

Official Representation Funds: Fiscally Controlled Funds or “Easy Money”?

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I want the easy, easy money, I want the good times, oh, I never had. I want the easy, easy money, I want the good life. I want it bad.

—Billy Joel¹

Introduction

Article I, Section 9 of the Constitution of the United States of America states that “no Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law.”² This is Congress’s “power of the purse”—the greatest power it has and the one it most zealously guards.³ During the nation’s early years, however, executive agencies did little to control the money they were given and abuses of public funds were common.⁴ Often, Congress was forced to appropriate additional funds in order to cover the nation’s expenses and obligations. To curb these abuses, Congress passed a series of statutes that established rules for fiscal control.⁵ Some statutes provide for criminal sanctions if they are not followed.⁶ A complete exposition of all these controls is outside the scope of this article. This article looks, however, at the three primary fiscal controls applicable to all government funds—purpose, time, and amount—to determine if and how they apply to a particular

type of funds—official representation funds (ORFs). The article begins with a brief discussion of what ORFs are and how they are used within the Department of Defense (DOD). Next, the article examines fiscal controls in general and when and if they apply to ORFs. Finally, the article examines the administrative controls for these funds within the DOD. This inquiry demonstrates that ORFs are indeed fiscally-controlled funds that serve an important purpose within the government.

This inquiry is important because ORFs appear on the surface to be completely discretionary to the heads of federal agencies.⁷ For the Army, Congress appropriates millions of dollars for this purpose.⁸ As the U.S. Supreme Court has noted, “the protection of the public fisc is a matter that is of interest to every citizen”⁹ As citizens, it is important to know whether the funds we give the government are subject to appropriate control, or whether there are “pots” of “easy money” that agency officials can spend for anything and everything they might want. As judge advocates, we are obligated to our client, the Army, to ensure that expenditures are made lawfully.

1. Billy Joel, *Easy Money*, on INNOCENT MAN (Sony Records 1983).

2. U.S. CONST. art. I, § 9, cl. 7.

3. See U.S. GENERAL ACCOUNTING OFFICE, OFFICE OF THE GENERAL COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-3 (2d ed. 1991) [hereinafter GAO RED BOOK] (providing a more complete discussion of the “power of the purse”). Commentators have described Congress’s power to appropriate funds as “the most important single curb in the Constitution on Presidential power.” *Id.* (quoting EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 134 (H.W. Chase & C. H. Ducat, 14th ed. 1978)). “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

4. GAO RED BOOK, *supra* note 3, at 1-6.

5. *Id.* at 1-6 - 1-7; see Purpose Statute, 31 U.S.C. § 1301(a); Antideficiency Act, 31 U.S.C. § 1341 (2000); “Bona Fide Needs” Statute, 31 U.S.C. § 1502(a); “Miscellaneous Receipts” Statute, 31 U.S.C. § 3302(b).

6. For example, to enforce the Antideficiency Act, the U.S. Code provides that “[a]n officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both.” 31 U.S.C. § 1350.

7. See *infra* note 26 and accompanying text.

8. Official representation funds are drawn from the emergency and extraordinary expense limitation contained in the operations and maintenance portion of the annual appropriation bills. For Fiscal Year 2004, as an example, Congress appropriated just over \$25 billion dollars for expenditures necessary for the operation and maintenance of the Army, but not otherwise specified in the appropriations act. Of that, “not to exceed \$ 11,034,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army.” Department of Defense Appropriations Act, 108 Pub. L. 87, tit. II, 117 Stat. 1054, 1056 (2003).

9. *Brock v. Pierce County*, 476 U.S. 253, 262 (1986).

What Is the Function of ORFs?

ORFs in General

The longstanding general rule in fiscal law is that government departments and agencies may not use appropriated funds for entertainment expenses, unless expressly authorized by Congress.¹⁰ Entertainment expenses include such things as food and gifts.¹¹ This prohibition includes the entertainment of both U.S. citizens and foreigners.¹² The rule makes some sense because of the potential for abuse that exists with these kinds of expenditures. There are circumstances, however, when agencies legitimately need to make these kinds of expenditures to conduct their affairs with other nations and, in some circumstances, with U.S. citizens.

An early Army case, often cited for the proposition that governments may not use appropriated funds for entertainment expenses, aptly demonstrates this need for a mechanism to pay protocol, or etiquette related expenses.¹³ In Fiscal Year (FY) 1925, Congress appropriated \$50,000 to fund an aerial flight around the world.¹⁴ The appropriation provided the following:

* * and not exceeding \$50,000 may be used for all contingent expenses in connection with an aerial flight around the world, for such purposes as may be approved or authorized by the Secretary of War, to be immediately available; * * *¹⁵

Two lieutenants were making arrangements for the flight which, given the technology of the time, involved landing in other countries. In making these arrangements, the lieutenants spent \$1265 “entertaining officials of various governments.”¹⁶ The question before the Comptroller General (CG) was whether these expenses were payable from the appropriation cited above. The CG ruled that they were not, even though the Secretary of War seemed to have authority to approve the expense under the language of the appropriation. To form his decision, the CG examined the appropriation request that the Army made to Congress and the discussion in Congress and found no mention of entertainment. From this, he concluded that the “contingent expenses” contemplated by Congress did not include entertainment.¹⁷ Unfortunately for the two young officers, no Army appropriation was available to meet these expenses at the time.

It is reasonable to conclude from common experience, however, that in many cultures, certain etiquette obligations are expected to be met in order to meet with officials and obtain decisions necessary to accomplish an objective. Many of these are expensive, involve food, drink or other entertainment expenses, but do not fit within the normal congressional appropriations. The State Department long had an entertainment appropriation because it was obvious that they needed to meet requirements of etiquette when dealing with foreign dignitaries.¹⁸ As the 20th Century progressed, it became clear that other agencies, like the Army officers from the then-War Department, had similar types of obligations. Congress began providing funds to meet official entertainment requirements, first limited to foreign visitors overseas, and then more broadly funding these types of expenses, even for officials from other agencies.¹⁹ In the 1960’s, the term “official reception and rep-

10. *See, e.g.*, To the Administrator, Veterans Administration, B-152331, 43 Comp. Gen. 305 (1963) (“[I]t is a general rule of longstanding that funds appropriated for Government departments and agencies may not be used for entertaining individuals by giving luncheons, etc., except when specifically authorized by statute.”).

11. *See, e.g.*, Matter of: Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986).

12. *See* GAO RED BOOK, *supra* note 3, at 4-100.

13. *See* To Captain Carl Halla, U.S. Army, 5 Comp. Gen. 455 (1925).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See* Matter of: U.S. Trade Representative--Use of Reception and Representation Funds, B-223678, 1989 U.S. Comp. Gen. LEXIS 598 n.2 (June 5, 1989) which states the following:

The “official reception and representation” appropriations originated from the need to permit officials of agencies with significant presence in foreign countries to reciprocate courtesies extended to them by foreign officials. Since the early 1960’s, when it seems to have originated, the use of R & R appropriations has outgrown the foreign relations context and has now become the most common, although not the only, form of “entertainment” appropriation.

Id.

19. GAO RED BOOK, *supra* note 3, at 4-109.

resentation funds” was coined (sometimes shortened to R & R funds) and most of these expenses now fall under this title.²⁰ Unfortunately, this term is not defined anywhere in the law.²¹ The CG has provided what he terms “a rough outline of a definition”²² stating,

Fairly read, our decisions make clear that we will not object to an agency’s use of its R & R appropriation to cover expenses incurred in connection with official agency events, typically characterized by a mixed ceremonial, social and/or business purpose, and hosted in a formal sense by high level agency officials.²³

Without a statutory meaning for the term, it can be difficult to determine the proper purposes to which governments can apply the money. Agency heads are generally given broad discretion in expending these funds, which raises the question—is this money subject to fiscal control, or is it simply “easy money” to be spent however the agency wishes?

ORFs in the DOD

Congress has long provided some form of “contingency” funds to the military.²⁴ Today, Congress provides these funds from the “emergency and extraordinary expense” limitation in the operations and maintenance appropriation (O & M).²⁵ Authority for this limitation has been codified in 10 U.S.C. § 127, entitled “Emergency and Extraordinary Expenses.”²⁶ Congress provides standing authority that:

within the limitation of appropriations made for the purpose, the Secretary of Defense, the Inspector General of the Department of Defense, and the Secretary of a military department within his department, may provide for any emergency or extraordinary expense which cannot be anticipated or classified. When it is so provided in such an appropriation, the funds may be spent on approval or authority of the Secretary concerned or the Inspector General for any purpose he determines to be proper, and such a determination is final and conclusive upon the accounting officers of the United States.²⁷

This statutory provision seems to provide plenary authority to the Secretary for any and all certifiable expenses. The statute, in a subsequent section, provides some administrative limits. For individual expenditures exceeding \$500,000, but less than \$1 million, the Secretary must give notice to Congress and wait five days before spending the money.²⁸ For individual expenditures exceeding \$1 million, the Secretary must wait fifteen days before spending the money.²⁹ Additionally, Congress must receive a quarterly report of all emergency and extraordinary expenses.³⁰ The first line of the statute provides the Secretary with discretion to use only funds appropriated specifically for “emergency and extraordinary expenses.”³¹ Thus, if Congress is not happy with the expenditures being reported to it, it can simply reduce or eliminate the funds appropriated for this purpose. The DOD, as well as each military service, provides additional limitations by regulation, but these are addressed later in this article.³²

20. *Id.* at 4-110 to 4-111.

21. *Id.*

22. *U.S. Trade Representative*, 1989 U.S. Comp. Gen. LEXIS 598, at n.3. The CG states,

We are not aware of any definition of “official reception” in the sundry appropriations therefore or their legislative history. Nor is it our purpose here to provide other than a rough outline of a definition. The essential point of any definition must reflect a distinction between the kinds of social and quasi-social functions suggested above that fall within the meaning of the phrase “official reception” and interagency working sessions or routine business meetings.

Id.

23. *Id.*

24. Act of Mar. 3, 1795, 1 Stat. 438. As discussed above, however, expenditures for entertainment were not considered allowable under this appropriation.

25. *See supra* note 8; *see also infra* note 34 and accompanying text.

26. 10 U.S.C. § 127 (2000).

27. *Id.*

28. *Id.* § (c)(1)(A).

29. *Id.* § (c)(1)(B).

30. *Id.* § (d).

The emergency and extraordinary expense funds for the DOD are included with the operations and maintenance appropriation for each service. While the appropriation does not mention “official representation” or “reception and representation,” it has long been recognized that the emergency and extraordinary expense limitation includes what the DOD terms as ORFs.³³ Congress specifies what portion of the O & M funds appropriated may be used, pursuant to 10 U.S.C. § 127, for emergency and extraordinary expenses. For example, the Army’s O & M appropriation for FY 2004 states,

For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; *and not to exceed \$ 11,034,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army*, and payments may be made on his certificate of necessity for confidential military purposes, \$25,029,346,000³⁴

The Army, by regulation, identifies four non-exclusive categories of expenses for which emergency and extraordinary expense funds may be used. These are Intelligence Contingency Funds, Criminal Investigation Activities, and two cate-

gories of miscellaneous expenses, A and B.³⁵ Category A are for “official courtesies and other representation expenses . . .”;³⁶ category B provides for any unanticipated expenditure that is not for official representation, such as emergency rescues.³⁷

The General Accounting Office (GAO) has generally given wide latitude to the Secretaries in the executive branch, at least with some categories of emergency and extraordinary expenses. For example, in 1992, the defense attaché in Port-Au-Prince, Haiti submitted an emergency and extraordinary expense voucher to the Embassy for Defense Intelligence Agency (DIA) expenditures pursuant to an agreement with the Department of State for the Embassy there to provide fiscal services.³⁸ The voucher did not specify what the expenses were, nor did it contain any other documentation because, the defense attaché asserted, the certifying officer did not have a sufficient security clearance to allow him to see the supporting documents.³⁹ The certifying officer refused to certify the funds and requested an advance decision from the CG. The State Department refused to forward the request for an advance decision arguing that the payment could be certified on the defense attaché’s signature alone, since the attaché had delegated authority from the Secretary pursuant to 10 U.S.C. § 127.⁴⁰ The certifying officer argued that he is required to certify both the legality and correctness of the voucher—a function he could not perform without the documentation.⁴¹

31. The meaning of “emergency and extraordinary” and its efficacy as a limitation is somewhat questionable. In a GAO audit in 1986, one of the errors noted was that some expenditures “were not of an emergency and extraordinary nature as they recur on a regular basis and clearly could have been anticipated.” Internal Controls: Defense’s Use of Emergency and Extraordinary Funds, GAO/AFMD-86-44, Comp. Gen. B-221257 (June 4, 1986). As an example of an event the GAO viewed as problematic was the annual Christmas reception for congressional staff. *Id.* The GAO questioned this because the event occurred every year, could have been anticipated, and could have been budgeted for. They recommended that the DOD regulations be modified to prohibit the use of emergency and extraordinary event funds for recurring events. *Id.* The current version of the DOD instruction does not include any such prohibition. See U.S. DEP’T OF DEFENSE, DIR. 7250.13, OFFICIAL REPRESENTATION FUNDS (ORF) (10 Sept. 2002) [hereinafter DOD DIR. 7250.13]. Additionally, the author is aware through personal experience at the Office of the Army General Counsel that the joint congressional reception continued to occur as late as FY00 and ORFs funded it. Clearly, the DOD did not agree with the GAO’s interpretation of this limitation in its audit and the GAO has apparently not taken any action to enforce its interpretation.

32. See *infra* notes 114 - 159 and accompanying text.

33. GAO RED BOOK, *supra* note 3, at 4-110 (citing Internal Controls: Defense’s use of Emergency and Extraordinary Funds, GAO/AFMD-86-44 (June 4, 1986); DOD Use of Official Representation Funds to Entertain Foreign Dignitaries, GAO/ID-83-7 (Dec. 29, 1982)).

34. Department of Defense Appropriations Act, 108 Pub. L. 87, 117 Stat. 1054 (Sept. 30, 2003) (emphasis added).

35. U.S. DEP’T OF ARMY, REG. 37-47, REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY para. 1-5 (31 May 1996) [hereinafter AR 37-47]. Sister services also have implementing guidance for the emergency and extraordinary expense limitation, and specifically ORF. See U.S. DEP’T OF NAVY, SEC’Y OF THE NAVY INSTR. 7042.7J, GUIDELINES FOR THE USE OF OFFICIAL REPRESENTATION FUNDS (5 Nov. 1998) [hereinafter SECNAVINST 7042.7J]; U.S. DEP’T OF NAVY, SEC’Y OF THE NAVY INSTR. 7042.14A, FUNDING OF VISITS BY FOREIGN DIGNITARIES (28 Feb. 1991) [hereinafter SECNAVINST 7042.14A]; U.S. DEP’T OF AIR FORCE, INSTR. 65-603, OFFICIAL REPRESENTATION FUNDS – GUIDANCE AND PROCEDURES (30 Jan. 2002) [hereinafter AFI 65-603].

36. *Id.* at 1.

37. *Id.*

38. Matter of: Certification of Defense Intelligence Agency Emergency and Extraordinary Expense Vouchers, B-251905, 72 Comp. Gen. 279 (1993). The arrangement with the State Department is the Foreign Affairs Administrative Service Agreement. The Comptroller General noted that they “have previously approved similar types of interagency servicing arrangements under the Economy Act, 31 U.S.C. § 1535. See, e.g., 55 Comp. Gen. 388 (1975); 59 Comp. Gen. 471 (1980); B-205616, July 16, 1982.”

39. Matter of: Certification of Defense Intelligence Agency Emergency and Extraordinary Expense Vouchers, 72 Comp. Gen. at 279.

40. *Id.*

The CG agreed with the State Department. While recognizing the certifying officer's usual obligation to certify legality and correctness, the CG found that the certification contained on the voucher (made by the defense attaché) combined with the authority of 10 U.S.C. § 127 satisfies the certification requirement.⁴² Once an emergency and extraordinary expense is so certified, 10 U.S.C. § 127 binds the certifying officers who may not question, nor are they responsible for the Secretary's original certification. Regarding liability for improper payments, the CG noted that when there are multiple certifications by certifying officials, the certification on the base document is the one binding for liability. Subsequent officials are only liable for errors in their own processing of the payment, not the payment itself.⁴³ Thus, it is the defense attaché who is liable for any impropriety with the payment. The CG concluded with the following broad statement regarding 10 U.S.C. § 127 and its impact on his own authority:

Reading these provisions together, the Secretary of Defense, or a designee, is authorized to make expenditures on the Secretary's certificate of necessity . . . for any emergency or extraordinary expense the Secretary determines to be proper, and the Secretary's determination of propriety is final and conclusive on this Office.⁴⁴

In practice, however, the CG has not given this degree of deference with the subset of emergency and extraordinary expense funds called ORF.⁴⁵ The GAO has approved, and disapproved, various purposes for these funds. As the CG has stated:

An agency head's custodianship of an official reception and representation account traditionally entails "a great deal of discretion" as to expenditures. *61 Comp. Gen. 261 (1982)*. This does not mean, however, that there are no limits on the proper expenditure of the fund.⁴⁶

Consequently, despite the apparent unfettered discretion that Secretaries have regarding emergency and extraordinary expense funds, the GAO will carefully scrutinize expenditures of these funds for official representation purposes in accord with traditional fiscal principles.

Fiscal Controls

Limitations as to Purpose

Purpose In General

The so-called "purpose statute" is 31 U.S.C. § 1301. Subsection (a) of that statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."⁴⁷ In other words, agencies must spend money only for the purposes Congress specifies in the appropriation. Different agencies request their funds using various descriptors. Consequently, not all appropriations are provided for the same purposes across the various agencies of the executive branch. While some of the purposes are similar, many of the names are specific to the agency. In the DOD, for example, the O & M funds are provided to cover day-to-day operating expenses, while procurement funds cover the acquisition of equipment and materiel for the force.

While it may seem like a straightforward matter to determine the purpose of funds by looking at the appropriation act, things are not that simple. For example, suppose a DOD agency needs to buy a new computer for an office. Is that an operating expense to be funded by O & M (which is readily available via government credit cards⁴⁸ and other payment devices) or is it an investment in a new system of equipment that requires procurement funds? The answer is, "it depends." The GAO has determined a three-part test for analyzing whether an obligation is properly funded by a particular "pot of money." These three parts are as follows:

1. The expenditure of an appropriation must be for a particular statutory purpose, or *nec-*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. For the Army, ORFs are .0012 Funds - Miscellaneous Expense, Category A. See AR 37-47, *supra* note 35, para. 1-5.

46. Matter of: HUD Gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1989).

47. 31 U.S.C. § 1301(a) (2000).

48. Government Purchase Cards are all managed under GSA Smartpay which enables government agencies to execute small purchases with the convenience of a credit card. See U.S. General Services Administration, *Government Charge Cards Overview*, available at http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8930&contentType=GSA_OVERVIEW (last visited Dec. 31, 2003). It should be noted that other types of funds are available via credit card programs, not just O & M.

essary and incident to the proper execution of the general purpose of the appropriation.

2. The expenditure must not be prohibited by law.
3. The expenditure must not be otherwise provided for; it must not fall within the scope of some other appropriation.⁴⁹

When is an expense “necessary and incident” to a proper purpose? The CG has stated that “an expenditure is permissible if it is *reasonably necessary* in carrying out an authorized function or will *contribute materially* to the effective accomplishment of that function”⁵⁰ This inquiry is important in two aspects of the three-part test. First, it helps to determine whether the expense fits properly within the particular appropriation from which an agency wants to pay the obligation. Second, it helps to determine if some other appropriation is more appropriate for that expense (part three of the test).

In evaluating this test, there are primarily four types of documents to consider. First, look to the appropriation act and its accompanying authorization act and their legislative history. Second, consider standing statutory authorities that exist for your agency that might either allow or prohibit the expenditure. Third, consider case law decisions regarding government spending for the particular type of funds, primarily in CG decisions. Finally, look to any regulatory restrictions that might exist in the agency. For ORFs, the appropriations act language is not particularly helpful. In the DOD, for example, the limitation from which ORFs are drawn simply specifies that the money is for “emergency and extraordinary expenses.”⁵¹ Consequently, if ORFs are to be fiscally controlled, we must examine how this term has been interpreted when the funds are used for representation purposes, other statutes that might limit their expenditure, and any administrative controls established by the agency.

The Purpose of ORFs

The CG’s three-part test for proper purpose provides a useful framework for discussing the decisions analyzing representation funds. Looking at cases discussing representation funds for the DOD and other agencies demonstrates that the CG tests ORF expenditures against these principles just like any other type of appropriated fund.

The Expenditure Must Be Necessary & Incident to “Official Representation”

The first limitation is imposed by the plain language description of the funds—they are “official representation” funds. Thus, the use must be official and must involve representation. Two cases demonstrate well the types of circumstances when this restriction arises.

In 1987, the Department of Housing and Urban Development (HUD) used a portion of its research and development (R & D) appropriation to pay for “food, entertainment, and gift items” in support of an international trade show for construction equipment in the Soviet Union.⁵² The HUD’s sponsorship of this event was purportedly pursuant to a bilateral cooperation agreement between the U.S. and the Soviet Union. The R & D appropriation was generally available for support of this bilateral agreement, along with other things.⁵³ The particular trade show, however, did not fit within the statutory authority HUD had for support of these shows.⁵⁴ Consequently, its activities involving the show were unauthorized and could not be official.

Specifically regarding the entertainment expenditures, the CG found the R & D appropriation inappropriate for this purpose based on the “general rule of longstanding that funds appropriated for Government departments and agencies may not be used for entertaining individuals by giving luncheons, etc., except when specifically authorized by statute and authorized or approved by proper administrative officers.”⁵⁵ Neither the R & D appropriation, nor the statute authorizing the bilateral agreement authorized entertainment or gift expenses.⁵⁶

The inappropriateness of the R & D appropriation was further supported by the fact that HUD receives a small amount of official reception and representation funds in a different appropriation. In accordance with the three part test above, the CG noted that when a more specific appropriation is available for a particular purpose, that fund should be used.⁵⁷ The HUD argued that its ORFs could only be used domestically and were, thus, unavailable for the Soviet conference, but the CG summarily dismissed that assertion.⁵⁸

While the ORF could be used for entertainment expenses, it could not be applied to the Soviet trade conference. The Comptroller said that “[t]he appropriation act requires that entertainment be ‘official’ in nature. In our view, entertainment cannot be ‘official’ if its primary purpose is to further an unauthorized

49. Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954).

50. Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) (emphasis added).

51. *See supra* note 8.

52. Matter of: HUD Gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1989).

53. *Id.*

54. *Id.*

activity.”⁵⁹ Thus, even using funds as flexible as ORFs, the funds must meet the terms of its appropriated purpose—the representation must support an activity that is “official.”

A similar distinction can be seen regarding the term “representation” in a case involving the Office of the U.S. Trade Representative.⁶⁰ That agency asked the CG two questions. First, could it use ORFs to fund food for employees in certain circumstances? Second, could it use ORFs to pay for business cards?⁶¹

The Office of the U.S. Trade Representative had internal meetings in two situations in which they desired to provide food for employees. The first were meetings that occasionally occurred before duty hours and the second were internal meetings during breaks in negotiations that extended beyond duty hours.⁶² The GAO noted the general rule that expenses classified as entertainment or personal could not be charged against appropriated funds. They explained their reasoning for these rules:

The theory is not so much that these items can never be business-related, because sometimes they clearly are. Rather, what the decisions are really saying is that, because public confidence in the integrity of those who spend the taxpayer’s money is essential, certain items which may appear frivolous or wasteful--however, legitimate they may in fact be in a specific context -- should, if they are to be charged to public funds, be authorized specifically by the Congress.⁶³

In practice, this specific authorization by Congress has been in the form of a limitation for reception and representation funds for “those agencies which can justify the need” for such funds.⁶⁴ Thus, for refreshments, the ORF limitation was the most applicable if the event involved “official reception.” In this case, the GAO found that reception, or in the DOD parlance representation, was not involved. The event was not one “characterized by a mixed ceremonial, social or business purpose, and hosted in a formal sense by high level agency officials.”⁶⁵ Rather, it was simply feeding employees working outside of normal duty hours. The CG commended the employees for their devotion to duty, but relied on the general rule that food “may not be provided to employees at their official duty station, even when unusual working conditions are involved.”⁶⁶

The GAO also defined representation more specifically in the context of business cards. The CG stated that “the term ‘representation,’ as used in the phrase ‘official reception and representation,’ means precisely what it implies--representing the agency or the United States in dealings with others in an official context.”⁶⁷ Thus, for those whose duties included this type of representation, business cards could be a legitimate expense since the purpose for the cards are to provide “the recipient [with] a convenient record or reminder of the person’s name, organization, title, and telephone number.”⁶⁸ This decision was unusual since, at the time, the GAO had routinely disallowed business cards to be purchased with appropriated funds because they were viewed as a personal expense.⁶⁹ This decision shows the unique nature of ORFs and the unique role they play.

These two cases demonstrate the application of the “necessary and incident” rule to ORFs. The event must be reasonably

55. To the Administrator, Veterans Administration, B-152331, 43 Comp. Gen. 305 (1963).

56. *HUD Case*, Comp. Gen. B-231627.

57. *See supra* note 49 and accompanying text.

58. *HUD Case*, Comp. Gen., B-231627. The GAO said, “[w]e have not found any previous decision of this Office or any other authority which limits the use of official reception and representation funds based upon a distinction between domestic and international activities.” *Id.*

59. *Id.*; *see also* text accompanying note 57.

60. Matter of: U.S. Trade Representative--Use of Reception and Representation Funds, B-223678, 1989 U.S. Comp. Gen. LEXIS 598 (June 5, 1989).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

related to “official representation”—that is, the event must support the official business of the United States and must involve representing the United States to others. While the funds are flexible to allow entertainment and other unusual expenses, the funds must still meet this fundamental test. Of course, if Congress grants the authority to spend funds, it can also pass statutes which limit the objects for which those funds may be used.

The Expenditure Must Not Be Prohibited by Law

Congress’s power to authorize expenditures can be used in the negative—Congress can prohibit expenditures as well. These prohibitions can range from the routine to the unusually specific. For example, Congress generally prohibits the expenditure of appropriated funds to put phone lines in private residences.⁷⁰ Congress also expressly prohibits the DOD from using appropriated funds to build, maintain, or operate a golf course in the United States.⁷¹ Generally, no amount of necessary expense language or rationale can overcome a statutory prohibition.⁷²

The GAO usually treats statutory prohibitions very strictly. For example, the GAO has consistently held that agencies may not overcome a statutory prohibition by requesting funds for the prohibited item, even if Congress appropriates money for it without comment.⁷³ According to the GAO, “[a]n appropria-

tion would be available for an otherwise prohibited item only if it makes specific reference to the item. Congress can, in effect, ‘waive’ a statutory prohibition, but it must do so explicitly.”⁷⁴

There is one major exception, however, to these general rules—when applying the statutory prohibition would make the accomplishment of a specific appropriation impossible.⁷⁵ This exception requires that violating the statutory prohibition be “absolutely essential” to accomplishing the object of the specific appropriation.⁷⁶ A good example comes from an early GAO case regarding the prohibition in 41 U.S.C. § 12 against constructing a public building without a specific appropriation from Congress.⁷⁷ Congress passed an appropriation to establish air mail service between New York, Chicago, and San Francisco.⁷⁸ The agency built hangars and related facilities at an airfield in Chicago, even though these buildings were not specifically mentioned in the appropriation.⁷⁹ The CG found that the funds were available for this purpose because it was impossible for the agency to accomplish the purpose of the appropriation without them.⁸⁰

While the impact of a statutory prohibition has not been central to any ORF cases, there is at least one case in which this was a subsidiary issue.⁸¹ In this case, a customs service employee was improperly reimbursed for, among other things, private membership in an airline club.⁸² The funds were recouped from the employee and he appealed. Regarding the airline club

69. See, e.g., Matter of: Forest Serv.—Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989); B-195036, 1979 U.S. Comp. Gen. LEXIS 2322 (July 11, 1979); B-131611, 1968 U.S. Comp. Gen. LEXIS 2916 (Feb. 15, 1968); To the Commissioner of the United States to A Century of Progress, 12 Comp. Gen. 565 (1933). In the late 1990’s, the GAO reversed this position finding that the purchase of business cards could meet the necessary expense rule for government employees who regularly deal with those outside their agency. See Matter of: Jerome J. Markiewicz, B-280759, 1998 U.S. Comp. Gen. LEXIS 412 (Nov. 5, 1998). Note that the agencies within the Defense Department have somewhat more restrictive rules by regulation. See U.S. DEP’T OF ARMY, REG. 25-30, THE ARMY PUBLISHING AND PRINTING PROGRAM para. 7-11 (15 July 2002); U.S. DEP’T OF AIR FORCE, INSTR. 65-601, BUDGET GUIDANCE AND PROCEDURES VOL. 1, para. 4.36 (24 Dec. 2002); Memorandum, U.S. Dep’t of the Navy (Financial Management and Comptroller), subject: Department of Navy Guidance for Procuring Business Cards (8 July 1999), available at <http://www.fmo.navy.mil/docs/bus-cards.pdf>; see also Memorandum, Director, Office of Administration and Management, Office of the Secretary of Defense, to Secretaries of the Military Departments, subject: Printing of Business Cards (15 July 1999), available at http://www.defenselink.mil/dodgc/defense_ethics/resource_library/BuscardAug.htm.

70. 31 U.S.C. § 1348 (2000). It should be noted that the statute authorizes the Secretary of Defense to establish exceptions to this rule by regulation. *Id.*

71. 10 U.S.C. § 2246.

72. GAO RED BOOK, *supra* note 3, at 4-21.

73. *Id.* at 4-10.

74. *Id.*

75. *Id.* at 4-21.

76. *Id.*

77. See Comptroller General McCarl to the Postmaster General, 2 Comp. Gen. 133 (1922).

78. *Id.*

79. *Id.*

80. *Id.*

membership, the employee claimed that the expense was proper because he was the Regional Director of Investigations.⁸³ The Inspector General (IG) for the agency required the recoupment of the money, finding that it was an entertainment expense. The IG also noted that the Customs Service did have a small amount of R & R funds, but these were not available to regional personnel.⁸⁴ The CG agreed with the IG that the private membership was not allowable because it was an entertainment expense. It also added an additional reason why the agency could not use appropriated funds. "Furthermore, 5 U.S.C. § 5946 (1982) generally prohibits the use of appropriated funds for the payment of membership fees incurred by individual employees."⁸⁵ While the CG did not specifically mention the R & R appropriation, it is reasonable to infer from the context that he added this additional reason to negate the IG's implication that R & R funds could be used to purchase a private membership. The reason was the statutory prohibition. Of course, even without the statutory prohibition, it would be difficult to relate this to the purpose of "official representation" as discussed above.

The Expenditure Must Not Be Otherwise Provided For

The final test for a necessary expense is fairly straightforward—to be necessary, the expense cannot be provided for in another, more specific appropriation.⁸⁶ Whether or not there are funds available in the other appropriation is irrelevant.⁸⁷ The DOD accounts for this control administratively with regard to ORFs. Its directive states the following:

E2.4.6. To ensure the integrity of the congressional limitation on emergency and extraordinary expenses, the following procedures shall be observed:

E2.4.6.1. Expenses incurred solely because of the authorized representation functions shall be charged to official representation costs that are a part of the emergency and extraordinary expense limitation.

E2.4.6.2. Other costs, such as salaries, travel, and transportation of DOD personnel, shall be charged to the appropriation properly chargeable for such costs.

E2.4.6.3. Under no circumstances may ORF expenses be charged to non-ORF funds to avoid emergency and extraordinary expense limitations. To simplify accounting for ORF-funded events or activities, costs normally charged as a non-ORF expense occasionally may be accounted for as an ORF expense.⁸⁸

Such administrative controls are important because agency ORFs are much more limited, in terms of dollars available, than other funds. Consequently, the motivation is to charge an expense against some other appropriation, if possible, to preserve the more flexible ORFs for other events.

A state department case counsels caution when determining whether the ORF limitation or some other appropriation is more specific.⁸⁹ The State Department has a representation fund pursuant to statutory authority.⁹⁰ These are similar to ORFs, but are usually referred to as "R & R Funds."⁹¹ The State Department also has a lump sum appropriation for salaries and expenses in the "administration of foreign affairs."⁹² A portion of this appropriation is allotted for "official residence expenses"

81. Matter of: Bertram C. Drouin - Use of Rental and Government Automobiles, Travel Expenses, Imprest Fund Charges, B-216016, 1987 U.S. Comp. Gen. LEXIS 1388 (Mar. 23, 1987).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. GAO RED BOOK, *supra* note 3, at 4-22.

87. *Id.*

88. DOD DIR. 7250.13, *supra* note 31, para. E2.4.6.

89. Matter of: Appropriations Chargeable with Expenses of Representational Events at Foreign Posts, B-214145, 64 Comp. Gen. 138 (1984) [hereinafter Representational Events at Foreign Posts].

90. See 22 U.S.C. § 4085 (2000).

91. See text accompanying *supra* note 20.

92. *Representational Events at Foreign Posts*, B-214145, 64 Comp. Gen. at 138.

(ORE) to fund maids, busboys, etc. for the official residences.⁹³ Normally, the State Department charged additional wait staff needed for representational events to the R & R appropriation. A practice had developed in a number of overseas stations, however, to charge the ORE allotment for additional wait staff when the R & R appropriation ran out.⁹⁴ The GAO framed the issue as follows: “It is not disputed that the representational allowance appropriation is specifically available for the ‘extra help’ expenses at issue. The question is whether the ORE allotment is equally available for the same purpose.”⁹⁵

The GAO answered this question in the negative. First, the State Department regulations specifically defined the household staff that could be funded by ORE.⁹⁶ The temporary wait staff hired only for a single function did not meet this definition. Second, even if the definition was viewed broadly, the State Department regulations prohibited funding an expense to the ORE account if it was “properly borne” by another appropriation.⁹⁷ Finally, the GAO reasserted its longstanding rule

that an appropriation made for a specific purpose is available for that purpose to the exclusion of a more general appropriation that might also include that purpose. Applying this principle to the instant case, there is no question that the representational appropriation is specifically available to cover the expenses of representational functions. Compensation of waiters and busboys hired only for particular representational functions is clearly included.⁹⁸

Consequently, for wait staff hired only for representational functions, the R & R appropriation is the more specific and the ORE appropriation is the more general one. As a result, the charges had to be expensed against the R & R appropriation.

This decision shows that applying an expense related to a representational function to a non-ORF account can be tricky. The DOD directive properly states the rule—if an expense is incurred *solely* because of the representational function, the ORF account must be charged to the exclusion of all others.⁹⁹

How Much Time Do We Have to Spend ORFs?

Appropriated funds are only available for a specified period of time. There are generally three types of funds—annual, multi-year, and no-year.¹⁰⁰ Annual appropriations are available only for the fiscal year for which they are appropriated. Multi-year funds are available for the time specified in the appropriation. No-year funds are available until expended.¹⁰¹ Normally the appropriation language itself will specify the period of availability for the funds. If the statute does not specify, however, the funds are only available for the fiscal year in which they are appropriated pursuant to 31 U.S.C. § 1301(c).¹⁰²

Pursuant to these standards, the O & M accounts within the DOD are annual appropriations. As mentioned previously, the emergency and extraordinary expense limitation from which ORFs are drawn is contained in this appropriation.¹⁰³ The CG recently had an opportunity to reaffirm the principle that a limitation is available for the same period of time as the appropriation it is a part of, in a case involving the Department of Energy (DOE).

The DOE received an appropriation for “departmental administration” which are no-year funds.¹⁰⁴ Within this appropriation is a limitation for R & R, the DOE equivalent to the DOD’s ORFs. The IG for the department found funding violations during an inspection of travel accounts because he believed that the R & R limitation could only be used during the fiscal year in which it was appropriated.¹⁰⁵ The DOE General Counsel disagreed, opining that the R & R limitation had the

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See text accompanying *supra* note 88.

100. GAO RED BOOK, *supra* note 3, at 5-3.

101. *Id.* at 5-3 thru 5-4.

102. *Id.* at 5-4.

103. See *supra* note 8 and text accompanying notes 25 and 34.

104. Matter of: Availability of Department of Energy Reception and Representation Funds, B-274576, 1997 U.S. Comp. Gen. LEXIS 13 (Jan. 13, 1997).

same duration as the departmental administration funds—that is, they were no-year funds which could be obligated until expended.¹⁰⁶ The CG agreed with the General Counsel.

The IG based his opinion on the DOE's past practice which was to merge any remaining R & R limitation into the departmental administration account at the end of the fiscal year and use it for other administration purposes.¹⁰⁷ The General Counsel simply stated that the past practice did not change the legal status of the funds.¹⁰⁸ The CG agreed, stating,

The authority conferred by law for obligating "Departmental Administration" funds is the same regardless of whether the purpose is an R & R activity or some other purpose for which the funds are available Thus, the authority conferred each year to use a specified portion of the "Departmental Administration" appropriation for R & R activities does not expire at the end of the first fiscal year of each annual appropriation act merely because DOE does not obligate the maximum authorized.¹⁰⁹

Of course, the Department's past practice did not violate the law—they simply were using less of the appropriation for R & R than they could have used.

This case reaffirms the principle that limitations retain the same time limit for obligation as the appropriation from which they are drawn. For DOD, the ORF limitation is a portion of the emergency and extraordinary expense limitation in the O & M appropriations. Unlike the DOE, the DOD's O & M appropriation is an annual appropriation. So, ORFs, like O & M funds, are only available for obligation for one year.

What Is the Amount Available?

On the surface, the question of the funding amount available for a particular purpose seems relatively simple—just look at the amount appropriated. In fiscal law, however, the discussion of the amount available can be somewhat more complex. The inquiry deals largely with issues surrounding the Antideficiency Act and the prohibitions that prevent agencies from over-obligating and overspending their appropriation.¹¹⁰ For the purposes of this article, a detailed discussion of the Antideficiency Act is unnecessary. Suffice it to say that the act applies to ORFs in the same way as it does to other appropriated funds.

The key point is the way ORFs are structured. The ORFs are part of a limitation to an appropriation. The language from the FY 2004 appropriation is typical— "and not to exceed \$11,034,000 can be used for emergencies and extraordinary expenses."¹¹¹ The "not to exceed" language establishes an absolute maximum that can be spent for emergency and extraordinary expenses.¹¹² The fact that there is additional money available in the general appropriation of which it is a part (O & M) makes no difference—no more than the amount specified may be used. Conversely, this language requires no minimum amount that must be used. Nothing prevents the Army, for example, from spending \$0 on emergency and extraordinary expenses and still spending the entirety of the O & M appropriation on other unrestricted expenses for which that appropriation is properly available.¹¹³ Basically Congress is saying that you do not have to spend anything on this purpose, but if you need to, you can only spend this much.

This brief discussion of the key fiscal controls of purpose, time, and amount should leave the reader with one main impression—ORFs are fiscally controlled like other appropriated funds. While they provide more flexibility for some types of expenses, neither Congress, nor the GAO view them as totally discretionary to any agency official. Using the DOD as an example, it is clear that the agencies understand this and have administrative measures in place to ensure that these very useful and important funds are properly used.

105. *Id.* at *2.

106. *Id.* at *2-*3.

107. *Id.* at *4-*5.

108. *Id.* at *5-*6.

109. *Id.* at *7-*8.

110. See GAO RED BOOK, *supra* note 3, ch. 6.

111. See *supra* note 34 and accompanying text.

112. See GAO RED BOOK, *supra* note 3, at 6-4.

113. *Id.* at 6-5. As a practical matter, local resource managers should discuss the issue through command channels before reallocating O & M dollars from ORFs to general O & M projects. The higher command may provide additional O & M dollars and preserve the ORF limitation for other parts of the command. If the resource manager fails to check this, the local command could squander valuable ORF limitation that could be used elsewhere in the command.

Administrative Controls Within the DOD

This article began with the congressional “power of the purse.” The most coercive exercise of that power is when Congress refuses to fund something or removes funding previously provided. This is, perhaps, the greatest fear with ORFs. Agency heads like and need the flexibility that these funds provide. But while agency heads have a great deal of discretion, they do not want to use the funds in a way that angers Congress and creates a reason to deny the funds in the future.

Within the DOD, administrative controls have been developed to avoid this outcome by delegating authority to subordinate officials while also ensuring that the funds are used acceptably. These controls are especially important in an organization as large as the DOD because the agency has senior leaders dispersed throughout the world who have need of representation funds. Consequently, the ORFs are apportioned out and executed in the field. The system of agency controls allows the Secretary of Defense and other subordinate officials to exercise their statutory responsibilities regarding these funds while still providing authority and flexibility to leaders in the field.

Department of Defense Directive 7250.13 contains the DOD ORF controls.¹¹⁴ This publication begins by establishing a clear purpose for ORFs. Within the DOD, “ORFs shall be used to maintain the standing and prestige of the United States by extending official courtesies to guests of the Department of Defense.”¹¹⁵ The directive defines the types of guests for which official courtesies are authorized, who may extend those courtesies, and the types of courtesies that may and may not be extended.

Authorized Guests & Hosts

The DOD only allows the expenditure of ORFs to fund courtesies to the following:

3.1.1. Civilian or military dignitaries and officials of foreign governments.

3.1.2. Senior U.S. Government officials.

3.1.3. Dignitaries and senior officials of State and local governments.

3.1.4. Other distinguished and prominent citizens (may include retired or former civilian or military officials of the Department) who have made a substantial contribution to the United States or the Department of Defense.¹¹⁶

Foreign dignitaries may be “invited” or “uninvited.” If they are invited, the DOD will generally fund their transportation within the United States, but the foreign official must fund their transportation to and from the United States.¹¹⁷ Only the “Secretary of Defense, the Deputy Secretary of Defense, the Secretaries of the Military Departments, the Chairman or the Vice Chairman of the Joint Chiefs of Staff, the Military Service Heads, and the Director of the Defense Intelligence Agency (DIA)” may issue invitations for U.S.-funded visits.¹¹⁸ Invitations may only be extended to the DOD official’s foreign counterpart, that counterpart’s spouse, and two accompanying officials.¹¹⁹ Other officials who visit at their own expense may also be extended appropriate courtesies by authorized DOD hosts,¹²⁰ which the directive defines as:

the Secretary of Defense, the Deputy Secretary of Defense, the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, the Vice Chairman of the Joint Chiefs of Staff, the Under Secretaries of Defense (USDs), the Assistant Secretaries of Defense (ASDs), the Military Service Heads, the Commanders of the Unified and Specified Commands, the Directors of the Defense Agencies, and the President of the USUHS. At their discretion, those DOD officials may delegate the authority to host official functions.¹²¹

The Army, as well as other services, have similar and consistent guidance in its regulation.¹²² It is important to note that the

114. DOD DIR. 7250.13, *supra* note 31, para. E2.4.6. The Army regulation for ORFs is *U.S. Dept. of Army, Reg. 37-47, Representation Funds of the Secretary of the Army*. AR 37-47, *supra* note 35. While the Army regulation remains largely consistent with the DOD directive, it has not been updated since the DOD directive was revised in 2002. Consequently, users must always check the Army regulation against the DOD directive. The Army regulation is still in force, however, so when it gives guidance that is within the discretion that the DOD policy gives to the Secretary of the Army, follow the regulation.

115. DOD DIR. 7250.13, *supra* note 31, para. 3.1.

116. *Id.* para. 3.1.

117. *Id.* para. E2.2.1.2.1.

118. *Id.* para. E2.2.1.1.

119. *Id.* para. E2.2.1.2.

120. *Id.* para. E2.1.

121. *Id.*

DOD directive allows the Service Secretaries to delegate their authority to host ORF events. The Secretary of the Army has exercised this authority and allows the following to serve as hosts:

the Chief of Staff, Army, Vice-Chief of Staff, Army, principal officials of HQDA, MACOM commanders and other officials who receive a Letter of Authority from [the Office of the Assistant Secretary of the Army for Financial Management and Comptroller] OASA (FM & C) in accordance with paragraph 3-1b, and installation commanders.¹²³

Some senior military officials may be considered authorized guests.¹²⁴ These officials are listed in Enclosure 1 to the DOD directive.¹²⁵ The military services have similar lists in their implementing regulations.¹²⁶

Allowable Courtesies

Generally

The DOD directive lists the typical types of courtesies that agencies may pay for all members of the “official party” attending the ORF event. Included in this official party are any authorized U.S. escort officers and interpreters.¹²⁷ The list is not all-inclusive, but is illustrative. The directive states that all officials planning ORF events must use “sound judgment and discretion” when determining what they should fund.¹²⁸ The list of courtesies includes:

- Lodging;
- Meals and refreshments;
- Gratuities for services rendered by

- non-Government personnel;
- Official communications made by U.S. escort personnel that relate directly to the official visit;
- Valet services; i.e., laundry and dry cleaning, which normally would not have been incurred except for travel associated with the official visit;
- Entertainment; i.e., theaters, sports activities and events, concerts, and sightseeing tours;
- Taxi fares and rental vehicle fees, when Government transportation is not available;
- Gifts and mementos [under the conditions discussed below]; and
- Fees for travelers’ checks to support [sic] mission.¹²⁹

Gifts

Official representation funds may finance gifts for presentation to authorized guests. Only the officials listed above as authorized hosts and those to whom they delegate authority to host ORF events, however, may present these gifts.¹³⁰ Subordinate officials may have written authorization to present the gift on behalf of the authorized official, but this delegation should only occur “in extenuating circumstances.”¹³¹ Gifts purchased and presented are limited in price by the maximum amount a U.S. official is allowed to receive from a foreign official. This amount is currently \$285, but changes periodically to adjust for inflation.¹³² Additionally, the DOD allows the presentation of small gifts to DOD officials listed as being authorized to receive official courtesies.¹³³ These gifts must be mementos and must have a value of \$40 or less.¹³⁴

122. AR 37-47, *supra* note 35, para. 2-7; *see also* SECNAVINST 7042.7J, *supra* note 35, para. 5; AFI 65-603, *supra* note 35, para. 7.

123. AR 37-47, *supra* note 35, para. 2-7.

124. DOD DIR. 7250.13, *supra* note 31, para 3.3.

125. The designated officials are: Secretary of Defense and Deputy Secretary of Defense, Under Secretaries of Defense, Director, Defense Research and Engineering, Assistant Secretaries of Defense, Comptroller of the Department of Defense (C, DOD), General Counsel of the Department of Defense (GC, DOD), Inspector General of the Department of Defense (IG, DOD), Director, Operational Test and Evaluation, Assistants to the Secretary of Defense, Chairman of the Joint Chiefs of Staff, Vice Chairman of the Joint Chiefs of Staff, Director, Joint Staff, Unified and Specified Commanders, Deputy Commander in Chief, Europe (DCINCEUR), Secretaries, Under Secretaries, and Assistant Secretaries of the Military Departments, Chiefs and Vice Chiefs of Staff of the Army and Air Force, Chief and Vice Chief of Naval Operations, Commandant and Assistant Commandant of the Marine Corps, Directors of the Defense Agencies, President, USUHS. *Id.* encl. 1.

126. AR 37-47, *supra* note 35, para. 2-4f.; SECNAVINST 7042.7J, *supra* note 35, para. 6a.(5), encl. 1; AFI 65-603, *supra* note 35, para. 3.3.

127. DOD DIR. 7250.13, *supra* note 31, para. E2.4.1.

128. *Id.* para. E2.3.

129. *Id.* para. E2.4.1 (bullets added).

130. *Id.* para. E2.4.1.8.1.

131. *Id.* para. E2.4.1.8.2.

It is important to note that guidance for a particular service must be consulted down to the level at which the funds are executed. For example, if you are at an installation, you must not only check the DOD directive, but also the Army regulation, as well as major command and installation-level regulations and policies to give proper advice. For example, the Army gives additional gift guidance in *AR 37-47*. Paragraph 2-9 of that regulation provides the following:

Gift items procured in bulk may not include the presenting official's name unless the official is the SA, CSA, or the Sergeant Major of the Army. This limitation does not prohibit the specific inscribing or engraving of a single item individually selected for a certain presentation or occasion. ORFs shall not be used for the presentation to, or acceptance by, DOD personnel of mementos of any kind.¹³⁵

So, even though DOD allows mementos to certain DOD officials, the Army regulation does not allow the expenditure and limits courtesies, even for those DOD officials allowed to be authorized guests, to those "minimally required" which means "small, modest functions."¹³⁶

Leisure and Entertainment Activities

Leisure and entertainment activities are generally allowed, but the DOD allows only one or two entertainment events during the course of the official visit.¹³⁷ The activities must also be "modest" in nature, which means the "hospitality that the typical American host, whose rank and position are equal to that of

the foreign dignitary, would provide to a special guest during a week's visit in his or her residence."¹³⁸ Dinners, luncheons, and receptions should not be considered "entertainment" for these purposes.¹³⁹ Additionally, significant detours in the travel itinerary may not be scheduled to facilitate leisure activities.¹⁴⁰

The Army's guidance is very similar and consistent with this policy. Paragraph 2-8 of the Army regulation, however, also requires that the leisure activities coincide with the military orientation aspect of the visit.¹⁴¹

Special Limitations for Visits by Citizens of the United States

Official representation funds are generally meant to maintain the standing and prestige of the United States.¹⁴² The DOD recognizes that meeting this purpose may also require providing limited courtesies to certain U.S. officials. The DOD policy allows these courtesies to "be offered to Federal, State, and local dignitaries and officials such as the President and the Vice President of the United States, members of the Cabinet, members and professional staff of Congress, governors of States, mayors of cities, citizens' committees,"¹⁴³ since the funds are meeting the same purpose—maintaining the standing and prestige of the department with these important groups. The directive also allows courtesies to "other distinguished or prominent citizens who have made a substantial contribution to the nation or to the DOD, and members of the news media on certain occasions."¹⁴⁴ It does not define these occasions.

The types of courtesies allowable are much more limited with these groups, however. Official representation funds may

132. *Id.* para. E.2.4.1.8. The DOD Directive cross references 22 U.S.C. § 2694, which in turn cross references 5 U.S.C. § 7342 as statutory support for this limitation. The General Services Administration (GSA) revises the amount for 5 U.S.C. § 7342 once every three years to take inflation into account. The GSA most recently revised the amount to \$285 in Change in Consumer Price Index Minimal Value, 67 Fed. Reg. 56495 (Sept. 4, 2002).

133. *See supra* notes 124 through 126 and accompanying text.

134. Memorandum, Director of Administration and Management, Office of the Secretary of Defense, to Under Secretaries of Defense and Directors of Defense Agencies and Field Agencies, subject: Official Representation Funds (ORF) (23 Dec. 2002). The memorandum provides examples of "mementos" as including "coins, paperweights, lapel pins, and plaques." *Id.*

135. *AR 37-47*, *supra* note 35, paras. 2-9c. and 2-9d. Other services have similar language that prohibit the presentation of gifts to DOD Personnel, despite the fact that the DOD allows such expenditures. *See* SECNAVINST 7042.7J, *supra* note 35, para. 6c.(1); AFI 65-603, *supra* note 35, para. 4.1.

136. *AR 37-47*, *supra* note 35 para. 2-4f; *see also* AFI 65-603, *supra* note 35, para. 3.3.

137. DOD DIR. 7250.13, *supra* note 31, para. E2.2.1.2.4.2.

138. *Id.*

139. *Id.* para. E2.2.1.2.4.1; *see also supra* text accompanying note 129 where examples of "entertainment" are provided (including "theaters, sports activities and events, concerts, and sightseeing tours"). Meals and refreshments are a separate category.

140. *Id.* para. E2.2.1.2.5.

141. *AR 37-47*, *supra* note 35, para. 2-8d; *see also* SECNAVINST 7042.7J, *supra* note 35, para. 6; AFI 65-603, *supra* note 35, paras. 1.2 and 5.1.6.

142. *See supra* note 116 and accompanying text.

143. DOD DIR. 7250.13, *supra* note 31, at E2.3.1.

pay for “the cost of luncheons, dinners, receptions, mementos, and participation expenses at DOD-sponsored events” for these individuals.¹⁴⁵ Any other type of expense may not be approved unless there is “specific justification.”¹⁴⁶

Prohibited Courtesies

Official representation funds may only be expended for purposes expressly allowed by regulation.¹⁴⁷ Thus, if the regulation does not expressly provide authority, the expenditure is prohibited unless you obtain authority by a waiver.¹⁴⁸ Additionally, the DOD specifically prohibits ORF funding for certain types of expenses. Of note is the prohibition against funding retirement ceremonies for the DOD personnel and change-of-command ceremonies.¹⁴⁹ Exceptions to this prohibition may be granted “by the Secretary of Defense, the Deputy Secretary of Defense, the Secretary of the Military Department concerned, or the Chairman or the Vice Chairman of the Joint Chiefs of Staff.”¹⁵⁰ This exception must be granted in advance of the event.

Events “solely for entertainment of DOD personnel” are prohibited as well.¹⁵¹ There is an exception for certain high-level leaders on official visits to the field.¹⁵² During these visits, “minimally required” expenditures may be made to extend official courtesies to those visiting the DOD officials.¹⁵³ To help ensure that there is not even an appearance that events are being hosted solely for the DOD personnel, the DOD defines the ratios of authorized guests to the DOD personnel that may

attend an official event in order to fund the event with ORFs. For events of less than thirty persons, twenty percent of the attendees “should be honored or distinguished guests and members of their party.”¹⁵⁴ For events of thirty or more people, the ratio goes up to fifty percent authorized guests.¹⁵⁵ In instances when it is desirable for additional DOD personnel to attend, the directive still specifies that only the number of the DOD Personnel “actively participating in the event or otherwise required to attend by virtue of their position or duties (but not in excess of the ratios in subparagraphs E2.4.3.1., and E2.4.3.2.) shall be considered part of the official party” to be funded by ORFs.¹⁵⁶ Other DOD personnel in attendance shall pay a pro rata share of event expenses.¹⁵⁷

Other prohibitions include the following:

- Personal items, such as clothing, toilet articles, cigarettes, hair and beauty care, shoeshine, and souvenirs.
- Long-distance telephone calls originated by the authorized guest, except when directly related to the purpose of the visit.
- Gifts or flowers to be presented by the authorized guests.
- Christmas, greeting, or calling cards.
- Classified projects for intelligence purposes.
- Payment of membership fees or dues.
- Any portion of any event that is eligible

144. *Id.*

145. *Id.* para. E2.3.2.

146. *Id.*

147. AR 37-47, *supra* note 35, para. 2-10; AFI 65-603, *supra* note 35, para. 10.

148. *Id.*

149. DOD DIR. 7250.13, *supra* note 31, para. E2.4.2.5. *But see* Matter of: U.S. Army School of the America’s—Use of Official Representation Funds, B-236816, 69 Comp. Gen. 242 (Feb. 1990) (distinguishing an incoming commander’s reception from a private change of command reception in certain circumstances).

150. DOD DIR. 7250.13, *supra* note 31, para. E2.4.2.5.

151. *Id.* para. 3.3.

152. *See supra* notes 124 through 126 and accompanying text.

153. DOD DIR. 7250.13, *supra* note 31, para. 3.3.

154. *Id.* para. E2.4.3.1. Note that the ratios are measured prior to the event based on the attendance list. The list, however, must be modified for record-keeping purposes showing who actually attended. *Id.* para. E2.4.4. Although the DOD directive does not give a reason for this requirement, it is fair to infer that, when records are audited, repeated events that are “padded” with authorized guests would be viewed negatively. The services reflect these ratios in their own implementing regulations. *See* AR 37-47, *supra* note 35, para. 2-5; SECNAVINST 7042.7J, *supra* note 35, para. 6b.; AFI 65-603, *supra* note 35, para. 1.2.

155. DOD DIR. 7250.13, *supra* note 31, para. E2.4.3.2.

156. *Id.* para. E2.4.5.

157. *Id.*

for sponsorship with welfare and recreation funds, except expenses of authorized guests.

- Repairs, maintenance, and renovation projects to enhance the appearance of DOD facilities.¹⁵⁸

The DOD directive reflects a sensitivity to the fact ORFs are critical and flexible funds that could be taken away if they are abused. The directive concludes with an important bottom line for all those dealing with ORFs:

To ensure the integrity of the congressional limitation on emergency and extraordinary expenses, . . . All DOD personnel authorized to expend ORFs shall monitor personally the use of such funds to ensure the highest order of propriety and integrity of all expenditures.¹⁵⁹

Conclusion

The foregoing discussion should leave you with two main impressions. First, representation funds provide important flexibility to government leaders to provide for legitimate government expenses funded nowhere else. Second, there are important fiscal controls that maintain the integrity and fidelity of these funds so that taxpayers can be confident that their money is being spent prudently. These controls are rooted in the fundamentals of fiscal law—purpose, time, and amount—as well as responsible administrative controls that the agencies establish themselves. Official representation funds are not “easy money” to be spent any way agencies want, but important fiscally controlled funds that fulfill a valuable purpose for the nation.

158. *Id.* para. E2.4.2.

159. *Id.* para. E2.4.7.