




Memorandum

**U.S. Department of
Transportation**
Office of the Secretary
of Transportation
Office of Inspector General

Subject: ACTION: Report on Spending Money from
Treasury Miscellaneous Receipts Accounts, DOT
FI-2002-108

Date: September 12, 2002

From: Alexis M. Stefani 
Assistant Inspector General for Auditing

Reply to
Attn. of: Meche: x61496

To: Assistant Secretary for Budget and Programs
and Chief Financial Officer
General Counsel

This report presents our audit results on a Hotline complaint alleging inappropriate use of funds by the former Department of Transportation (DOT) Deputy Chief Financial Officer (Deputy CFO). Specifically, the complainant alleged that during Fiscal Year (FY) 2000 the former Deputy CFO paid for office space restructuring and new furniture for the DOT Office of Financial Management using funds from the Maritime Administration and was charging expenses directly to a Federal Aviation Administration (FAA) suspense account¹ rather than, as required, to the appropriation for the Office of the Assistant Secretary for Budget and Programs. Our audit objective was to determine whether these allegations were valid.

RESULTS IN BRIEF

We found that DOT spent about \$37 million obtained from U.S. Treasury (Treasury) "miscellaneous receipts" accounts between FY 1998 and FY 2001 to finance four projects involving office space renovation, purchasing new systems furniture, and developing new DOT financial systems, rather than using funds appropriated to DOT for such purposes. Although the projects represented legitimate needs, DOT did not have the authority to spend money from Treasury miscellaneous receipts accounts. No DOT employee gained personally from spending Treasury's money instead of DOT appropriated funds. We made four recommendations, and DOT responded with corrective action plans.

Regarding renovation of office space to accommodate new systems furniture, we found that the former Assistant Secretary for Budget and Programs authorized the

¹ Suspense accounts are to be used to temporarily hold money until the proper appropriation to be credited is determined.

renovation project and properly obligated \$30,000 against his office's appropriated funds for the design work. To complete the project, the former Deputy CFO later split the procurement into eight separate reimbursable agreements to two different Operating Administrations and, without a legal opinion from the DOT General Counsel, spent about \$287,000 that was obtained from Treasury miscellaneous receipts accounts, rather than using funds that were appropriated for such purposes to the Office of the Assistant Secretary for Budget and Programs. The former Assistant Secretary for Budget and Programs stated he was unaware that money from Treasury miscellaneous receipts accounts had been spent on the four projects.

When the spending of Treasury money on DOT projects was brought to the attention of the current Assistant Secretary for Budget and Programs, she sought legal advice from the DOT General Counsel and was informed that money from Treasury miscellaneous receipts accounts could not be retained and spent on DOT projects. She then directed that spending Treasury's money be stopped and that all money obtained from Treasury miscellaneous receipts accounts be returned to Treasury. We confirmed that none of Treasury's money was obligated during FY 2002.

We also referred this matter to the DOT General Counsel for a determination as to whether or not the circumstances under which the \$37 million was spent create a reportable violation of the Anti-deficiency Act within Title 31, United States Code (U.S.C.), Section 1341(a). The DOT General Counsel concluded that the amount withdrawn from Treasury miscellaneous receipts accounts must now be repaid. Further, unless unobligated balances sufficient to repay the amounts in question are now available in expired appropriations accounts and those accounts could properly have been charged for the costs in question at the time they were incurred, the reports required by the Anti-deficiency Act must be transmitted to the President and to Congress.

Although these four projects represented legitimate DOT needs, the spending of Treasury money rather than funds appropriated to DOT, in our opinion, violated statutory provisions prohibiting such actions. All but \$287,000 of the \$37 million was spent on developing and implementing new DOT financial systems. DOT had a procedure in place to allocate cost to the Operating Administrations for the development and implementation of DOT financial systems, but none of the \$37 million was allocated to the Operating Administrations using this procedure. Specifically, we found:

- In 1997, DOT requested authority from Congress to allow funds received each year from travel management centers, credit card programs, the subleasing of building space, and miscellaneous sources to be credited to DOT appropriations and be available for use by DOT until December 31. Congress included this authority as

Section 338 in the 1998 DOT Appropriations Act. The same provision² has been included each year since FY 1998. This report will refer to the provision as the Section 338 legislation.

- To implement the Section 338 legislation, the former Deputy CFO set up a *suspense* account, which this report will refer to as the DOT 338 Account. The suspense account was maintained by FAA, although the Federal Transit Administration (FTA) maintained the official accounting records for the Office of the Assistant Secretary for Budget and Programs. Until August 2001, the money deposited and withdrawn from the DOT 338 Account was under the exclusive control of the former Deputy CFO. For internal control purposes, proper separation of duties did not exist.
- For the 4 years ended September 30, 2001, about \$61 million was deposited in the DOT 338 Account. About \$12 million came from funds received from rebates, subleasing of space, and commissions from travel management centers and credit card programs, which was consistent with the intent of the Section 338 legislation. As of September 30, 2001, about \$11 million had been returned to the DOT Operating Administrations in accordance with the Section 338 legislation.
- The remaining \$49 million came from DOT collections that were required to be deposited in Treasury miscellaneous receipts accounts and returned to Treasury. DOT did not have the authority to retain and spend this money. The former Deputy CFO authorized the accounting staff to move money from selected Treasury accounts each year immediately before Treasury would have transferred the money into its General Fund. This moved Treasury's money to the FAA suspense account under DOT control. After the former Deputy CFO retired in August 2001, DOT continued the practice by moving \$9.7 million from the Treasury accounts into the DOT 338 Account on September 28, 2001.
- DOT spent \$37 million of the \$49 million obtained from Treasury accounts. In addition to not having the authority to spend Treasury's money, DOT also obligated \$21 million of the \$37 million to authorize and create new obligations after the funds had legally expired for obligation. None of the Treasury money was credited to DOT appropriations nor was it allocated to elements of the Department as required by the Section 338 legislation, and none of the expenses was charged against amounts appropriated to DOT.

During the 4 years ended September 30, 2001, Congress appropriated about \$27 million for the Office of the Assistant Secretary for Budget and Programs. Retaining and obligating \$37 million of Treasury's money without proper authority

² This provision has a different section number after FY 1998 and identifies the specific year in which the funds are no longer available as of December 31.

more than doubled the funds that were appropriated for use by the Office of the Assistant Secretary for Budget and Programs. Except for the \$30,000 obligation for design work for the renovation of office space, the FTA accounting office did not know about the other obligations totaling \$37 million.

To resolve these issues, we recommended that DOT stop spending money from Treasury miscellaneous receipts accounts and return the \$49 million to Treasury; determine which funds can appropriately be deposited in the DOT 338 Account and establish internal controls to record, account for, and spend these funds; record the \$37 million against the proper fiscal year appropriations, and request a determination from the DOT General Counsel as to whether or not the circumstances under which the \$37 million was spent creates a reportable violation of the Anti-deficiency Act.

The current Assistant Secretary for Budget and Programs and Chief Financial Officer concurred with all of our recommendations. She agreed that the \$49 million should be returned to Treasury, and already returned \$12.3 million of Treasury's money that was never obligated. She also eliminated the DOT 338 Account, and is working with the General Counsel on the proper course of action to record the \$37 million against the appropriate DOT fiscal year appropriations and whether or not the course of action to be taken will result in a reportable violation of the Anti-deficiency Act. The planned completion date for these actions is December 2002.

BACKGROUND

In 1997, DOT requested authority from Congress to allow refunds, rebates, and other returns of appropriations received by DOT to be credited to departmental appropriations. In its request, DOT stated that many repayments are received late in the fourth quarter of the fiscal year or in the first quarter of the next year; thus they are lost to the agency for incurring new obligations. Congress agreed with DOT's request and included Section 338 in the 1998 Department of Transportation and Related Agencies Appropriation Act, which stated:

Rebates, refunds, incentive payments, minor fees and other funds received by the Department from travel management centers, charge card programs, the subleasing of building space, and miscellaneous sources are to be credited to appropriations of the Department and allocated to elements of the Department using fair and equitable criteria and such funds shall be available until December 31, 1998.

The same provision has been included in DOT's Appropriations Acts each year since FY 1998. To implement the Section 338 provision, the former Deputy CFO set up the DOT 338 Account as a suspense account in FAA's records. From inception until

August 2001, the DOT 338 Account was under the exclusive control of the former Deputy CFO. Our scope and methodology are discussed in Exhibit A.

FINDINGS

We found that internal controls were inadequate over the DOT 338 Account. Specifically, there was no separation of duties because the former Deputy CFO, who authorized transfers of funds into the DOT 338 Account, was the only person who authorized the spending of these funds. From FY 1998 through FY 2001, DOT deposited about \$61 million in the DOT 338 Account. Of the \$61 million, about \$12 million resulted from payments from third parties, such as rebates on credit cards, which was consistent with the intent of the Section 338 legislation. The other \$49 million came from Treasury miscellaneous receipts accounts for which DOT had no authority to retain and spend. We also found \$21 million was obligated from the DOT 338 Account after the funds had legally expired for obligation.

Depositing Money Into Treasury Miscellaneous Receipts Accounts

Title 31, U.S.C., Section 3302(b) states:

... an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

To understand the significance of Section 3302(b), the General Accounting Office (GAO) has ruled that once money is deposited into a Treasury miscellaneous receipts account, it takes an appropriation to get it back out.³ GAO guidance goes on to say:

Accordingly, for an agency to retain and credit to its own appropriation moneys which it should have deposited into the general fund of the Treasury is an improper augmentation of the agency's appropriation.

Treasury officials stated that deposits in Treasury miscellaneous receipts accounts maintained by all Government agencies are transferred once a year on or about September 30 to the Treasury General Fund.

Of the \$61 million deposited in the DOT 338 Account, about \$49 million came from DOT collections that initially were deposited into Treasury miscellaneous receipts accounts by the Operating Administrations. Notwithstanding Section 3302(b) and GAO guidance, and without a legal opinion from the DOT General Counsel, the

³ Principles of Federal Appropriations Law, GAO/OGC-92-13, Volume II, Chapter 6, Availability of Appropriations: Amount.

former Deputy CFO established a standard practice starting on September 10, 1998, to move money from selected Treasury miscellaneous receipts accounts into the DOT 338 Account just before September 30 of each year. After the former Deputy CFO retired in August 2001, DOT continued the practice by moving \$9.7 million from the Treasury accounts into the DOT 338 Account on September 28, 2001.

The instructions provided to the DOT accounting staff specifically stated that the task was to:

... remove any monies over 50 thousand in the General Fund Receipt [Treasury miscellaneous receipts] accounts ... for all DOT agencies and place it into [the] FAA ... suspense account until further instructions. ... Those agencies the funds are being removed from do not have to be notified.

To implement the instructions, the accounting staff moved the money that the Operating Administrations had collected and deposited in their Treasury miscellaneous receipts accounts, as required by Section 3302(b), into the DOT 338 Account. The primary sources of funds initially deposited in the Treasury miscellaneous receipts accounts were lease payments to FAA from the Metropolitan Washington Airport Authority,⁴ import fees to National Highway Traffic Safety Administration for Motor Vehicle Safety,⁵ and repayments to the Maritime Administration for Construction Differential Subsidies. The Operating Administrations told us that applicable laws prevented them from spending the money in Treasury miscellaneous receipts accounts and that they were unaware DOT had not returned the money to Treasury. We also found that DOT did not have specific statutory authority to retain and spend money deposited in these Treasury miscellaneous receipts accounts.

Using Funds From the DOT 338 Account

As of September 30, 2001, the DOT 338 Account had a balance of about \$13 million. For the remainder of the \$61 million deposited in the DOT 338 Account for the 4 years ended September 30, 2001, we found about \$11 million had been returned to the Operating Administrations consistent with the intent of the Section 338 legislation. The remaining \$37 million obtained from Treasury miscellaneous receipts accounts was spent, but was not credited to any DOT appropriation nor was it allocated to

⁴ Public Law 105-102 specifically states that collections from the Metropolitan Washington Airports are to be deposited into the Treasury General Fund. There was no provision in the law that DOT could retain and spend these funds.

⁵ Title 49, U.S.C., Chapter 301, §30141 states that the fees are available to the Secretary of Transportation to the extent provided for in advance in appropriation laws and only to carry out provisions within this Title. There was no provision in appropriation laws that DOT could retain and spend these funds.

elements of the Department, as required by the Section 338 legislation, and none of the expenses was charged against amounts appropriated to DOT.

The Chief Financial Officers Act of 1990 provides statutory responsibility to the DOT CFO for financial systems in the Department. Each year, in advance of appropriations, the DOT CFO establishes an agreement with each Operating Administration setting the policy for the DOT CFO to sponsor and selectively manage the development, implementation, operation, and maintenance of departmental accounting and financial information systems and related financial systems and activities. In this agreement, the DOT CFO develops the annual funding plan that specifies the total budget by activities for the coming fiscal year and allocates a share of the costs to each of the Operating Administrations, which must be paid from their appropriated funds.

Of concern to us is that although all but \$287,000 of the \$37 million of Treasury's money was spent on development and implementation of new DOT financial systems, the agreement in place to allocate such costs to the Operating Administrations was not used. Consequently, the Operating Administrations were not charged a share of the \$37 million. Instead, DOT used separate reimbursable agreements to create obligations to spend Treasury's money to pay its bills. Title 31, U.S.C., Section 1535, establishes the rules for appropriate use of reimbursable orders or agreements and states:

The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency . . . if amounts are available. . . . An order placed or agreement made under this section obligates an appropriation of the ordering agency or unit.

Using reimbursable agreements separate from the annual funding plan, DOT spent \$37 million of Treasury's money that had been moved into the DOT 338 Account on four projects as described below. None of the \$37 million was allocated to the Operating Administrations using the procedure in place for the annual funding plan for the fiscal years involved.

- In December 1997, DOT began the development and implementation of its new Delphi accounting system under the direction of the former Deputy CFO. In support of Delphi, DOT withdrew about \$31.2 million from September 1998 to September 2001 that had been deposited into the DOT 338 Account, all of which came from Treasury miscellaneous receipts accounts.

Multiple reimbursable agreements and *suspense* accounts were used to obligate the money without charging any DOT appropriation. For example, on September 24, 1998, the former Deputy CFO withdrew about \$10 million from the DOT 338 Account and moved it to a Federal Highway Administration (FHWA)

suspense account. FHWA then sent reimbursable orders of \$7 million to FAA and \$3 million to the Coast Guard to authorize obligations in support of the Delphi implementation. FHWA then reimbursed FAA and Coast Guard from the money in its suspense account that came from Treasury miscellaneous receipts accounts through the DOT 338 Account. None of the obligations or payments was charged against the appropriations of the ordering unit as required by Section 1535 or allocated to the elements of the Department using fair and equitable criteria as required by the Section 338 legislation.

- In June 1999, DOT began development of its Do It Yourself (DIY) system that would create a website to enable DOT to sell its services and products over the Internet. The former Deputy CFO withdrew about \$1.8 million that had been deposited in the DOT 338 Account, all of which came from Treasury miscellaneous receipts accounts. None of the obligations or payments was charged against the appropriation of the ordering unit as required by Section 1535 or allocated to the elements of the Department using fair and equitable criteria as required by the Section 338 legislation.
- In September 1999, the former Assistant Secretary for Budget and Programs initiated a project to renovate office space and purchase new systems furniture for DOT's Office of Financial Management at an estimated cost of \$317,000. To start the renovation project, he authorized a reimbursable agreement totaling \$30,000 to FAA for design work, which was properly obligated by the FTA accounting office against FY 1999 funds appropriated to the Office of the Assistant Secretary for Budget and Programs in accordance with Section 1535.

To complete the renovation project, the former Deputy CFO spent \$287,000 during FY 2000 from Treasury miscellaneous receipts accounts that had been deposited in the DOT 338 Account. The former Deputy CFO split the procurements into a series of eight reimbursable agreements to FAA and the Maritime Administration. Other than the design work, no other obligation or payment was charged against the funds appropriated to the Office of the Assistant Secretary for Budget and Programs as required by Section 1535. The FTA accounting office did not know about the other obligations totaling \$287,000. The former Assistant Secretary for Budget and Programs stated he was unaware that Treasury miscellaneous receipts had been deposited into the DOT 338 Account and spent on DOT projects.

- In September 2000, DOT began development and implementation of an imaging system to integrate electronically scanned financial documents into a database to maintain supporting documentation in an electronic rather than paper file. The former Deputy CFO withdrew about \$3.8 million that had been deposited in the DOT 338 Account, all of which came from Treasury miscellaneous receipts accounts. None of the obligations or payments was charged against the

appropriation of the ordering unit as required by Section 1535 or allocated to the elements of the Department using fair and equitable criteria as required by the Section 338 legislation.

These projects represented legitimate DOT needs and no DOT employee gained personally from spending Treasury's money instead of funds appropriated to DOT. However, DOT did not have the authority to retain and spend money obtained from Treasury miscellaneous receipts accounts for projects that should have been financed with appropriated funds. During the 4 years ended September 30, 2001, Congress appropriated about \$27 million for the Office of the Assistant Secretary for Budget and Programs. Except for the \$30,000 obligation for design work for the renovation of office space, the FTA accounting office, which maintained the official accounting records, did not know about the other obligations totaling \$37 million. Retaining and obligating \$37 million of Treasury's money without proper authority more than doubled the funds that were appropriated for use by the Office of the Assistant Secretary for Budget and Programs.

Spending Expired Funds

DOT's annual appropriations acts specifically state that funds collected during a given fiscal year within the intent of Section 338 legislation shall be available until December 31 of that year. For the \$37 million obligated using money from Treasury miscellaneous receipts accounts, we found that DOT obligated about \$21 million to authorize new obligations and expenditures after the funds had legally expired for obligation. For example, DOT authorized new obligations totaling \$12.7 million in August and September 2001 using funds that were deposited in the DOT 338 Account in FY 2000. In accordance with the Section 338 legislation, the \$12.7 million legally expired for creating new obligations on December 31, 2000.

Reporting Procedures

DOT authorized the creation of obligations and expenditures totaling \$37 million from money that it did not have the authority to spend and these amounts were not recorded against funds appropriated to DOT. These obligations and expenditures need to be charged against the proper DOT fiscal year appropriations.

We referred our audit results to the DOT General Counsel and requested a determination as to whether or not the circumstances under which the \$37 million was spent creates a reportable violation of the Anti-deficiency Act. Office of Management and Budget (OMB) Circular A-34, *Instructions on Budget Execution*, provides reporting procedures for violations of the Anti-deficiency Act.

RECOMMENDATIONS

We recommend that the Assistant Secretary for Budget and Programs and Chief Financial Officer, in coordination and agreement with the DOT General Counsel:

1. Stop the practice of spending money from Treasury miscellaneous receipts accounts unless authorized by specific legislation, and return to the U.S. Treasury the \$49 million that was moved from Treasury miscellaneous receipts accounts to the DOT 338 account from FY 1998 through FY 2001.
2. Determine which funds appropriately can be deposited in the DOT 338 Account, and establish appropriate procedures and internal controls, including separation of duties, to properly record, account for, and spend funds in the DOT 338 Account.
3. Record the \$37 million of obligations and related expenses against the proper DOT fiscal year appropriations.
4. Request a determination from the DOT General Counsel as to whether or not the circumstances under which the \$37 million was spent create a reportable violation of the Anti-deficiency Act.

MANAGEMENT RESPONSES

A draft of this report was provided to the Assistant Secretary for Budget and Programs and Chief Financial Officer, and the DOT General Counsel on June 24, 2002. In her August 23 reply, the Assistant Secretary for Budget and Programs and Chief Financial Officer stated:

Recommendation 1. Concur. I directed that the practice be halted as soon as the issue was identified. Unobligated funds in the amount of \$12,300,519 have been returned to Treasury and we are currently working with General Counsel on the proper course of action to take regarding the return of \$36,955,917, which was obligated by DOT to Treasury's miscellaneous receipts accounts. We are working to resolve this quickly and have a goal of completing the necessary actions by September 30, 2002.

Recommendation 2. Procedures have been instituted that eliminate the need for the DOT 338 Account process. We have modified procedures to have the various vendors distribute rebates and refunds directly to the Operating Administrations. We have distributed all unobligated balances and closed the DOT 338 Account, effective September 6, 2002.

Recommendations 3. and 4. I concur and am currently working with General Counsel on the proper course of action to be taken. We anticipate completing the necessary actions by December 2002.

The DOT General Counsel provided these comments:

The amount withdrawn from Treasury miscellaneous receipts accounts must now be repaid, and that unless unobligated balances sufficient to repay the amounts in question are now available in expired appropriations accounts and those accounts could properly have been charged for the costs in question at the time they were incurred, the reports required by the Anti-deficiency Act must be transmitted to the President and to Congress. The allocation of charges to the unobligated balance accounts of each Operating Administration, the Office of the Secretary, the Office of the Inspector General, the Transportation Administrative Service Center, and the Surface Transportation Board must be reasonably related to the costs actually incurred on behalf of each of them in providing these financial management programs and services and space renovations/acquisition of furniture.

The complete texts of management comments are Appendices 1 and 2 to this report.

OFFICE OF INSPECTOR GENERAL COMMENTS

Actions taken and planned by DOT are reasonable. To use prior-year unobligated balances, DOT needs to develop fair and equitable criteria to allocate the \$37 million to the DOT appropriations that should have borne the costs in the first place. We will monitor this process to ensure accurate accounting and reporting.

We appreciate the courtesies and cooperation of DOT representatives. If you have questions concerning this report, please contact me at (202) 366-1992 or John Meche at (202) 366-1496.

EXHIBIT A. SCOPE AND METHODOLOGY

For the 4 years ended September 30, 2001, DOT deposited about \$61 million in the DOT 338 Account. We reviewed \$2.5 million in rebates received from Bank of America credit cards during FY 2000 and DOT's allocation of these rebates to the Operating Administrations. We also reviewed the spending of about \$37 million of funds moved from Treasury miscellaneous receipts accounts into the DOT 338 Account.

We interviewed program and accounting managers in FAA, FHWA, FTA, the National Highway Traffic Safety Administration, and the Maritime Administration. Our discussions focused on accounting policies and limitations for spending money deposited in Treasury miscellaneous receipts accounts. We also interviewed representatives of the DOT General Counsel in Washington, D.C., and discussed Treasury miscellaneous receipts accounts with the U.S. Treasury Financial Management Service.

We reviewed policy documents and financial records regarding the DOT 338 Account maintained by the Office of the Deputy CFO and DOT's Cash Operations Group in Oklahoma City, Oklahoma. We also obtained a legal opinion from the Office of Inspector General Senior Counsel concerning funds deposited into and spent from the DOT 338 Account.

We performed most of the audit work from June through August 2001. Because of statutory work associated with our annual audits of DOT's financial statements, and the need for a legal opinion, we suspended the work on this project from September 2001 to January 2002. We resumed our audit work in February 2002 and completed it in June 2002. The audit was conducted in accordance with Government Auditing Standards prescribed by the Comptroller General of the United States.

EXHIBIT B. MAJOR CONTRIBUTORS TO THIS REPORT

THE FOLLOWING INDIVIDUALS CONTRIBUTED TO THIS REPORT.

<u>Name</u>	<u>Title</u>
Terrence Letko	Program Director
Roger Williams	Senior Counsel
Leonard Meade	Project Manager
Sharon Ayers	Senior Auditor
Tom Wise	Senior Auditor



**U.S. Department of
Transportation**


Office of the Secretary
of Transportation

Assistant Secretary
for Budget and Programs
and Chief Financial Officer

400 Seventh St., S.W.
Washington, D.C. 20590

DATE: August 23, 2002

MEMORANDUM TO: John L. Meche
Assistant Inspector General for Financial, Information
Technology and Department-wide Programs

FROM: Donna McLean 

SUBJECT: Draft Report on Spending Money from Treasury
Miscellaneous Receipts Accounts, DOT Project Number:
01F3029F000

Thank you for the opportunity to provide comments on the draft report. I agree with the general conclusions and am providing the following comments on the recommendations contained in the report.

The report contains four recommendations.

1. Stop the practice of spending money from Treasury miscellaneous receipts accounts unless authorized by specific legislation, and return to the U.S. Treasury the \$49 million that was moved from Treasury miscellaneous receipts accounts to the DOT 339 account from FY 1998 through FY 2001.
 - I concur and as noted in your report directed that the practice be halted as soon as the issue was identified. Unobligated funds in the amount of \$12,300,519 have been returned to Treasury and we are currently working with Counsel on the proper course of action to take regarding the return of \$36,955,917 which was obligated by DOT to Treasury's miscellaneous receipts accounts. We are working to resolve this quickly and have a goal of completing the necessary actions by the end of the fiscal year.
2. Determine which funds appropriately can be deposited in the DOT 338 Account, and establish appropriate procedures and internal controls, including separation of duties, to properly record, account for, and spend funds in the DOT 338 Account.
 - Procedures have been instituted that eliminate the need for the 338 account process. We have modified procedures to have the various vendors distribute rebates and refunds directly to the operating

administrations. We expect to have all unobligated balances distributed and be able to close the 338 account by the end of August 2002.

3. Record the \$37 million of obligations and related expenses against the proper DOT fiscal year appropriations.
 - I concur and am currently working with General Counsel on the proper course of action to be taken. We anticipate completing the necessary actions by December 2002.
4. Request a determination from the DOT General Counsel as to whether or not the circumstances under which the \$37 million was spent created a reportable violation of the Antideficiency Act. This should include coordination and consultation with appropriate officials in OMB, Treasury and GAO.
 - I concur and am currently working with General Counsel in this regard. We hope to have this completed by December 2002.

Please contact me if you have any questions or need additional information.

Cc: Kirk K. Van Tine - General Counsel
Kenneth Mead - Inspector General



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

September 10, 2002

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

**MEMORANDUM TO THE ASSISTANT SECRETARY FOR BUDGET AND
PROGRAMS/CHIEF FINANCIAL OFFICER**

FROM:

Kirk K. Van Tine
General Counsel

SUBJECT: Use of Unobligated Balances to Adjust Obligations

Our Office has reviewed certain issues regarding the withdrawal of funds from Treasury's Miscellaneous Receipts accounts and the expenditure of those funds to cover costs relating to the Departmental Delphi accounting system, the Do It Yourself (DIY) and Imaging Capability programs, and space renovations/acquisition of furniture during fiscal years (FYs) 1998 through 2001.¹ We have concluded that the amount withdrawn must now be repaid to the Miscellaneous Receipts accounts. Further, unless unobligated balances sufficient to repay the amounts in question are now available in expired appropriations accounts and those accounts could properly have been charged for the costs in question at the time they were incurred, the reports required by the Anti-deficiency Act, 31 U.S.C. §§1341 and 1517 *et seq.*, must be transmitted to the President and to Congress. The allocation of charges to the unobligated balance accounts of each Operating Administration, the Office of the Secretary (OST), the Office of the Inspector General (OIG), the Transportation Administrative Service Center (TASC), and the Surface Transportation Board (STB) must be reasonably related to the costs actually incurred on behalf of each of them in providing these financial management programs and services and space renovations/acquisition of furniture.

BACKGROUND

The 1998 Department of Transportation's and Related Agencies Appropriations Act, and every DOT appropriations act thereafter, contains a general provision that states: "Rebates, refunds, incentive payments, minor fees and other funds received by the Department from travel management centers, charge card programs, the subleasing of building space, and miscellaneous sources are to be credited to appropriations of the Department and allocated to elements of the Department using fair and equitable criteria

¹ The Delphi accounting system is DOT's new Department-wide accounting system. The DIY site allows DOT customers to pay for a wide range of goods and services using their credit cards and also covers applications for various DOT programs. The Imaging Capability program is a Department-wide electronic document processing and retrieval system.

and such funds shall be available until December 31” of each respective fiscal year.² As a result, DOT established a suspense account (commonly referred to as the “338 Suspense Account”) in which such receipts were deposited. Rebates, refunds, and other receipts received by DOT were deposited directly into this account. We have been informed that, in reliance on the statutory language quoted above, approximately \$49 million in receipts that had been initially deposited in Treasury’s Miscellaneous Receipts accounts were withdrawn prior to the end of FYs 1998 through 2001 and credited to the 338 Suspense Account. Based on documents supplied by your Office, of the \$49 million in Miscellaneous Receipts deposited into the 338 Suspense Account, a total of approximately \$37 million was ultimately credited to accounts of the Federal Aviation Administration (FAA), the U.S. Coast Guard (USCG), the Federal Highway Administration (FHWA), and the Maritime Administration (MARAD) (referred to herein as the servicing agencies). We understand that a balance of approximately \$12 million has recently been transferred from the 338 Suspense Account back to Treasury’s Miscellaneous Receipts accounts.

During FYs 1998 through 2001, funds were expended on administrative activities that benefited the Operating Administrations, OST, OIG, TASC, and STB, including the Delphi accounting system, the DIY, the Imaging Capability programs and space renovations/acquisition of furniture. It is our understanding, however, that rather than requiring the Operating Administrations, OST, OIG, TASC, and STB to obligate and expend funds directly from their respective budget accounts, approximately \$37 million that had been moved into the 338 Suspense Account was ultimately credited to the servicing agencies’ accounts to cover the costs of the activities mentioned above. The OIG has reviewed these transactions and has concluded that approximately \$49 million was inappropriately withdrawn from Treasury’s Miscellaneous Receipts accounts and deposited into the 338 Suspense Account. Based on the facts reported to us, we believe that conclusion is legally correct. The OIG has recommended that these funds be deobligated and returned to the Miscellaneous Receipts accounts. We concur with that recommendation. In addition, the OIG requested a legal determination as to whether the circumstances under which the \$37 million was spent resulted in a reportable event under the Anti-deficiency Act.

ANALYSIS

The “Miscellaneous Receipts” statute, set forth in 31 U.S.C. § 3302(b), requires that a government official or agent receiving money for the government from any source must deposit that money in the Treasury as soon as practical without deduction for any charge or claim. However, the Miscellaneous Receipts statute does not apply if an agency has some other specific statutory authority to retain the funds. General Accounting Office, Principles of Federal Appropriations Law, Vol. II, at 6-108 (1992). The general statutory provision included in the DOT Appropriations Act between 1998 and 2002 identifies both several types of funds and several sources for these funds that can be retained by DOT. The types of funds that DOT is authorized to retain include rebates, refunds, incentive payments, minor fees, and “other funds.” The specified sources of those funds

² See section 338, Pub. L. 105-66, Oct. 27, 1997; section 335, Pub. L. 105-277, Oct. 19, 1998; section 333, Pub. L. 106-69, Oct. 9, 1999; section 327, Pub. L. 106-346, Oct. 23, 2000; section 327, Pub. L. 107-87, Dec. 18, 2001.

that can be retained are travel management centers, charge card programs, subleasing of building space, and “miscellaneous sources.” The meaning of the terms “other funds” and “miscellaneous sources” in the general provision is not self-evident and the statute does not include additional guidance to aid in interpreting its scope. Further, we have been unable to locate any other language in the Appropriations Acts or their legislative history that is helpful in interpreting the general provision.

In determining which types of revenues derived from “other funds” and “miscellaneous sources” can be retained under the general provision, we rely on general principles of statutory interpretation. Where the literal or plain meaning of a statute is unclear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases. See 2A Singer, ed. Statutes and Statutory Construction, 6th ed. 2000, section 47.16. The rule of *ejusdem generis* (i.e., “of the same kind”) is particularly helpful in this instance. Under this rule, where general words (i.e., “other funds” and “miscellaneous sources”) follow specific words (i.e., “rebates, refunds, incentive payments, minor fees” and “travel management centers, charge card programs, subleasing of building space”), the general words are construed to encompass only objects similar in nature to those objects enumerated by the specific preceding words. *Id.*, at section 47.17. This rule of interpretation is particularly important in reconciling an incompatibility between specific and general words in a statute so that all the words can be given effect.

Under that legal principle, the general provision would not permit the Department to credit civil penalties received by an Operating Administration from individuals or entities determined to have violated statutory or regulatory provisions to Departmental appropriations (although they may be credited to Departmental accounts if authorized by the particular enforcement statute). Although civil penalties could be viewed as “other funds ... received from miscellaneous sources,” civil penalty collections are not of the same kind as “rebates, refunds, incentive payments” and “minor fees”. Similarly, we do not believe that the general provision at issue here can be read so broadly as to allow Metropolitan Washington Airports Authority lease payments initially credited to the Treasury’s Miscellaneous Receipts account pursuant 49 U.S.C. § 49104(b) to be withdrawn and retained by DOT for obligation and expenditure. We believe the same is true for the foreign import fees credited to the Miscellaneous Receipts account pursuant to 31 U.S.C. § 3302(b), but later withdrawn and deposited into the 338 Suspense Account.

We also believe that an overly broad interpretation of the general provision would likely result in an implicit change in a number of existing substantive statutory requirements administered by DOT agencies. Comptroller General decisions and relevant case law make it abundantly clear that “repeals by implication” of substantive provisions of law are disfavored, and statutes are to be interpreted to avoid that result. Tennessee Valley Authority v. Hill, 437 U.S. 153, 189-90 (1978).

Based on the language of the statute and the legal principles of statutory interpretation, we agree with the OIG’s conclusion that approximately \$49 million was inappropriately withdrawn from Treasury’s Miscellaneous Receipts accounts and deposited into the 338 Suspense Account and that these funds must be returned to the U.S. Treasury. An

agency's retention of funds that it should have deposited into the General Fund of the Treasury constitutes an improper augmentation of its appropriations. See General Accounting Office, Principles of Federal Appropriations Law, Vol. II, at 6-108 (1992); General Accounting Office, Policy and Procedures Manual, Title VII, Fiscal Guidance, at 7.5-4 (May 1993); 46 Comp. Gen. 31, 34 (1966).

Correcting the FY 1998-2001 transfers of Miscellaneous Receipts in this instance may result in a deficiency in each of the servicing agencies' appropriations accounts that were previously credited with portions of the \$37 million in 338 Suspense Account funds. An Anti-deficiency Act violation will occur unless appropriate funding sources, which were available to the affected DOT element at the time, have sufficient unobligated balances to allow an adjustment of the affected accounts.³ Although unobligated balances are appropriations that have expired and are no longer available to cover new obligations, they are still available for the recording and/or payment of obligations properly incurred before the period of availability ended.⁴

Upon the expiration of a fixed appropriation, the obligated and unobligated balances retain their fiscal-year identity in an "expired account" for that appropriation for an additional five fiscal years.⁵ During this five-year period, any unobligated balance remains available to record previously unrecorded obligations or to make upward adjustments in previously recorded or underrecorded obligations. GAO, Principles of Federal Appropriations Law, Vol. I, at 5-62 (1991). This authority allows agencies to adjust their accounts to reflect more accurately obligations and liabilities actually incurred during the period of availability. *Id.*; see also, 63 Comp. Gen. 525, 528 (1984); 73 Comp. Gen. 338 (1994); U.S. General Accounting Office, "Cancelled Appropriations: \$615 Million of Illegal or Otherwise Improper Adjustments," GAO-01-697, July 2001. "An agency may also adjust its records if it discovers that a disbursement actually made before an appropriation account closed and properly chargeable to an obligation incurred during the appropriation's period of availability was either not recorded at all or was charged to the wrong appropriation." GAO-01-697 at p. 7. Based on GAO precedent, therefore, unobligated balances may be available to adjust the affected accounts. However, if no alternative funding sources are available, or if the amounts available are insufficient to repay the amounts returned to Treasury's Miscellaneous Receipts accounts, the reports required by the Anti-deficiency Act must be filed.

³ Agencies may not spend, or commit themselves to spend, in advance of or in excess of appropriations. 31 U.S.C. § 1341.

⁴ Section 1553(a) of title 31, U.S.C., states that "[a]fter the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account under section 1552(a) of this title, the account shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account;" see also General Accounting Office (GAO), Principles of Federal Appropriations Law, Vol. I, at 5-13 (1991).

⁵ Section 1552(a) of title 31, U.S.C., states that "[o]n September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose."

In this case, DOT must also ensure that amounts that are charged against unobligated balances available in the Operating Administrations, OST, OIG, TASC, and STB are reasonably related to their proportionate share of the costs of receiving the Delphi, DIY, and Imaging Capability program services, and the space renovations/acquisition of furniture. In 63 Comp. Gen. 422 (1984), GAO determined that where adjustment of the accounts was not possible because alternate funding sources were already obligated, expenditures improperly charged by the Department of Defense (DOD) resulted in a violation of the Anti-deficiency Act, 31 U.S.C. § 1341(a). However, GAO also stated that “the Anti-deficiency Act’s prohibition against incurring obligations in excess or in advance of available appropriations is not violated ... unless no other funds were available for that expenditure.” *Id.* at 424. GAO concluded that after-the-fact judgments as to whether alternate sources of funds were available were properly the responsibility of DOD, and that if the necessary adjustments were not feasible, DOD should file the required Anti-deficiency Act reports. *See* U.S. General Accounting Office, “Topaz II Space Nuclear Power Program - Management, Funding, and Contracting Problems,” B-277078 (December 1, 1997) at page 4 (“We recommend that the Secretary of Defense ... determine if unobligated funds are available to cover the \$5.9 million difference between \$9.4 million (the contract’s total price) and \$3.5 million (the amount obligated and expended from fiscal year 1993 funds). *If funds in that amount are not available*, the Secretary should ensure that the [Ballistic Missile Defense Organization] notifies the Office of Management and Budget and the Congress that it violated the Anti-deficiency Act.”) (emphasis added).

During FY 1998 through 2001, DOT had reimbursable agreements in place under the Economy Act, 31 U.S.C § 1535, to allocate costs to each Operating Administration, OST, OIG, TASC, and STB for the development and implementation of the new DOT financial systems. The procedures in the reimbursable agreements were not followed for the \$37 million obtained from Treasury’s Miscellaneous receipts accounts. To properly allocate costs, the Economy Act requires the ordering agency pay the performing agency “the actual cost” incurred in providing the goods or services ordered. 31 U.S.C. § 1535(b). The term “actual cost” includes all direct costs attributable to providing the goods or services ordered, as well as indirect costs funded out of the performing agency’s currently available appropriations that bear a significant relationship to providing the goods or services. 57 Comp. Gen. 674, 682-3 (1978). The GAO has held that agencies possess some flexibility in applying the Act’s “actual cost” standard to specific situations, so long as there is reasonable assurance that the performing agency is reimbursed for its costs without the ordering or performing agency augmenting its appropriation. Decision of the Associate General Counsel, GAO, B-250377, January 28, 1993. GAO has repeatedly held that the test is whether the computation of standard cost produces a reasonable approximation of costs, not exacting precision. Federal Mediation and Conciliation Service- Propriety of Financial Management Service Charges under the Economy Act, B-257823, January 22, 1998. Pursuant to the Economy Act and GAO precedent, the allocation of charges to the unobligated balance accounts of each Operating Administration, OST, OIG, TASC, and STB must be reasonably related to the costs actually incurred on behalf of each of them in providing these financial management programs and services and space renovations/acquisition of furniture.

CONCLUSION

In returning the \$37 million to Treasury's Miscellaneous Receipts accounts, the Department need not file reports under the Anti-deficiency Act if the servicing agencies' expired appropriations accounts contain unobligated balances for FYs 1998 through 2001 to which the costs of the Delphi accounting systems, the DIY program, the Imaging Capability program, and the space renovations/acquisition of furniture may be properly charged. The allocation of costs among the expired appropriations accounts must bear a reasonable relationship to the actual costs of providing the services in question to each agency.