United States
General Accounting Office

Memorandum

DATE: February 23, 1990

TO: Director, GS&C - Richard L. Brown
Director, GGD/Claims - Sharon Green

FROM: Associate General Counsel - Gary L. Kepplinger

SUBJECT: Certifying Officers in GAO - B-236141.2

You asked for our advice on the following questions: (1) Is GAO legally authorized to have its own certifying officers? (2) If so, are the GAO employees who serve as certifying officers pecuniarily liable to the United States for losses that result from erroneous or improper certifications made by them? (3) Assuming affirmative answers to the preceding questions, is there any legal basis upon which GAO can, when appropriate to the facts and circumstances of particular cases, grant relief from liability to those employees?

As more fully explained in the attachment to this memorandum, we conclude that GAO may legally have its own certifying officers. Unless GAO modifies its regulations to provide otherwise, GAO's certifying officers are not pecuniarily liable for losses that result from erroneous or improper certifications made by them. If GAO decides to administratively impose pecuniary liability upon its certifying officers, it also may provide a mechanism to relieve those employees from their liability.1/ Of course, as an

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1/ In the alternative, GAO could simply limit the liability of certifying employees to those situations in which the certifying employee was negligent, "at fault," or failed to exercise "due care," etc. In other words, rather than automatically making GAO certifying officers liable for any and all losses and requiring the employee to prove that he or she was not at fault, GAO could structure its regulations to place the burden on the agency to establish that the employee acted improperly and should be held liable.

alternative to administratively providing for liability and relief of its certifying officers, GAO could either seek legislation to yield the same results, do nothing at all with respect to its certifying officers, or simply handle the certifying officer's performance in the context of established performance appraisal and pay-for-performance systems.

Should you have any further questions on this matter, or require our assistance in drafting regulations or legislative proposals discussed in this memorandum, please feel free to contact me or Mr. Neill Martin-Rolsky of my staff, at 275-5544.

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BACKGROUND

Questions concerning the authority and liability of government disbursing and certifying officers, are usually answered by reference to the provisions of 31 U.S.C. §§ 3325(a) and 3528 (1982), as amended, and the body of case law which surrounds them. GAO originally proposed these statutes.1/ Act of Dec. 29, 1941, Pub. L. No. 77-389, Chap. 641, 55 Stat. 875. Shortly after Congress enacted these statutes, the Comptroller General held that, by their own terms, these laws are limited to disbursing and certifying officers employed in the executive branch. Consequently, none of these provisions are applicable to disbursing and certifying officers in the legislative or judicial branches. 21 Comp. Gen. 987 (1942). See also, e.g., B-6061, June 19, 1947.

Briefly stated, 31 U.S.C. § 3325, with certain exceptions not relevant here, provides that executive branch disbursing officers shall make payments only upon vouchers certified by agency heads or authorized certifying officers. In addition, 31 U.S.C. § 3325 makes executive branch disbursing officers responsible for appropriate examination of each voucher to verify its propriety, and liable for any losses resulting from the failure to follow those requirements.

With respect to 31 U.S.C. § 3528, that statute makes executive branch certifying officers responsible for the existence and correctness of the facts recited in certificates and vouchers, as well as the papers which support them, and for the legality of the proposed payments under the appropriation or fund involved. They are liable to the United States for the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate or misleading certificate made by them, as well as for any payment prohibited by law or which does not represent a legal obligation under the appropriation or fund involved. 31 U.S.C. § 3528(a). The Comptroller General, however, may grant relief from financial liability to those certifying

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1/ See Annual Reports of the Comptroller General of the United States for the Fiscal Years ended June 30, 1939 and June 30, 1940, at 98-100, and 63-66, respectively.

officers who meet certain criteria specified in the law. 31 U.S.C. § 3528(b).2/

During GS&C's review and revision of GAO's Orders relating to those employees who certify internal GAO vouchers, GS&C realized that section 3528 is not applicable to GAO's certifying officers. GS&C became concerned that GAO may lack the authority to certify its internal vouchers for such things as employee travel expenses, contract payments, and pay and compensation, etc. GS&C also became concerned that GAO may lack authority to grant relief to GAO employees whose erroneous certifications result in losses to the United States.

Claims Group became similarly concerned about its officers who are certifying the payment of judgments and certain other obligations of the United States from the so-called Judgment Fund--the permanent, indefinite appropriation created by 31 U.S.C. § 1304 (1982), as amended.3/ Claims Group became concerned during discussions with the Treasury Department's Financial Management Service of a proposal to

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2/ Relief for disbursing officers is authorized by other laws, including one enacted prior to this legislation, which may explain why the 1941 legislation included relief authority only for certifying officers. See 28 U.S.C. § 2512 (originally enacted in 1866); 31 U.S.C. § 3527 (the subsections of this statute were originally enacted as separate laws in 1944, 1947, and 1955).

3/ By law, Judgment Fund payments must be "certified" by the Comptroller General or his designee. 31 U.S.C. § 1304(a)(2). Neither the Judgment Fund statute nor its legislative history address the meaning of the term "certify." In the absence of such legislative guidance, we give the statute its "plain meaning," namely, that Congress intended GAO to implement the act's certification requirements in a way comparable to the way other voucher certifications are implemented within the government. Cf., e.g., 64 Comp. Gen. 142, 146 n.3, citing Perrin v. United States, 444 U.S. 37, 42 (1979). Thus, we do not believe that the fact that GAO's Judgment Fund certification authority derives from a specific statutory provision dictates any difference in the advice to be given to Claims Group, as compared to that given to GS&C.

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speed up the Judgment Fund process, among other things, by discontinuing Treasury's current practice of requiring its own certifying officers to add their certifications to those previously made by Claims Group officials, before disbursements are made from the fund.

Question #1: Is GAO legally authorized to have its own certifying officers?

Answer #1: Yes.

Discussion: Prior to 1912, government disbursing officers routinely certified the vouchers upon which they made payments. (In other words, at that time, the certifying and disbursing functions were invested in the same person.) In that year, Congress enacted a provision which generally prohibited executive branch disbursing officers from certifying the vouchers upon which they made payment. Act of Aug. 23, 1912, ch. 350, 37 Stat. 360, 375, codified in 31 U.S.C. § 3521 (1982). The 1912 provision resulted from the congressional discovery that many executive branch disbursing officers had accumulated huge and inordinately expensive auditing staffs in order to assure themselves of the propriety of vouchers presented for payment. To eliminate this costly practice and expedite the disbursement process, the 1912 provision specified that agency administrative officers would prepare and review vouchers and payrolls in the executive branch prior to presentment to agency disbursing officers. Henceforth, disbursing officers would only be responsible for "such examination of all vouchers as may be necessary to ascertain whether they represent legal claims against the United States." 48 Cong. Rec. 5900-5901 (1912) (statements of Rep. Johnson).

As recounted in GAO's 1939 and 1940 Annual Reports to Congress,4/ considerable confusion arose in the wake of the 1912 provision concerning the respective duties and liabilities of disbursing officers and the new administrative certifying officers. Many disbursing officers concluded, based on the 1912 act, that they were legally entitled to accept and rely upon the administrative certifications, and argued that they should not be held liable for any improper payments resulting from erroneous certifications. Much of the strength of their position drew from the fact that the

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4/ See footnote 1, above.

1912 act precluded them from reexamining matters considered by the certifying officer, i.e., the disbursing officer's review was limited to those matters apparent from the face of the voucher and its supporting papers, if any. On the other hand, since the payments were made by disbursing officers who were (at that time) required to be bonded, many administrative certifying officers concluded that certification was merely a perfunctory duty, and that they should bear no legal liability for resulting losses. This confusion was further compounded by an Executive Order which appeared to assert that certifying officers, rather than disbursing officers, would be financially liable for losses arising from erroneous certifications. Exec. Order No. 6166, sec. 4, June 10, 1933. See 13 Comp. Gen. 326 (1934).

To remedy this confusion, GAO proposed the 1941 legislation to more clearly specify the respective duties and liabilities of executive branch disbursing and certifying officers.5/ Act of Dec. 29, 1941, supra, codified in 31 U.S.C. §§ 3528 and 3325(a). See, e.g., H.R. Rep. No. 1263, 77th Cong., 1st Sess. (1941) (quoting GAO's 1940 Annual Report to Congress). The history of this legislation offers no clear explanation of why it was limited to the executive branch. However, in 21 Comp. Gen. 987 (1942), the Comptroller General advised the Library of Congress that the need for this legislation arose from the effects of the 1912 act and the 1933 Executive Order. The Comptroller explained that where the legislative and judicial branches were concerned, "the vexing problems of determining the liabilities of the two classes of officers under [the 1912] act and Executive Order did not exist. . . ." 21 Comp. Gen. at 988. This contemporaneous comment by the original proponent of the 1941 legislation suggests that sections 3528 and 3325(a) were enacted not to authorize executive branch agencies to establish disbursing and certifying officers, but rather to "set definite limits," 21 Comp. Gen. at 987, on the duties and liabilities of disbursing and certifying officers who had already been created within the executive branch by the 1912 act. The foregoing also suggests that the other two branches were not included in this legislation because the 1912 act and the 1933 Executive Order were inapplicable to them and the functioning of their certifying officers was

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5/ GAO's proposal was enacted with only a few changes not relevant to this discussion.

not seen as a "problem" which merited statutory reform.6/ Consequently, the statute simply did not address them. Thus, the provisions of 31 U.S.C. § 3528√were not intended to affirmatively prohibit GAO or other legislative and judicial branch entities from having certifying officers, and have no application to the problem before us.

We think it clear that, subject to certain limitations which are discussed below, government agencies (regardless of the branch in which they are located) have implicit, discretionary legal authority, independent of the 1912 and 1941 legislation, to designate officers and employees in their respective agencies to perform a certifying function. This authority derives from the general statutory provisions which empower the heads of government agencies to organize and manage their agencies in a manner which best effects the agency's "mission" and legal responsibilities. See 21 Comp. Gen. at 988.

For GAO, this general statutory authority may be found in three statutes. First, 31 U.S.C. § 711(a)√and (b)√authorize the Comptroller General to prescribe rules and regulations to carry out the duties and powers of his office, and to delegate those duties and powers to his officers and employees. Second, 31 U.S.C. § 731√authorizes the Comptroller General to appoint, pay, assign, and remove officers and employees that he decides are necessary to carry out his duties and powers. Third, the Comptroller General is expressly provided by 31 U.S.C. § 704√with the same general authority to administer his agency as is given by law to the heads of other agencies. In view of these statutes, we think the Comptroller General may designate officers and employees of the GAO to act as certifying officers.

6/ As discussed later in the text, in the absence of statutory authority to do so, the financial liability of a disbursing officer for losses resulting from erroneous payments cannot be transferred to a certifying officer, even where the disbursing officer acted entirely without fault and the loss can be traced to an erroneous certification. 21 Comp. Gen. at 988. Presumably, the "vexing problems" mentioned in 21 Comp. Gen. 987 arose because the 1912 act was being used to support the assertion that Congress had in fact provided the necessary statutory authority for the transfer of liability between disbursing and certifying officers within the executive branch.

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Question # 2: Are the GAO employees who serve as certifying officers pecuniarily liable to the United States for losses that result from erroneous or improper certifications made by them?

Answer # 2: Unless GAO by regulation expressly so provides, its certifying officers are not pecuniarily liable for losses resulting from erroneous or improper certifications.

Discussion: Accountable officers, including disbursing officers, are automatically and strictly liable for all funds entrusted to them. E.g., 54 Comp. Gen. 112, 114 (1974). However, by definition, certifying officers are not entrusted with funds, but rather with the power to certify a voucher and thereby authorize the payment of funds by a disbursing officer. Cf., 55 Comp. Gen. 297 (1975). Except as provided by law, the liability of a disbursing officer may not be transferred away from that officer to another person, including a certifying officer. 21 Comp. Gen. at 988-89. As discussed above, while the 1912 and 1941 legislation transferred some of the pecuniary liability imposed upon executive branch disbursing officers to executive branch certifying officers, those acts do not apply to officers in the legislative or judicial branches. Furthermore, while some agencies within the legislative and judicial branches have obtained specific provisions which transfer some liability from their disbursing officers to their certifying officers,7/ there is no such statutory provision applicable to GAO. Thus, GAO certifying officers are not presently liable for losses resulting from erroneous certifications.

However, government agencies do have the authority to administratively impose upon their employees some degree of pecuniary liability for losses incurred by the United States as the result of employee errors of judgment or negligence. E.g., 25 Comp. Gen. 299 (1945). In 21 Comp. Gen. 987 (1942), we considered a plan of the Library of Congress to administratively establish duties and liabilities for its certifying officers that would parallel those established for executive branch certifying officers by the 1941 act. Among other things, the Library proposed

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7/ E.g., 2 U.S.C. § 142b (Library of Congress); 2 U.S.C. § 142e (Congressional Budget Office); 2 U.S.C. § 142f (Office of Technology Assessment); and 44 U.S.C. § 308 (Government Printing Office).

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to make its certifying officers financially liable for losses resulting from erroneous certifications, and to absolve its disbursing officers of any liability from those losses, so long as they occurred without any fault on the part of the disbursing officers. We advised the Library that, in view of its general statutory authority to prescribe rules and regulations concerning its own activities, GAO would not object if it administratively established internal requirements for its accountable officers comparable to those prescribed by the 1941 act. In this regard, we commented that any regulations issued by the Library to fix the responsibilities of its employees become part of the "contract of employment" for those persons, provided those regulations and requirements do not otherwise violate the law. 21 Comp. Gen. at 988. See also 25 Comp. Gen. at 301.

We stressed that any responsibilities or liabilities so imposed would arise by virtue of the Library's administrative authority, rather than by reason of the 1941 legislation. This latter point was important because:

> "[N]either the prescribing of such administrative regulations nor the bonding of certifying officers could operate to relieve the disbursing officer for the Library of any responsibility or liability under his bond . . . The primary responsibility for the expenditure of, and proper accounting for, public funds is that of the disbursing officer to whom such funds are advanced and that responsibility cannot be shifted to another who may be willing to assume it and execute a bond for that purpose unless such transfer of responsibility is specifically authorized by law. Insofar as concerns this office, such an assumption of liability on the part of the certifying officer of the Library would have to be regarded merely as an administrative arrangement whereby the certifying officer would be required to make good certain losses for which the disbursing officer primarily is liable; but this office would look to the disbursing officer for adjustment of any differences in his accounts--any recovery from the certifying officer or his surety being a matter for administrative consideration [by the Library and the disbursing officer]. . . .
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> [In other words], the liability so imposed would have to be considered merely as additional protection to the Government rather than as in substitution for, or in

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reduction of, the liability imposed by law upon the disbursing officer."

21 Comp. Gen. at 988-89 (emphasis added).

Thus, we conclude that where an entity within the legislative or judicial branch is authorized to prescribe rules and regulations governing its operations under the laws which create, empower, and regulate it, it may administratively establish certifying officers and invest them with pecuniary responsibility for their actions, so long as those administrative rules do not otherwise contravene the law. Those rules may not wholly insulate the legislative or judicial branch entity's disbursing officers from financial liability for any payments not in accordance with the law. Assuming that its disbursing officer was not at fault, the interests of the government are otherwise adequately protected, and such actions are administratively convenient, the most that a legislative or judicial branch entity could provide in its rules would be that the agency would initially attempt to recover erroneous payments from the payees and the certifying officers, before collecting from its disbursing officers.

Consequently, unless GAO promulgates an internal regulation pursuant to 31 U.S.C. § 711 (1982), which provides otherwise, its certifying officers will not be financially responsible for any losses which result from errors in their certifications. We also find that if a loss resulted from an erroneous GAO certification which appeared on its face to be proper, there would be adequate legal grounds upon which to relieve the disbursing officer if he or she is employed in the executive branch, even if GAO does not by regulation impose liability upon the certifying officer.8/ If the

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8/ In 4 Comp. Gen. 991 (1925), there was no authority to transfer liability from disbursing to certifying officers, yet we credited the accounts of an executive branch disbursing officer for losses resulting from erroneous certifications without any fault on the part of the disbursing officer. Cf., e.g., 7 Comp. Gen. 797 (1928). The difference between the rule in these cases and that in 21 Comp. Gen. 987 derives from the fact that the 1912 act limited executive branch disbursing officer examinations to the "face" of vouchers presented for payment. Holding the executive branch disbursing officer liable would have

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disbursing officer is employed by the legislative or judicial branch, GAO could choose under appropriate regulatory criteria to defer collection from the disbursing officer pending completion of attempts to collect from the payee and the certifying officer (assuming for the latter that the agency by regulation has imposed pecuniary liability).

Question #3: Assuming affirmative answers to the preceding questions, is there any legal basis upon which GAO can, when appropriate to the facts and circumstances of particular cases, grant relief from liability to GAO's certifying officers?

Answer #3: If GAO administratively imposes liability upon its certifying officers for losses resulting from their erroneous certifications, it may also provide a means to relieve certifying officers from liability.

Discussion: We think that some form of relief from financial responsibility to GAO's certifying officers could be included in regulations which administratively impose that liability. The case law in this area is somewhat sparse. In our Library of Congress decision, 21 Comp. Gen. 987 (1942), discussed earlier, we advised that any certifying officers which the Library administratively established and invested with pecuniary liability would not be eligible for relief pursuant to the provisions of the 1941 legislation (now codified in section 3528). 21 Comp. Gen. at 989. We did not address the possibility of administratively providing for such relief. Some years later, in B-191036, July 7, 1978, the Library of Congress sought our opinion on a related issue. In that case, we were asked whether we objected to proposed regulations concerning the responsibilities and accountability of the certifying officers of the Copyright Royalty Tribunal under Pub. L. No. 94-553, 90 Stat. 2541, 2598 (1976), codified in 17 U.S.C. § 806(b). The draft regulations provided that the Comptroller General could relieve the Tribunal's certifying officers under 31 U.S.C. § 3528. We objected to this provision, observing

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8/(...continued)
punished him for failing to do that which the 1912 act affirmatively prohibited. The same would be true for Treasury disbursing officers who pay facially valid, but ultimately erroneous vouchers certified by GAO officers.

that the relief authority in section 3528 was limited to certifying officers in the executive branch. That authority, we added, was not expanded by 17 U.S.C. § 806, and cannot be conferred by regulation, with or without GAO's consent. As an alternative, we suggested that given the broad grant of authority to the Library and the Tribunal under section 806 to "prescribe responsibilities and accountability of . . . officers and employees with respect to such certifications," we saw no reason why those regulations could not administratively authorize an officer of the Library or the Tribunal (as opposed to the Comptroller General) to grant relief under criteria comparable to those in section 3528.

By analogy from this case, we think that a legislative agency which imposes pecuniary liability upon its certifying officers (pursuant to the principles discussed in 21 Comp. Gen. 987 and 25 Comp. Gen. 299) can also provide a mechanism by which to avoid, or grant relief from, liability under appropriate criteria specified in those regulations. Where the agency is administratively establishing such liability, its discretion appears to be almost as broad as that which was noted in B-191036, above. Other agencies have in fact relied upon these same principles to impose upon employees who were not otherwise financially responsible a "limited," rather than "strict," liability for losses resulting from their actions. For example, in 65 Comp. Gen. 177, 180 (1986), we noted without objection that the Forest Service had chosen to administratively impose pecuniary responsibility upon one of its non-accountable officers (consistent with 25 Comp. Gen. 299) only where the loss resulted from deliberate or wilful actions, and not where the loss resulted from errors of judgment, ignorance, or negligence.

This suggests to us that GAO and other agencies not subject to the 1912 and 1941 acts (or other similar legislation) have substantial flexibility in determining whether, and to what extent and form their certifying officers should be held accountable for erroneous certifications. If an agency may legitimately impose such a "limited" liability, it seems only logical to conclude that an agency might alternatively impose a "strict" liability upon its certifying officers, with provisions for administrative relief under criteria comparable to those prescribed in section 3528. Clearly, the resulting liability is the same, although the relative burdens of proof would be different. Specifically, where automatic, strict pecuniary liability is imposed with the

possibility of relief contingent upon the officer's demonstration that he was not negligent, the officer charged is essentially required to prove his "innocence." Whereas, the limited liability approach requires the agency to first prove the officer's "guilt" before any adverse consequences may attach. Either way, the officer will only be held accountable if he is ultimately found to be at fault. However, the relative burdens of the officer and agency (to come forward with convincing evidence) shift substantially under these two approaches. Another alternative could be to impose no pecuniary liability upon an errant certifying officer, leaving the task of correcting and controlling the certifying officer's performance to the performance appraisal and pay-for-performance systems.

Regardless of which approach is taken, however, inasmuch as this liability is "contractual"9/ rather than "statutory" in its origin, the agency has the latitude to include in that "contract" any terms which the other party (the certifying officer) is willing to accept as a condition of employment. On the other hand, of course, if the terms of that contract are too onerous, employees will decline the post and the agency will be forced to modify its position. For this reason, common sense and fairness suggest that whatever liability is imposed should be designed to be no more onerous than that imposed by statute upon executive branch certifying officers.

9/ E.g., 21 Comp. Gen. at 988; 25 Comp. Gen. at 301.