United States Government Accountability Office
Washington, DC 20548

B-302973

October 6, 2004

The Honorable Lane Evans
Ranking Minority Member
Committee on Veterans Affairs
House of Representatives

Subject: *Veterans Health Administration–Appropriations for CARES Cost Comparison Studies*

Dear Mr. Evans:

This responds to your request of April 23, 2004, for our opinion on whether the restrictions in 38 U.S.C. § 8110(a)(5) apply to cost comparison studies conducted by the Department of Veterans Affairs (VA) as part of the VA's Capital Asset Realignment for Enhanced Services (CARES) process. Section 8110(a)(5) prohibits VA from using Veterans Health Administration (VHA) appropriations for "medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses" for any studies comparing the costs of services provided by private contractors with those provided by VA, unless these appropriations have been specifically made available for that purpose. The prohibition also provides that no employee compensated from the specified appropriations may carry out any activity in connection with such studies. VA established CARES in October 2000 as an ongoing process through which VA systematically studies the health care needs of veterans and alternatives for meeting those needs, including contracting with private health care providers. *See* GAO, *VA Health Care: Framework for Analyzing Capital Asset Realignment for Enhanced Services Decisions* 1, GAO-03-1103R (Washington, D.C.: Aug. 18, 2003) (2003 GAO Report); *see also* VA, *Draft National CARES Plan* 1-6 (Washington, D.C.: Aug. 4, 2003) (2003 CARES Plan).[1]

As we explain below, section 8110(a)(5) does not allow VA to use the restricted VHA appropriations for studies comparing the cost of VA versus contractor provision of services, including the payment of salaries for VA employees involved in such studies,

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[1] In May 2004, the VA Secretary accepted the CARES Commission Report, which is a comprehensive review of the Draft National CARES Plan. The 2003 CARES Plan continues to be informative on the CARES process.

absent a specific provision from Congress making the restricted appropriations available for that purpose. Clearly, informed decisionmaking in the CARES process requires the use of cost comparison studies, and section 8110(a)(5) does not prohibit VA from undertaking such cost comparison studies. For the reasons provided below, we conclude that unless Congress includes an affirmative statement that it is appropriating VHA funds for the otherwise prohibited cost comparison studies, VA must use another appropriation that is available for that purpose. VA could fund such studies in fiscal year 2004, for example, by using VA's appropriation for major projects construction, which is available for that purpose. If VA has obligated the specified VHA appropriations for the purpose of conducting CARES cost comparison studies, then VA has violated not only section 8110(a)(5) but also the purpose statute, 31 U.S.C. § 1301, and would have to adjust its accounts to correct the violation.[2] If VA were unable to correct the purpose violation, then this would also result in a reportable violation of the Antideficiency Act, 31 U.S.C. § 1341.

To respond to your request, on June 4, 2004, we wrote VA for factual information regarding CARES and its legal justification for its use of VHA appropriations for this purpose. Letter from Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, to Tim S. McClain, General Counsel, VA, June 4, 2004. VA responded by letter dated June 15, 2004. Letter from Tim S. McClain, General Counsel, VA, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, June 15, 2004 (McClain Letter). We also had a telephone conversation with Jack Thompson, VA Deputy General Counsel, in which we requested additional factual information about CARES. On July 2, 2004, Mr. McClain responded by sending us general background materials on CARES. Letter from Tim S. McClain, General Counsel, VA, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, July 2, 2004.

BACKGROUND

Section 8110(a)(5)

Section 8110(a)(5) was enacted in October 1981 as part of the Veterans' Compensation Amendments of 1981. Pub. L. No. 97-66, § 601(b)(5), 95 Stat. 1026, 1034 (Oct. 17, 1981). As codified, the provision reads:

> "Notwithstanding any other provision of this title or of any other law, funds appropriated for the Department under the appropriation accounts for medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses

[2] We did not undertake an audit in conjunction with this legal opinion to determine if VHA used these appropriations for this purpose.

> may not be used for, and no employee compensated from such funds may carry out any activity in connection with, the conduct of any study comparing the cost of the provision by private contractors with the cost of the provision by the Department of commercial or industrial products and services for the Veterans Health Administration unless such funds have been specifically appropriated for that purpose."

38 U.S.C. § 8110(a)(5).[3]

As recently as 1999, Congress acknowledged the prohibition of section 8110(a)(5) by specifically appropriating funds for cost comparison studies in the VHA appropriation for medical care: "For necessary expenses . . . and not to exceed $8,000,000 to fund cost comparison studies as referred to in 38 U.S.C. 8110(a)(5)." Pub. L. No. 106-74, 113 Stat. 1047, 1049-50 (Oct. 20, 1999). Congress included similar language in the appropriations for medical care for many prior fiscal years. *See, e.g.,* Pub. L. No. 103-327, 108 Stat. 2298, 2301 (Sept. 29, 1994); Pub. L. No. 100-404, 102 Stat. 1014, 1032 (Aug. 19, 1988).

CARES

In 1999 we evaluated VHA's operations and maintenance of its capital infrastructure and concluded that VHA needed to improve its capital asset planning and budgeting to meet the current and future health care needs of veterans. GAO, *VA Health Care: Improvements Needed in Capital Asset Planning and Budgeting*, GAO/HEHS-99-145 (Washington, D.C.: Aug. 13, 1999).[4] We recommended that VA reduce the resources spent on underused or inefficient buildings by developing "asset-restructuring plans for all markets to guide future investment," incorporating best practices of the industry, and complying with OMB guidelines on capital resources. *Id.* at 2, 4. OMB guidelines include comparing the cost of various alternative methods for meeting a target population's needs.[5]

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[3] Prior to May 1991, the section was codified in Title 38 as section 5010(a)(5) instead of section 8110(a)(5).

[4] *See also* GAO, *VA Health Care: Capital Asset Planning and Budgeting Need Improvement*, GAO/T-HEHS-99-83 (Washington, D.C.: Mar. 10, 1999); GAO, *VA Health Care: Challenges Facing VA in Developing an Asset Realignment Process*, GAO/ T-HEHS-99-173 (Washington, D.C.: July 22, 1999).

[5] OMB, *Capital Programming Guide*, Version 1.0 (Washington, D.C.: July 1997). The current version of *Capital Programming Guide* is available at http://www.whitehouse.gov/omb/circulars/a11/cpgtoc.html (last visited Aug. 6, 2004).

In response, the VA Secretary established CARES in October 2000. 2003 GAO Report, at 1. The CARES process involves a number of steps, including defining market areas, analyzing needs, developing market plans, and integrating the plans into the strategic planning cycle. *See* CARES Commission, *Capital Asset Realignment for Enhanced Services: Report to the Secretary of Veterans Affairs* 1-2, 1-3 (Feb. 2004), *available at* http://www.carescommission.va.gov/default.asp (last visited June 20, 2004) (2004 Commission Report). Through the ongoing CARES process, VA decides whether to renovate or close existing facilities, where to construct new facilities, and, importantly for purposes of this opinion, when to provide health care through private contractors. *See* 2003 CARES Plan, at 1-6. Indeed, cost comparison studies are an integral part of the CARES process. In the 2003 CARES Plan, VA stated: "The use of standardized methods allowed many cost alternatives to be assessed in determining how to meet future demands. For example, the costs of contracts could be compared with using in-house resources. . . . In the Draft National CARES Plan, the lower cost alternative was selected in nearly 60% of all planning solutions." *Id.* at 1-6.

Although CARES is not a statutorily-created program, it is supported by statutory authorities, such as 38 U.S.C. § 513, which authorizes the VA Secretary "to enter into contracts or agreements with private or public agencies or persons . . . for such necessary services . . . as the Secretary may consider practicable." Both the House and Senate appropriations committees have expressed their support for CARES in their committee reports, including support for CARES cost comparison studies. For example, the Senate Appropriations Committee explained that it was providing $10 million for fiscal year 2000 in the major projects construction appropriation to fund capital asset realignment studies to "assess VA's future health care requirements and *whether other alternatives such as contracting for services*, sharing agreements, facility leasing, partnering, asset replacements, or a combination thereof, are best suited for providing health care to veterans in various geographic areas" (emphasis added). S. Rep. No. 106-161, at 26 (1999). More recently, the same committee stated in its recommendation for the major projects construction appropriation that it "remains strongly committed to the Capital Asset Realignment for Enhanced Services initiative to ensure the VA health care system can meet the needs of veterans today and in the future." S. Rep. No. 108-143, at 22 (2003). *See also* H.R. Rep. No. 107-740, at 19 (2002).

Congress supported CARES in fiscal years 2002 through 2004 with specific appropriations for CARES in the VA appropriations for construction of major and minor projects. *See* Pub. L. No. 108-199, Div. G, 118 Stat. 3, 367-68 (Jan. 23, 2004); Pub. L. No. 108-7, Div. K, 117 Stat. 474, 479-80 (Feb. 20, 2003); Pub. L. No. 107-73, 115 Stat. 651, 655-56 (Nov. 26, 2001). In fiscal year 2002, Congress appropriated money for CARES in the VHA medical care appropriation, but it did not specifically provide that it was available for cost comparison studies. *See* Pub. L. No. 107-73, 115 Stat. 651, 654 (Nov. 26, 2001).

In fiscal year 2004, Congress also did not specifically appropriate VHA funds for use in CARES cost comparison studies. Instead, Congress provided VA with authority to transfer as much as $400 million from its VHA appropriation for medical care to VA's

major projects construction appropriation "for purposes of implementing CARES subject to a determination by the Secretary that such funds will improve access and quality of veterans' health care needs." Pub. L. No. 108-199, Div. G, 118 Stat. 3, 365 (Jan. 23, 2004).

DISCUSSION

At issue here is whether the section 8110(a)(5) prohibition applies to CARES cost comparison studies. The issue is one of statutory construction. In interpreting statutes, the federal courts have developed a number of well-recognized conventions, which are also known as canons of statutory construction. One canon of statutory construction is the plain meaning rule, *i.e.*, when the statutory language is clear and unambiguous, the words enacted into public law should be given their common and ordinary meaning. *See, e.g., Mallard v. U.S. District Court*, 490 U.S. 296, 300-02 (1989); B-288173, June 13, 2002; *see also* 2A Sutherland, *Statutes and Statutory Construction* § 46:1, Plain Meaning Rule (6th ed. 2000). In applying the plain meaning rule, we carefully consider each word included in the statutory provision at issue. Section 8110(a)(5) prohibits the use of the specified VHA appropriations, such as those for medical care and research, for "the conduct of *any* study comparing the cost of the provision by private contractors with the cost of the provision by the Department of commercial or industrial products and services for the Veterans Health Administration" (emphasis added).[6] Furthermore, section 8110(a)(5) states that this prohibition is in effect "*unless* such funds have been *specifically* appropriated for that purpose" (emphasis added).

In analyzing the language in section 8110(a)(5), one of the smallest words is perhaps the most significant. Section 8110(a)(5) uses the inclusive word "any" to modify "study." In ordinary English discourse, the word "any" connotes the idea of "each and every one" or "all." *See, e.g.,* Merriam-Webster Online Dictionary, *available at* http://www.merriam-webster.com/ (last visited Aug. 31, 2004) (Merriam-Webster). Indeed, in considering the word "any" in federal statutes, the U.S. Supreme Court has interpreted "any" in this broad manner, stating: "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzalez*, 520 U.S. 1, 5 (1997), quoting Webster's Third New International Dictionary 97 (1976). *See also, e.g., Barseback Kraft AB v. United States*, 121 F.3d 1475, 1481 (Fed. Cir. 1997), quoting *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 115 (3d Cir. 1992) ("The word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive."); *Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir. 1999) ("The word 'any' is a term of great breadth. . . . see also Black's Law Dictionary 94 (6th ed. 1990) (defining 'any' to mean 'some; one out of many; an indefinite number,' that depending on the context and subject matter of the statute, 'may be employed to

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[6] We are aware of no reason, and VA has not asserted any reason, to exclude the delivery of medical care from "commercial services" covered by this prohibition.

indicate 'all' or 'every')."). In our view, this meaning ascribed to "any" suggests that the section 8110(a)(5) prohibition applies to all cost comparison studies, including those conducted as part of CARES.

Section 8110(a)(5) also uses the conditional term "unless" to state what must occur to overcome the provision's restrictions. In common usage, the exclusive word "unless" means "except on condition that" or "only if." *See, e.g.,* Merriam-Webster. In the case of section 8110(a)(5), the single condition that will overcome the provision's restrictions is that funds from the designated appropriations must have been "specifically appropriated for that purpose."

In our decisions, we have interpreted the word "specifically" in other statutes to mean "expressly" or "explicitly stated." For example, the Comptroller General is authorized to relieve certifying officials from strict liability for an improper payment if the Comptroller General finds that, among other factors, "no law *specifically* prohibited the payment" (emphasis added). *See* 31 U.S.C. § 3528(b)(1). In a 1995 decision, we stated that we have interpreted that factor as "referring to statutes which *expressly* prohibit payments for specific items or services" (emphasis added). B-257893, June 1, 1995. *See also* B-252110, Mar. 19, 1997; 70 Comp. Gen. 723 (1991); B-191900 (July 21, 1978). If we apply the same logic here, the section 8110(a)(5) requirement that "funds have been specifically appropriated for that purpose" can only be met by an appropriation containing an affirmative statement that the restricted appropriations are now being made available for the otherwise prohibited purpose.

The language used in section 8110(a)(5)—particularly the use of the words "any," "unless," and "specifically"—leads us to conclude that VA cannot use medical care or the other specified appropriations to pay for any studies comparing the cost of commercial services and products provided by the VA with those provided by private contractors, including CARES cost comparison studies, unless Congress employs language appropriating money for such studies in the specified appropriations.

Both in its June 2004 letter to us and its earlier internal memorandum referenced in that letter, VA concluded that the section 8110(a)(5) prohibition does not apply to CARES cost comparison studies and that it applies only to cost comparison studies performed pursuant to Office of Management and Budget (OMB) Circular No. A-76 (A-76).[7] McClain Letter, at 1-2; Memorandum from Tim S. McClain, General Counsel, to Under Secretary for Health for the Veterans Health Administration, VA, re: "Section

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[7] OMB Circular No. A-76, *Performance of Commercial Activities* (May 29, 2003, as revised by M-03-20, Aug. 15, 2003, which made technical corrections to A-76). A-76, which was first issued in 1966, establishes federal policy on identifying commercial-type government activities suitable for outsourcing and implementing a competitive process to determine whether the activity should be performed by private contractors or government employees.

8110(a)(5) and 'CARES,'" Jan. 30, 2004, at 3 (VA Memo). In arriving at this conclusion, VA makes two arguments that, in effect, argue for making an exception to the plain meaning rule in this case. We do not find these arguments persuasive.

First, VA argues that Congress impliedly authorized VA to use VHA appropriations to conduct cost comparison studies as part of CARES. McClain Letter, at 1; VA Memo, at 1. VA states that section 8110(a)(5) "must not be read in isolation," but instead should be interpreted in the context of its relationship to other laws, such as sections 1706(a), 1703, and 8153(a) of Title 38. *Id.* VA argues that viewing section 8110(a)(5) in the context of these other statutes shows that Congress understood and intended that VA would conduct cost comparison studies as part of the CARES process and would therefore necessarily have to use funds appropriated from the restricted appropriations, or employees compensated from such appropriations, to do so. *Id.* Section 1706(a) charges the VA Secretary with designing, establishing, and managing the provision of medical care "to promote cost-effective delivery of health care services in the most clinically appropriate setting." 38 U.S.C. § 1706(a). Sections 1703[8] and 8153(a)[9] of Title 38 grant the VA Secretary authority to contract for services when necessary to fulfill VA's responsibility under section 1706(a). McClain Letter, at 1; VA Memo, at 1.

We agree with VA that the VA Secretary has the authority to contract for commercial services and to conduct cost comparison studies to decide whether to secure services by contract. Section 8110(a)(5) prohibits neither. Section 8110(a)(5) only prohibits VA from using, for this purpose, the VHA appropriations specified therein unless Congress makes those appropriations available for that purpose. *See, e.g.,* 127 Cong. Rec. S22,704, S22,713 (1981) (the provision's restrictions apply "*unless* the funds involved have been *specifically appropriated* for that purpose" (emphasis added)); 127 Cong. Rec. H22,888, H22,900 (1981) (statement of Representative Leath) ("We are not taking any firm position on the substantive issue here, but what we are saying is that if these studies to compare costs are to be conducted, funds must be appropriated for that purpose."). VA, however, is free to fund cost comparison studies from other appropriations that are not limited by section 8110(a)(5) and would otherwise be available for this purpose, such as those for construction of major and minor projects.

Second, VA argues that section 8110(a)(5) applies only to A-76 cost comparison studies, and, therefore, not to those conducted as part of the CARES process.

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[8] Section 1703 authorizes the VA Secretary to contract for medical care when VA facilities are not capable of doing so economically in specified circumstances, such as treatment for service-related disabilities and life-threatening medical emergencies.

[9] Section 8153(a) authorizes the VA Secretary to enter into arrangements with other entities, including contracts with private entities, for sharing health care resources "which otherwise might not be feasibly available" or "to effectively utilize certain other health-care resources." 38 U.S.C. § 8153(a).

McClain Letter, at 1-2; VA Memo, at 2-3. VA bases this position on its characterization of the legislative history of section 8110(a)(5). *Id.* VA asserts that section 8110(a)(5) should be interpreted "in the manner its legislative history indicates was intended – not as being so broad as to preclude all development of cost data that is vital to making sound decisions to contract for fee-basis care or to enter sharing agreements, but rather as precluding only formal cost comparisons under OMB Circular A-76." McClain Letter, at 1. To buttress this position, VA cited a passage in the joint explanatory statement in the Congressional Record[10] discussing VA health care appropriations in relation to "activities under the Office of Management and Budget Circular A-76 or otherwise in connection with the contracting-out (and studies of the feasibility of such contracting) of functions carried out by VA employees." 127 Cong. Rec. S22,704, S22,713 (1981); McClain Letter, at 1; VA Memo, at 2-3.

While we agree with VA that this passage shows that the immediate factor motivating the provision in 1981 was the planned A-76 cost comparison studies, we do not read the legislative history to suggest that the Congress meant the prohibition to cover only A-76 studies. In the same passage that VA finds critical to an understanding of legislative intent, the Congress did not limit its concern to A-76 studies; the joint explanatory statement said "A-76 *or otherwise*" (emphasis added). 127 Cong. Rec. S22,704, S22,713 (1981). That passage further stated that the provision "would prohibit the use of any funds appropriated for the VA's medical care account, medical and prosthetic research account, or medical administration and miscellaneous operating expenses account for the purpose of conducting *any studies* comparing the cost of the VA itself performing various functions in the VA's Department of Medicine and Surgery (DM&S) with the cost of having such functions performed by private contractors" (emphasis added). *Id.*

Furthermore, a review of the legislative history in its entirety shows that the larger issue was diverting scarce resources appropriated for the actual delivery of health care to veterans to a costly administrative activity, such as conducting cost comparison studies. The joint explanatory statement stated a concern about the conduct of these studies because "the substantial costs involved . . . must come from funds appropriated for the provision of health-care services." 127 Cong. Rec. S22,704, S22,713 (1981). Cost comparison studies conducted pursuant to CARES could result in the same effect as those conducted pursuant to A-76—diversion of resources. Any dollar spent on cost comparison studies conducted for whatever purpose is necessarily not available to pay for medical care and research for veterans. Thus, a review of the entire legislative history does not support VA's position that the section 8110(a)(5) limitation applies only to A-76 cost comparison studies and to no other cost comparison studies.

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[10] Because the provision in the statute that enacted section 8110(a)(5) was inserted late in the legislative process, there is no conference report discussing the provision.

Accordingly, we conclude that section 8110(a)(5)'s reference to cost comparison studies encompasses the CARES cost comparison studies. When Congress wants to appropriate money for cost comparison studies consistent with section 8110(a)(5), it knows how to do so, as it has demonstrated many times in prior years. For fiscal year 2004, however, Congress did not do so. Because VHA appropriations are not available for the purpose of conducting CARES cost comparison studies, then VA has violated section 8110(a)(5) and the purpose statute, 31 U.S.C. § 1301(a), if it has obligated VHA's restricted appropriations. The purpose statute prohibits charging authorized activities, such as CARES cost comparison studies, to the wrong appropriation, such as the VHA appropriation. *See, e.g.*, B-285066, May 19, 2000.

If VA has obligated its restricted VHA appropriations for costs related to CARES cost comparison studies, then VA needs to adjust its accounts to correct its purpose violation. VA should deobligate those amounts charged to the VHA appropriations and obligate the amounts to the unobligated balances of another available appropriation not restricted by section 8110(a)(5). The major projects construction appropriation for fiscal year 2004, for example, includes $181 million for "Capital Asset Realignment for Enhanced Services (CARES) activities," and indicates that, among other things, it is available for "needs assessments which may or may not lead to capital investments, and other capital asset management related activities." Pub. L. No. 108-199, Div. G, 118 Stat. 3, 367 (Jan. 23, 2004). Because it is through the CARES process that VA decides whether to renovate or close existing facilities, where to construct new facilities, or, alternatively, when to provide health care through private contractors, the appropriation for construction of major projects would be available in fiscal year 2004 to conduct CARES cost comparison studies.

If VA, after adjusting its accounts, were to have insufficient budget authority to cover all obligations incurred, then VA would have to report an Antideficiency Act violation. *See* 31 U.S.C. §§ 1341, 1351. The Antideficiency Act prohibits an agency from making an obligation in excess of available appropriations, 31 U.S.C. § 1341, and requires agencies to report violations to the Congress and the President, 31 U.S.C. § 1351.

CONCLUSION

The section 8110(a)(5) restriction on using specified VHA appropriations for any studies comparing the costs of services provided by private contractors with those provided by VA applies to cost comparison studies conducted as part of the CARES process. For fiscal year 2004, appropriations available to VA for CARES cost comparison studies include those for construction of major and minor projects. VA also has the authority to transfer up to $400 million from medical care to major projects construction to fund CARES. If VA has obligated the specified VHA appropriations for costs related to cost comparison studies, then VA has violated section 8110(a)(5) and the purpose statute, 31 U.S.C. § 1301(a). To correct that violation, VA would have to adjust its accounts, deobligating those amounts charged to the VHA appropriations and obligating those amounts to the unobligated balances of available appropriations not restricted by section 8110(a)(5). If VA, after adjusting

its accounts, has insufficient budget authority to cover all obligations incurred, then VA will have to report an Antideficiency Act violation.

If you have any questions, please contact Susan A. Poling, Managing Associate General Counsel, at 202-512-5644, or Thomas H. Armstrong, Assistant General Counsel, at 202-512-8257.

Sincerely yours,

/signed/

Anthony H. Gamboa
General Counsel

DIGEST

The prohibition in 38 U.S.C. § 8110(a)(5) on using appropriations for "medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses" for the Veterans Health Administration (VHA) to conduct studies comparing the cost of the provision of commercial services and products by the Department of Veterans Affairs (VA) with that by private contractors applies to cost comparison studies conducted as part of VA's Capital Asset Realignment for Enhanced Services (CARES) process. It also prohibits the use of VHA employees to conduct such studies. The section 8110(a)(5) prohibition applies unless Congress includes an affirmative statement that it is appropriating VHA funds for that specific purpose. This conclusion is supported both by applying the plain meaning rule to section 8110(a)(5) and reviewing the provision's legislative history. If VA has used restricted VHA appropriations in fiscal year 2004 to conduct such studies in the absence of an express appropriation, then VA has violated section 8110(a)(5). It would also constitute a violation of the purpose statute, 31 U.S.C. § 1301(a). If VA, after adjusting its accounts, were to have insufficient budget authority to cover all obligations incurred, then VA would have to report an Antideficiency Act violation.