely to avoid exceeding the O&M threshold.

Example: An agency is acquiring 200 stand-alone computers and software at \$2,000 each. The computers are being purchased primarily to operate as independent workstations. The agency should use O&M funds for this acquisition. If one of the primary reasons for purchasing the computers is so that their users could tie into a network and communicate with one another via email, the computers should be purchased with Procurement funds.

IX. AUGMENTATION OF APPROPRIATIONS & MISCELLANEOUS RECEIPTS.

A. General Rule - Augmentation of Appropriations Is Not Permitted.

- 1. Augmentation is action by an 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.
- 2. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:
 - a. [Article I, Section 9, Clause 7 of the United States Constitution.](#)

No money shall be drawn from the treasury except in consequence of appropriations made by law.

- b. [31 U.S.C. § 1301\(a\)](#) (Purpose Statute).

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

- c. [31 U.S.C. § 3302\(b\)](#) (Miscellaneous Receipts Statute).

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 practical without any deduction for any charge or claim.

3. Types of Augmentation.

- a. Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, 31 U.S.C. § 1301(a). U.S. Equal Employment Opportunity Comm'n – Reimbursement of Registration Fees for Fed. Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (1991); Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); Department of Health and Human Servs.—Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

Example: On page 2-35 *supra*, we discussed the Air Force buying air-to-air missiles using its “Procurement, Ammunition, Air Force” appropriation instead of its “Procurement, Missiles, Air Force” appropriation. If the Air Force had used its ammunition funds, this would have enabled it to purchase a greater overall quantity of missiles (some using the missile appropriation and some using the ammunition appropriation) than Congress desired.

- b. Augmenting an appropriation by retaining government funds received from another source.
 - (1) This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See *Scheduled Airlines Traffic Offices, Inc. v. Dep't. of Def.*, 87 F.3d 1356 (D.C. Cir. 1996) (indicating that a contract for official and unofficial travel, which provided for concession fees to be paid to the local morale, welfare, and recreation account, violates Miscellaneous Receipts Statute; note, however, that Congress has subsequently enacted statutory language – found at [10 U.S.C. § 2646](#) – that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts); *Interest Earned on Unauthorized Loans of Fed. Grant Funds*, B-246502, 71 Comp. Gen. 387 (1992); But see *Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties*, B-226004, 67 Comp. Gen. 510 (1988) (noting that 31 U.S.C. § 3302 **only applies to monies** received, not to other property or services).
 - (2) Expending the retained funds generally violates the constitutional requirement for an appropriation. See *Use of Appropriated Funds by Air Force to Provide Support for Child Care Ctrs. for Children of Civilian Employees*, B-222989, 67 Comp. Gen. 443 (1988).

B. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted which expressly authorize agencies to retain funds received from a non-Congressional source include:

- 1. Economy Act. [31 U.S.C. § 1535](#) authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. [31 U.S.C. § 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.” See also [41 U.S.C. § 23](#) (providing similar intra-DOD project order authority).

2. Foreign Assistance Act. [22 U.S.C. § 2392](#) authorizes the President to transfer State Department funds to other agencies, including DOD, to carry out the purpose of the Foreign Assistance Act.
3. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. See [10 U.S.C. § 2208](#); National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (1992); Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960).
4. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States. [16 U.S.C. § 579c](#); USDA Forest Serv.—Auth. to Reimburse Gen. Appropriations with the Proceeds of Forfeited Performance Bond Guarantees, B-226132, 67 Comp. Gen. 276 (1988); National Park Serv.—Disposition of Performance Bond Forfeited to Gov't by Defaulting Contractor, B-216688, 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).
5. Defense Gifts. [10 U.S.C. § 2608](#). The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress.
6. Health Care Recoveries. [10 U.S.C. § 1095\(g\)](#). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.
7. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts “shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned.” [42 U.S.C. § 2651](#). The U.S. Army Claims Service has taken the position that such recoveries should be credited to the installation’s operation and maintenance account. See *Affirmative Claims Note, Lost Wages under the Federal Medical Care Recovery Act*, ARMY LAW., Dec, 1996, at 38.

8. Military Leases of Real or Personal Property. [10 U.S.C. § 2667\(d\)\(1\)](#). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the military department and used for facility maintenance, repair, or environmental restoration.
9. Damage to Real Property. [10 U.S.C. § 2782](#). Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.
10. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. [10 U.S.C. § 2575](#). Proceeds are credited to the operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities.
11. Host nation contributions to relocate armed forces within a host country. [10 U.S.C. § 2350k](#).

C. GAO Sanctioned Exceptions to the Miscellaneous Receipts Statute. In addition to the statutory authorities detailed above, the Comptroller General recognizes other exceptions to the Miscellaneous Receipts Statute, including:

1. Replacement Contracts. An agency may retain recovered excess procurement costs to fund replacement contracts. Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678 (1983).
 - a. This rule applies regardless of whether the government terminates for default or simply claims for damages due to defective workmanship.
 - b. The replacement contract must be coextensive with the original contract, i.e., the agency may procure only those goods and services that would have been provided under the original contract.
 - c. Amounts recovered that exceed the actual costs of the replacement contract must be deposited as miscellaneous receipts.

2. Refunds.

- a. Refunds for erroneous payments, overpayments, or advance payments may be credited to agency appropriations. Department of Justice—Deposit of Amounts Received from Third Parties, B-205508, 61 Comp. Gen. 537 (1982) (agency may retain funds received from carriers/insurers for damage to employee's property for which agency has paid employee's claim); International Natural Rubber Org.—Return of United States Contribution, B-207994, 62 Comp. Gen. 70 (1982).
- b. Amounts that exceed the actual refund must be deposited as miscellaneous receipts. Federal Emergency Mgmt. Agency—Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260 (1990) (agency may retain reimbursement for false claims, interest, and administrative expenses in revolving fund; treble damages and penalties must be deposited as miscellaneous receipts).
- c. Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts. Defense Logistics Agency—Disposition of Funds Paid in Settlement of Contract Action, B-226553, 67 Comp. Gen. 129 (1987) (negligent installation of power supply system caused damage to computer software and equipment; insurance company payment to settle government's claim for damages must be deposited as miscellaneous receipts).
- d. Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired. Accounting for Rebates from Travel Mgmt. Ctr. Contractors, B-217913.3, 73 Comp. Gen. 210 (1994); To The Sec'y of War, B-40355, 23 Comp. Gen. 648 (1944). This rule applies to refunds in the form of a credit. See [Principles of Fed. Appropriations Law](#), vol. II, ch. 6, 6-111, GAO/OGC 92-13 (2d ed. 1992), [Appropriation Accounting—Refunds and Uncollectibles](#), B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130 (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed).

3. Receipt of property other than cash. When the government receives a replacement for property damaged by a third party in lieu of cash, the agency may retain the property. Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (replacement by repair of damaged vehicles).

4. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments that it intends to deliver to the rightful owner, it need not deposit the funds into the treasury as a miscellaneous receipt. The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).

5. Nonreimbursable Details.
 - a. The Comptroller General has held that nonreimbursable agency details of personnel to other agencies are generally unallowable. Department of Health and Human Servs.—Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

 - b. Exceptions.
 - (1) A law authorizes nonreimbursable details. See, e.g., 3 U.S.C. § 112 (nonreimbursable details to White House); The Honorable William D. Ford, Chairman, Comm. on Post Office and Civil Serv., House of Representatives, B-224033, 1988 U.S. Comp. Gen. LEXIS 1695 (Jan. 30, 1987).

 - (2) The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission. Details to Congressional Comm'ns., B-230960, 1988 U.S. Comp. Gen. LEXIS 334 (Apr. 11, 1988).

- (3) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means.
Department of Health and Human Servs. Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

X. EMERGENCY AND EXTRAORDINARY EXPENSE FUNDS.

- A. Definition. Emergency and extraordinary expense funds are appropriations that an agency has much broader discretion to use for "emergency and extraordinary expenses." Expenditures made using these funds need not satisfy the normal purpose rules.
- B. Historical Background. Congress has provided such discretionary funds throughout our history for use by the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438.

C. Appropriations Language.

1. For DOD, Congress provides emergency and extraordinary funds as a separate item in the applicable operation and maintenance appropriation.

Example: In FY 2004, Congress provided the following appropriation to the Army: "For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; and **not to exceed \$11,034,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes,** \$25,029,346,000 . . ." (emphasis added)

2. Not all agencies receive emergency and extraordinary funds. If Congress does not specifically grant an agency emergency and extraordinary funds, that agency may not use other appropriations for such purposes. See HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989).

D. Statutory Background.

1. [10 U.S.C. § 127](#). Emergency and extraordinary expenses.
 - a. Authorizes the Secretary of Defense and the Secretary of a military department to spend emergency and extraordinary expenses funds for "any purpose he determines to be proper, and such a determination is final and conclusive."
 - b. Requires a quarterly report of such expenditures to the Congress.
 - c. Congressional notice requirement. In response to a \$5 million payment to North Korea in the mid-90s using DOD emergency and extraordinary expense funds, Congress amended 10 U.S.C. § 127, imposing the following additional restrictions on our use of these funds:
 - (1) If the amount to be expended exceeds \$1 million: the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 15 days.
 - (2) If the amount exceeds \$500,000 (but is less than \$1 million): the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 5 days.
2. Other executive agencies may have similar authority. See, e.g., 22 U.S.C. § 2671 (authorizing the State Department to pay for "unforeseen emergencies").

E. Regulatory Controls. Emergency and extraordinary expense funds have strict regulatory controls because of their limited availability and potential for abuse. The uses DOD makes of these funds and the corresponding regulation(s) dealing with such usage are as follows:

1. Official Representation (Protocol). This subset of emergency and extraordinary expense funds are available to extend official courtesies to dignitaries and officials of foreign governments.
 - a. DOD Regulations: [DOD Directive 7250.13, Official Representation Funds](#) (10 Sep. 2002); [DOD FMR, vol. 10, ch. 12, para. 120222.B](#).
 - b. Army Regulation: [AR 37-47, Representation Funds of the Secretary of the Army](#) (31 May 1996).
 - c. Air Force Regulation: [AFI 65-603, Official Representation Funds: Guidance and Procedures](#) (30 Jan. 2002).
 - d. Navy Regulation: [SECNAV 7042.7, Guidelines for Use of Official Representation Funds](#) (5 Nov. 1998).
2. Criminal Investigation Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during criminal investigations or crime prevention.
 - a. Army Regulation: [AR 195-4, Use of Contingency Limitation .0015 Funds For Criminal Investigative Activities](#) (15 Apr. 1983).
 - b. Air Force Regulation: [AFI 71-101, vol. 1, Criminal Investigations, para. 1.18](#) (1 Dec. 1999) (governing counterintelligence and investigative contingency funds, also known as C-funds).

3. Intelligence Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during intelligence investigations.
 - a. Army Regulation: AR 381-141(C), Intelligence Contingency Funds (30 July 1990).
 - b. [Air Force Regulation: AFI 71-101, Criminal Investigations, para. 1.18 \(1 Dec. 1999\)](#) (governing counterintelligence and investigative contingency funds, also known as C-funds).

4. Other Miscellaneous Expenses (other than official representation). This subset of emergency and extraordinary expense funds are available for such uses as Armed Services Board of Contract Appeals witness fees and settlements of claims. [AR 37-47, para. 1-5b](#). Other examples include:
 - a. Acquisition of weapons from Panamanian civilians. (currently considered to be a proper expenditure of operation and maintenance funds);
 - b. Reward for search teams at the Gander air crash; and
 - c. Mitigation of erroneous tax withholding of soldiers' pay.

5. Procedures for Use of Official Representation Funds.
 - a. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. [DOD Directive 7250.13, para. 3.1](#); [AR 37-47, para. 2-1](#); [AFI 65-603, para. 1](#); [SECNAVINST 7042.7J, para. 6](#). Official courtesies are subject to required ratios of authorized guests to DOD personnel. See, e.g., DOD Directive 7250.13, para. E2.4.3; [AR 37-47, paras. 2-1b and 2-5](#). Courtesies are defined as:
 - (1) Hosting of authorized guests to maintain the standing and prestige of the United States;

- (2) Luncheons, dinners, and receptions at DOD events in honor of authorized guests;
 - (3) Entertainment of local authorized guests for civic or community relations;
 - (4) New commander receptions;
 - (5) Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and foreign vessels to U.S. ports;
 - (6) Official functions in observance of foreign national holidays and similar occasions in foreign countries; and
 - (7) Dedication of facilities.
- b. Gifts. Official representation funds may be used to purchase, gifts, mementos, or tokens for authorized guests.
- (1) If the guest is from outside DOD, the gift may cost no more than \$285.00. See [DOD Directive 7250.13, para. E.2.4.1.8](#) (which cross references [22 U.S.C. § 2694](#) which in turn cross references [5 U.S.C. § 7342](#); the amount established in the latter statute is revised by GSA once every three years to take inflation into account and at [67 Fed. Reg. 56,495](#) was most recently raised to \$285) See also [AR 37-47, para. 2-9a\(1\)](#); [AFI 65-603, para. 4](#); [SECNAVINST 7042.7J, para. 6c\(1\)](#).
 - (2) If the guest is from within DOD and is one of the specified individuals listed in [Enclosure 1 to DOD Directive 7250.13](#), then the command may present him or her with a gift valued at no more than \$40.00. See Department of Defense memorandum, dated 23 December 2002, subject: Official Representation Funds.

- (3) If the guest is from within DOD and not on this list of specified individuals, then no gift (purchased with appropriated funds) may be made to that individual. [See DOD Directive 7250.13, para. E2.4.2.10; AR 37-47, para. 2-9c; AFI 65-603, para. 4; SECNAVINST 7042.7J, para. 6c\(1\).](#)

- c. Levels of expenditures. Levels of expenditures are to be “modest.” [DOD Directive 7250.13, para. E2.2.1.2.4.2; AR 37-47, para. 2-2a; AFI 65-603, para. 1-2 \(\\$10,000 per event threshold - AR 37-47, para. 2-2b\).](#)

- d. Prohibitions on Using Representational Funds. [DOD Directive 7250.13, para. E2.4.2; AR 37-47, para. 2-10; AFI 65-603, para. 5; SECNAVINST 7042.7J, para. 6d.](#)
 - (1) Any use not specifically authorized by regulation requires an exception to policy. [AR 37-47, para. 2-10; AFI 65-603, para. 10.](#)

 - (2) Exceptions will not be granted for the following:
 - (a) Classified projects and intelligence projects;

 - (b) Entertainment of DOD personnel, except as specifically authorized by regulation;

 - (c) Membership fees and dues;

 - (d) Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);

 - (e) Gifts and mementos an authorized guest wishes to present to another;

 - (f) Personal items (clothing, cigarettes, souvenirs);

- (g) Guest telephone bills;
- (h) Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and
- (i) Repair, maintenance, and renovation of DOD facilities.

See [AR 37-47, para. 2-10](#); [AFI 65-603, para. 5](#).

- (3) Use for retirements and change of command ceremonies, is permitted as an exception, but must specifically be approved in advance by the Service Secretary. [DOD Directive 7250.13, para. E2.4.2.5](#); [AR 37-47, para. 2-4g](#); [AFI 65-603, para. 5.1](#); [SECNAVINST 7042.7J, para. 6d\(10\)](#); United States Army School of the Americas—Use of Official Representation Funds, B-236816, 69 Comp. Gen. 242 (1990) (new commander reception distinguished from change of command ceremony).
- e. Approval and accounting procedures. [AR 37-47, Chapter 3](#); [AFI 65-603, para 4](#); [SECNAVINST 7042.7J, para 8](#).
- (1) Fiscal year letters of authority. [AR 37-47, para. 3-1b](#).
 - (2) Written appointment of certifying and approving officer.
 - (3) Written appointment of representation fund custodian.
 - (4) Funds must be requested and made available before obligation. Requests for retroactive approval must be forwarded to the SA or his designee. [AR 37-47, para. 3-1d](#).
 - (5) Legal review. [AR 37-47, para. 3-1f\(2\)](#).

6. Community Relations and Public Affairs Funds. [AR 360-1, para. 4-5](#). Do not use public affairs funds to supplement official representation funds. Doing so violates 31 U.S.C. § 1301.

XI. ANALYZING A PURPOSE ISSUE.

A. Use the Attached Flowchart in Conjunction With the Narrative in Paragraphs B through E below to Conduct a Step-By-Step Analysis.

B. Determine Whether Congress Has Enacted any Statute on Point.

1. Your primary concern should be whether there is a statute or legislation that addresses your intended purchase.

2. Locating Codified Statutory Authority.

- a. The U.S. Code is broken down into titles which typically cover a given subject matter area. You may be able to scan through appropriate volumes/chapters to see if there is something on point.

Example: Statutes pertaining to DOD are typically found in Title 10, so if I want to find a statute dealing only with restriction on DOD's use of its appropriations, it will likely be found in Title 10. Statutes dealing with all federal employees are generally found in Title 5, so if I want to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, I would probably start with Title 5.

- b. You can run a general boolean search on either a specialized legal database, such as LEXISTM or WestlawTM, or on the [U.S. Code website](#). Note: you may have to run alternate searches utilizing synonyms for your topic (i.e. if someone wants to know whether "T-shirts" may be purchased, you may have to look under "Clothing," "Uniforms," etc).

- c. U.S. Code Annotated Index. This index contains a listing arranged by subject of the codified U.S. statutes.

Example: I need to know whether I can use appropriated funds to operate golf courses. I would go to the latest index of the U.S. Code Annotated and look under the key word “Golf Courses” to find the cross-reference to 10 U.S.C. § 2246. Note: once again you may have to run alternate searches utilizing synonyms for your topic.

- d. Agency Regulations. Agencies will often (but not always) list the statutory authority(ies) upon which the regulation is based. If you can find a regulation dealing with your issue (*see* Part XI.D. *infra.*), you may be able to then locate the underlying statutory authority.

Example: I need to know when I can use appropriated funds to support my post chaplain. AR 165-1, Chaplain Activities in the United States Army (26 May 2000) contains cross-references to 10 U.S.C. §§ 3073, 3547, and 3581. 10 U.S.C. § 3547 contains some minimal guidance on resourcing chaplains.

- e. GAO Opinions. You could go onto a legal database such as Lexis-Nexis™ or Westlaw™ to find GAO Opinions related to a given topic and hope that they cross-reference the underlying statutory authority. If the opinion was issued after October 1, 1995, it may also be found at the Government Printing Office (GPO) *GPO Access website* found at:
<http://www.gpoaccess.gov/gaodecisions/index.html>.

- f. GAO Redbooks. The GAO has issued a 5-volume treatise on fiscal issues called “Principles of Federal Appropriations Law.” It often contains cross-references to underlying statutory authority throughout each of the topical discussions. Volume V also contains a set of comprehensive indexes, including indexes for: 1) U.S. Code cites; 2) statutes at large; 3) public and private laws; and 4) by topic. The treatise can be found at:
<http://www.gao.gov/legal.htm> (near the bottom, right-hand side of the page).

- g. Administrative Law Topic/Reference Index. OTJAG Admin Law Division has developed a quick cross-reference guide to many of the more routine issues you may run across. The index cross-references statutes and DOD and Army regulations associated with a given topic. The most recent guide can be found at:
<http://134.11.61.26/cd1/Publications/JA/AL/AL%20Ad%20Law%20Index%2020030601.pdf>.

3. Locating Legislation/Uncodified Authority.

- a. Appropriation Acts. Congress typically passes thirteen (13) appropriations acts each year. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. In addition to Lexis-NexisTM and WestlawTM-based research, one can utilize the [Thomas website](http://thomas.loc.gov/) within the Library of Congress (<http://thomas.loc.gov/>) to conduct research on legislation enacted since 1973. This website also has a consolidated listing of appropriation legislation enacted since 1999 and a list of pending appropriation bills for the current or upcoming fiscal year.
- b. Authorization Acts. Although there is no general requirement to have an authorization act, Congress has enacted a statutory requirement for DOD to have an authorization act each year. As with appropriations acts above, one can use Lexis-NexisTM, WestlawTM, and/or the [Thomas website](http://thomas.loc.gov/) to conduct research.
- c. Other Legislation. Outside of the appropriation/authorization process, Congress will often place statutory restrictions on our actions.
- d. Issues in Researching Legislation. If Congress does not subsequently codify the legislation, it is often difficult to locate any legislation that restricts our ability to spend appropriated funds. Hopefully, at the head of the agency level, there has been some sort of regulatory or other policy guidance that has been promulgated covering the uncodified restriction.

4. Even assuming you find statutory / legislative authority to conduct your intended acquisition, you must still determine whether there is a regulatory prohibition or other restriction covering that purchase. To do so, *see* Part XI.D. *infra*.

Example: Congress has given us express authorities to carry out procurements of various weapons programs, construction projects, and research projects. We still have various regulations that give us guidance on how we will carry out those programs and projects. For example, Army regulation and policy permits the installation commander to approve repair and/or maintenance projects amounting to no more than \$3 million. Congress permits us to carry out projects above this threshold, but by regulation, the agency has withheld the approval authority on such projects.

C. Necessary Expense Test.

1. If there is no statute that authorizes your intended purchase, you will have to apply the necessary expense test to determine if you have authority to carry out your intended purchase. See Part VI *supra* for an overview of this test.
2. If your research uncovers an agency level regulation that addresses your intended purchase (*see* Part XI.D. *infra*), the proponents of that regulation are likely to have used a necessary expense analysis in drafting the regulation. In such a circumstance, you are probably safe relying upon the regulation to make the intended purchase. If after reviewing a regulation, you feel there is a disconnect between what the regulation permits and what should be permitted under a necessary expense analysis, you should consult legal counsel (or if you are legal counsel, you should consult your next higher legal counsel).

Example: For several years, AR 165-1 has permitted the use of appropriated funds to conduct religious retreats and workshops. These events would include lodging and food and would also be open to service members as well as their families. Prior to enactment of the 2003 DOD Appropriations Act, there had been no express authority given to DOD to carry these sorts of programs for family members (Note: § 8116 only contained authority to use FY2003 appropriations to carry out such programs so we are also once again without express authority). Using a necessary expense analysis, it would be hard to come up with justification for using appropriated funds to pay for lodging and food for participants, especially for the non-service members participants. Various installations eventually raised their concerns – that the regulation did not mesh with the fiscal rules – to the agency-level. This high-level attention resulted in a solution (although only temporary) being worked out (express authorization from Congress in the form of legislation).

3. It is probably a good idea to have a written document that you retain in your files that addresses the underlying facts as well as your analysis that led to your conclusion that the purchase satisfied the necessary expense test. It would also probably be advisable to have a written document from the requester of the intended items/services that indicates what the underlying facts are.
4. Even assuming you conduct a necessary expense test which leads you to believe you should have the authority to purchase the intended items / services, you still need to determine whether there is a regulatory prohibition or restriction covering that purchase. To do so, *see* Part XI.D. immediately *infra*.

Example: I need to know whether I can buy bottled water for distribution to troops at remote locations in Southwest Asia. I determine there is no statute dealing specifically with this issue. I perform a “necessary expense” analysis and determine that having bottled water for these remotely located troops will definitely contribute materially towards their mission accomplishment (they need water to survive and if the troops are not located near a potable water supply, such as a water buffalo, then bottled water is probably going to be the most effective way to get their water needs replenished). Unfortunately, there are a variety of Army Regulations that place restrictions on the purchase of bottled water, including the approval authority. As a result, looking at just the statutes and doing a necessary expense analysis will not be sufficient.

D. Determine Whether the Agency Has Promulgated any Regulation on Point.

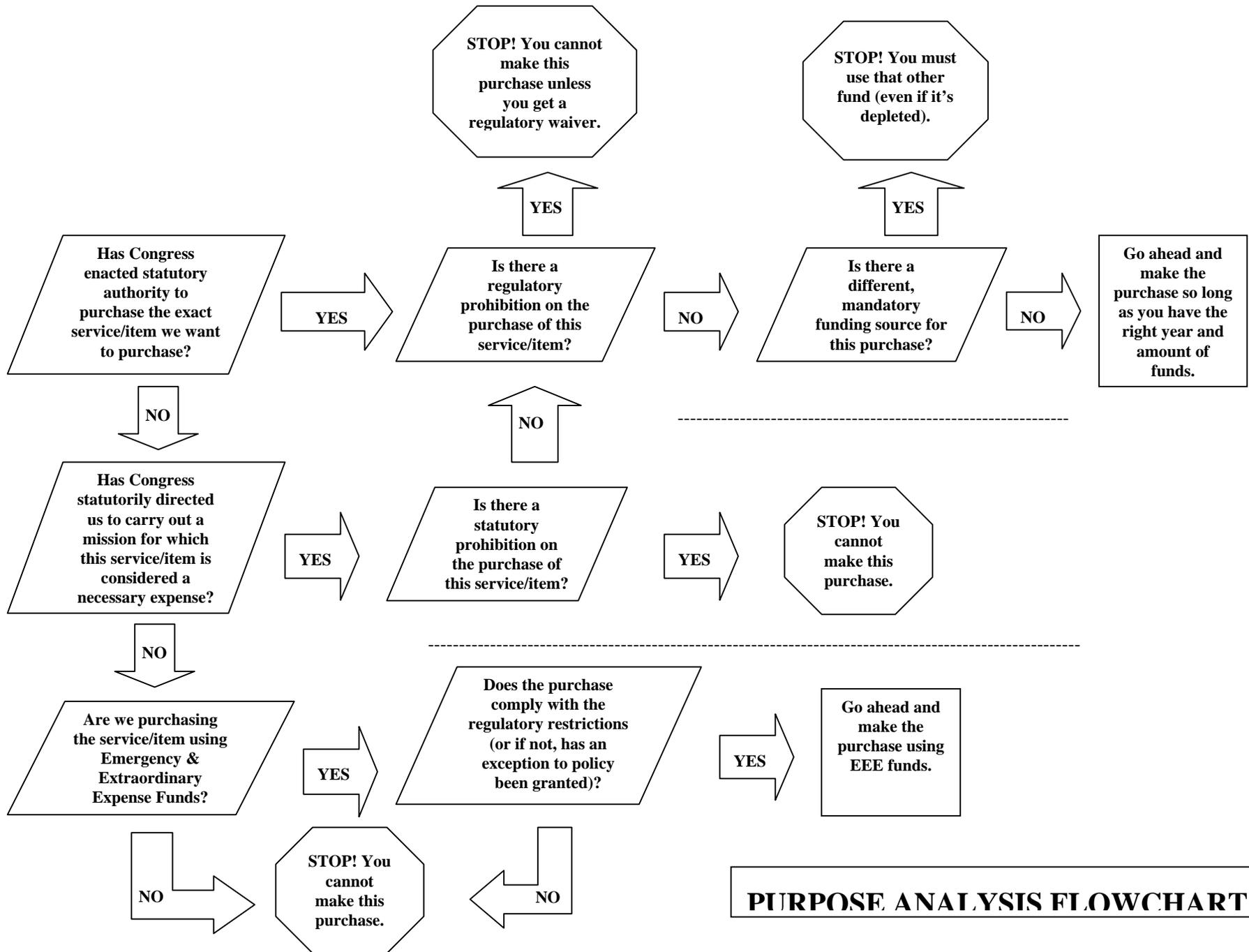
1. Agency Publication Websites. The DOD as well as many of the civilian agencies has a website containing electronic copies of most of their regulations. Most agency publication websites allow you to perform a boolean search of the text of the regulations. Note: you may have to run alternate searches utilizing synonyms for your topic (i.e. if someone wants to know whether “T-shirts” may be purchased, you may have to look under “Clothing,” “Uniforms,” etc. If you know the underlying statutory authority, you can also use it as your keyword (i.e. plug in “10 U.S.C. § 2246” or “10 U.S.C. 2246” or “10 USC 2246” as your search term).
 - a. DOD Regulations (<https://lad.dtic.mil/whs/directives/>).
 - b. Army Regulations (<http://www.usapa.army.mil/>). Unfortunately, the Army website only permits a search of the titles (not the text) of the regulations. To search the text of Army regulations, you must use the JAGCNET website.
 - c. Air Force Regulations (<http://www.e-publishing.af.mil/orgs.asp?type=pubs>).
 - d. Navy Regulations (<http://neds.nebt.daps.mil/>).
 - e. Marine Corps Regulations (<http://www.usmc.mil/marinelink/ind.nsf/publications>).
 - f. Joint Publications (<http://www.dtic.mil/doctrine/>).
2. Use JAGCNET (<https://www.jagcnet.army.mil/laawsxxi/cds.nsf>) to Search for Publications. Those individuals with a JAGCNET password may conduct a search of the text of all publications contained within the JAGCNET library of publications (most DOD-level and DA-level regulations plus TJAGSA deskbooks).

3. Specialized Websites. In addition to the above websites that compile all agency regulations into one location, there are various other websites that contain regulations specific to the fiscal arena. These include:
 - a. [DOD Financial Management Regulation](http://www.dod.mil/comptroller/fmr/) (<http://www.dod.mil/comptroller/fmr/>). The DOD Financial Management Regulation, DOD 7000.14-R establishes requirements, principles, standards, systems, procedures, and practices needed to comply with statutory and regulatory requirements applicable to the Department of Defense. This 15 volume set of regulations contains a very user-friendly, key word-searchable function.
 - b. [Defense Finance and Accounting Service \(DFAS\) Regulations](https://dfas4dod.dfas.mil/search.htm). DFAS handles the finance and accounting services for DOD. It is organized into geographic regions which are assigned a specific DOD service or organization to support (i.e. the Indianapolis office provides services to the Army. You can conduct a search of the overall DFAS library (<https://dfas4dod.dfas.mil/search.htm>) only.

E. Emergency & Extraordinary (E&E) Expenses.

1. As a matter of last resort, if you cannot find a statute or legislation that permits your intended purchase AND you do not believe the item / service is necessary, you could request to use E&E funds to make the purchase.
2. The service regulations already contain guidance on the items / services for which the service secretaries have issued “blanket approvals.” Your purchase probably will not fit into this category, but each of the regulations permit an exception or waiver provided there is adequate justification.

XII. CONCLUSION.



PURPOSE ANALYSIS FLOWCHART

