Authority to Recover Travel Payments Made in Violation of Federal Regulations

Where the recipient of a travel payment violating the Federal Travel Regulation or the Federal Acquisition Regulation is a contractor that has fully performed its contract obligations, an agency may recover the payment only if the violation was plain on the face of the regulation. Where the recipient of such a payment is a government employee, the agency is generally entitled to recover the unlawful payment from the responsible certifying official or from the employee who received the payment, even if the violation was not plain.

Where the requirements of 5 U.S.C. § 5584 or the Federal Claims Collection Standards are satisfied, an agency may waive or end collection action on a claim against a recipient contractor or employee. Where the standards of 31 U.S.C. § 3528(b)(1) for relieving a certifying official of liability are satisfied, an agency need not attempt to collect from the certifying official.

July 16, 2020

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF HEALTH AND HUMAN SERVICES

You have asked whether the Department of Health and Human Services ("HHS") may recover certain travel payments to contractors and employees that, in the view of HHS's Office of Inspector General ("OIG"), violated the Federal Travel Regulation ("FTR"), 41 C.F.R. § 300-1.1 *et seq.*, or the Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 1.000 *et seq.*[1]

We conclude that, where the recipient of a travel payment violating federal regulations is a contractor that has fully performed its contract obligations, an agency may recover the payment from the contractor only if the regulatory violations were, or should have been, clear to the contractor. Where the recipient is a government employee, on the other hand,

[1] *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Robert P. Charrow, General Counsel, HHS, *Re: Request for Advice in Connection with OIG Report Regarding Government Travel* (July 16, 2018). Consistent with our practice of not opining on the legality of past actions, we do not here express any view whether any of the travel payments identified by HHS OIG in fact violated the FTR or the FAR. *See, e.g.*, *Online Terms of Service Agreements with Open-Ended Indemnification Clauses Under the Anti-Deficiency Act*, 36 Op. O.L.C. 112, 114 (2012).

the agency is generally entitled to recover the unlawful payment, even if the violation was not plain. An agency has discretion not to attempt collection of a claim against a recipient contractor or employee, at least where requirements of the Federal Claims Collection Standards, 31 C.F.R. § 900.1 *et seq.*, or of 5 U.S.C. § 5584 are satisfied.

Alternatively, an agency may recover a travel payment that violates federal regulations from the official who *certified* the payment voucher, but, if the requirements of 31 U.S.C. § 3528(b)(1) are satisfied, the agency need not attempt administrative collection. A travel payment's inconsistency with federal regulations does not render the official who *disbursed* the payment liable. Nor may any other employee who benefited from the payment be held liable, unless a statute specifically authorizes the agency to subject its employees to liability for unlawful payments.[2]

These conclusions may well seem, at once, too lenient and too harsh. An employee who receives the benefit of an improper payment but not the payment itself will escape liability, while an employee who certifies the payment but receives no personal benefit will be potentially liable. Here, however, we do no more than identify the allocation of potential liability that is already established in fiscal law. In reaching our conclusions, we do not condone an employee's undertaking travel at an impermissible cost to the government, nor do we suggest that, on the facts of particular cases, the government would have to press its claims against certifying officials.

I.

In July 2018, HHS OIG completed an audit of government-funded travel by Thomas E. Price when he was Secretary of HHS. HHS OIG, A-12-17-00002, *The Office of the Secretary of Health and Human Services Did Not Comply with Federal Regulations for Chartered Aircraft and Other Government Travel Related to Former Secretary Price* (July 11, 2018) ("Audit Report"). The audit determined that, on 12 occasions, HHS paid for Secretary Price to take charter flights when comparable commercial

[2] In reaching these conclusions, we solicited and considered the views of the Civil Division and the Justice Management Division of the Department of Justice, the Department of the Treasury, the General Services Administration, and the Office of Management and Budget.

flights were available. *Id.* at 11. Each of those payments, the audit concluded, violated one or more provisions of the FTR, *id.* at 10, 16, including 41 C.F.R. § 301-10.261(a), which mandates the use of "scheduled commercial airline service" for "official travel" unless such service is not "reasonably available" or is more costly than a chartered flight, and 41 C.F.R. § 301-10.262(b), which provides that, absent an emergency, a senior legal official within an agency "must authorize . . . in advance and in writing" any chartered flight by a "senior Federal official." The audit also found that three of the payments violated the FAR, *see* Audit Report at 13–14, because the payment either went to a charter airline that was not the lowest bidder, without any written justification, 48 C.F.R. § 15.101-1(c), or was made after soliciting only one bid, again without any written justification, *id.* § 6.303-1(a).

The audit also identified three instances in which Secretary Price, in alleged violation of the FTR, began or ended a trip at his home in Georgia rather than at his duty station in Washington, D.C. Audit Report at 18–21.[3] In addition, the audit found that, on several occasions, Secretary Price or other HHS officials received reimbursements for miscellaneous expenses that were not properly reimbursable. *Id.* at 23–25. All told, the audit concluded, HHS paid $392,787 in violation of the FTR and the FAR, of which Secretary Price voluntarily reimbursed $51,887. *Id.* at 7, 27–28.[4] The audit recommended that HHS "determine and take appropriate administrative actions to recoup" the remaining $340,900. *Id.* at 27–28.

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[3] Technically, the audit concluded that these payments violated the HHS Travel Policy Manual, which provides that "[t]ravel should be from the Official [Duty] Station to the [Temporary Duty] location." *Id.* § 3.1.1 (rev. ed. Nov. 1, 2014). But this provision of the HHS Manual simply restates an FTR requirement. *See* 41 C.F.R. § 300-3.1 (defining "official travel" as "[t]ravel under an official travel authorization from an employee's official station or other authorized point of departure to a temporary duty location and return [therefrom]"); *see also id.* §§ 301-10.7 and -10.8. We therefore view the audit, by necessary implication, as having determined that the payments violated not only the HHS Manual but also the FTR.

[4] A current or former employee may reimburse an unlawful payment from which he benefited. *See* 2 Government Accountability Office, *Principles of Federal Appropriations Law* 6-222 to -223 (3d ed. 2006). Because you have not asked specifically about voluntary reimbursements, we do not address them further in this opinion.

II.

We begin with a general discussion about the collection of government claims. For purposes of the Federal Claims Collection Act ("FCCA"), 31 U.S.C. § 3711 *et seq.*, Congress has defined a government "claim" as "any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency." 31 U.S.C. § 3701(b)(1). Congress has identified the Director of the Office of Management and Budget ("OMB") as the official who "shall settle" most potential claims. *Id.* § 3702(a)(4). For "claims involving expenses incurred by Federal civilian employees for official travel and transportation," however, the Administrator of General Services "shall settle" the claim. *Id.* § 3702(a)(3). As used in section 3702, the term "settle" means "to administratively determine the validity of [a] claim." *Adams v. Hinchman*, 154 F.3d 420, 422 (D.C. Cir. 1998) (per curiam) (quoting General Accounting Office, *Principles of Federal Appropriations Law* 11-6 (1982) ("GAO Redbook 1st")); *see Ill. Sur. Co. v. United States ex rel. Peeler*, 240 U.S. 214, 219 (1916) ("The word 'settlement' in connection with public transactions and accounts has been used from the beginning to describe administrative determination of the amount due."). Claims-settlement authority includes the authority to make "both factual and legal determinations." *Adams*, 154 F.3d at 422 (quoting GAO Redbook 1st at 11-6). Both the Director of OMB and the Administrator of General Services have delegated their respective claims-settlement authorities to "the Executive Branch agency out of whose activity the claim arose." OMB, Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316, att. A (Dec. 17, 1996) ("OMB Delegation"); *see Matter of Alexander J. Qatsha*, GSBCA No. 15494-RELO, 01-1 BCA ¶ 31,364 (explaining that, under General Services Administration regulations, "claims of or against the United States Government which involve [travel] expenses" must be "adjudicated by the agency involved" (citing 48 C.F.R. § 6104.401(c))).

An agency determination that it has a valid claim gives rise to obligations under the FCCA and its implementing regulations, the Federal Claims Collection Standards ("FCCS"), 31 C.F.R. § 900.1 *et seq.* The FCCA provides that "[t]he head of an executive, judicial, or legislative agency . . . shall try to collect a claim of the United States Government

for money or property arising out of the activities of, or referred to, the agency." 31 U.S.C. § 3711(a)(1). As authorized by section 3711(d)(2), the Attorney General and the Secretary of the Treasury have jointly promulgated the FCCS. Under those regulations, an agency must "aggressively collect" a valid claim. 31 C.F.R. § 901.1(a). If an agency's collection attempt fails, the agency may refer the claim to the Department of Justice for potential litigation (or to the Secretary of the Treasury for administrative collection). *See* 31 U.S.C. § 3711(g)(2)(A)(i); 31 C.F.R. §§ 285.12(d)(2)(i)(A), 901.1(e)(1), 904.1(a).

In specified circumstances, however, the FCCA and FCCS authorize an agency to "compromise" or "end collection action on" a valid claim. 31 U.S.C. § 3711(a)(2)–(3); *see* 31 C.F.R. §§ 902.2(a), 903.3(a). Other statutory provisions identify additional circumstances in which an agency may compromise or waive particular types of claims. Relevant here, for example, is 5 U.S.C. § 5584, which, in the circumstances discussed below, *see infra* p. 173, authorizes the Director of OMB to "waive[] in whole or in part" a claim against an agency employee "arising out of an erroneous payment of travel, transportation or relocation expenses." *Id.* § 5584(a)(1), (g)(2).[5] As with the claims-settlement authority discussed above, the Director of OMB has delegated that waiver authority to "the Executive Branch agency that made the erroneous payment." OMB Delegation, att. A.

III.

We first address whether, if an agency has contracted and paid for goods or services in violation of federal regulations, the agency may or must attempt to recover that payment, either from the contractor that received it or from any agency employee.

A.

An agency has a valid claim to recover a payment that it previously made under a fully performed contract only if the contract's unlawfulness was, or should have been, clear to the contractor. One element of any

[5] Section 5584 of title 5 currently has two subsections (g). Whenever we refer to subsection (g) in this opinion, we are referring to the second of the two.

valid government contract is "authority on the part of the government representative who entered or ratified the agreement to bind the United States." *Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997). The scope of a government agent's authority "may be explicitly defined by Congress or be limited by [an agency] . . . properly exercis[ing] . . . the rule-making power." *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). A contract that violates a statute or regulation, then, may be invalid because the government agent who purported to enter into the contract lacked the authority to do so. But when a contractor has fully performed its obligations under a contract that violates a statute or regulation, courts invalidate the contract only if the unlawfulness of the agreement was "plain on the face of the statute [or] the regulations." *Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995); *see also Rockies Exp. Pipeline LLC v. Salazar*, 730 F.3d 1330, 1337 (Fed. Cir. 2013). Courts assess whether illegality is "plain" by viewing the contract and the relevant statutory or regulatory provisions through "*the bidder's eyes*." *United States v. Amdahl Corp.*, 786 F.2d 387, 395 (Fed. Cir. 1986) (emphasis in original) (quoting *Trilon Educ. Corp. v. United States*, 578 F.2d 1356, 1360 (Ct. Cl. 1978)).[6]

The HHS OIG Audit Report addressed potential regulatory violations concerning charter-flight expenses. Absent unusual circumstances, however, the violations of the particular FTR and FAR provisions at issue in connection with government travel will not be "plain on the face" of those regulations. The FTR does not categorically bar charter flights. To the contrary, charter flights are permitted when (i) "[n]o scheduled commercial airline service is reasonably available (i.e., able to meet [the employee's] departure and/or arrival requirements within a 24-hour period, unless . . . extraordinary circumstances require a shorter period)," 41

[6] Upholding a fully performed contract in the absence of plain illegality is distinct from awarding compensation under a *quantum meruit* theory. *See Gould*, 67 F.3d at 929–30 (describing, as separate arguments, a contractor's claims that (i) despite a statutory violation, the contract was valid because the illegality was not plain, and (ii) even if the express contract was invalid, the contractor was entitled to compensation under an implied contract because it provided value to the government). In the former case, the contractor is entitled to the contract price (or contractually specified liquidated damage); in the latter, the contractor is entitled only to the fair market value of the goods or services supplied. *See Amdahl*, 786 F.2d at 395.

C.F.R. § 301-10.261(a)(1), or "[t]he cost of [a charter flight] is less than the cost of the city-pair fare for scheduled commercial airline service or the cost of the lowest available full coach fare if a city-pair fare is not available," *id.* § 301-10.261(a)(2); and (ii) when the traveler is a senior federal official, a senior legal official within the agency has authorized the flight "in advance and in writing," *id.* § 301-10.262(b). The FTR itself will not give charter airlines notice of what departure and arrival needs an agency official has, whether any commercial flights would meet those needs, or whether agency lawyers authorized the flights. Similarly, the FAR does not categorically bar the award of a sole-source contract or other contract to a bidder that does not have the lowest offer. Instead, both sole-source and non-lowest-bidder awards are permissible if the agency (among other required procedures) "justifies . . . the use of such [an award] in writing." 48 C.F.R. §§ 6.303-1(a)(1), 15.101-1(c). The FAR itself will not give charter airlines notice of what written justification an agency has, or has not, included in its contract files.[7]

Even if an agency has a valid claim against a contractor, the FCCA and FCCS permit an agency, in certain circumstances, to "compromise" or "end collection action on" that claim. 31 U.S.C. § 3711(a)(2)–(3); 31 C.F.R. § 900.1(a). Specifically, under the FCCS, an agency may compromise a claim that "does not exceed $100,000," 31 C.F.R. § 902.1(a), if any of the following conditions are met: (i) "[t]he debtor is unable to pay the full amount in a reasonable time"; (ii) "[t]he Government is unable to collect [that amount] within a reasonable time"; (iii) "[t]he cost of collecting [that amount] does not justify the enforced collection"; or (iv) "[t]here is significant doubt concerning the Government's ability to prove its case in court," *id.* § 902.2(a); *see* 31 U.S.C. § 3711(a)(2). Similarly, an agency may "terminate collection" of a claim that "do[es] not exceed $100,000," 31 C.F.R. § 903.1(a), in any of six specified situations, including where the "[c]osts of collection are anticipated to exceed the amount recoverable" and where "[t]he debt is legally without merit or enforcement . . . is barred by any applicable statute of limitations," *id.* § 903.3(a)(3)–(4); *see*

[7] Although written justifications generally must be made public within 14 days, 48 C.F.R. § 6.305(a), that requirement does not apply "if posting the justification would disclose the executive agency's needs and disclosure of such needs would . . . create . . . security risks," *id.* § 6.305(f), which, depending upon the circumstances, may be the case where a contract is related to a cabinet official's travel.

31 U.S.C. § 3711(a)(3).[8] Moreover, if an agency determines that those compromise or termination requirements are met but the claim exceeds $100,000, the agency need not attempt collection but rather "shall refer" the claim to the Department of Justice for a final decision on whether to compromise or end collection action on the claim. 31 C.F.R. §§ 902.1(b), 903.1(b). Thus, even if an agency determines that it has a valid claim to recover contract payments made in violation of federal regulations, the agency is not obligated, in these circumstances, to attempt collection.

B.

We next consider whether an agency may or must seek to recover contract payments that violate federal regulations from any of the agency employees involved in the payments.

In relevant part, 31 U.S.C. § 3528 provides:

> (a) A certifying official certifying a [payment] voucher is responsible for—
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> . . . .
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> (4) repaying a payment—
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> (A) illegal, improper, or incorrect because of an inaccurate or misleading certificate;
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> (B) prohibited by law; or
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> (C) that does not represent a legal obligation under the appropriation or fund involved[.]

The Comptroller General refers to all payments covered by that provision as "improper payments." 2 Government Accountability Office, *Principles of Federal Appropriations Law* 9-88 (3d ed. 2006) ("GAO Redbook 3d").

As with a claim against a contractor, an agency must first determine whether a claim against a certifying official is valid. Congress has provided that the Comptroller General "shall settle"—that is, determine the validity of—claims against "accountable official[s]," 31 U.S.C. § 3526(c)(1), including those who certify payment vouchers and disburse

[8] Even if those requirements are met, however, an agency is barred from compromising or ending collection activity with respect to a claim "that appears to be fraudulent, false, or misrepresented by a party with an interest in the claim." 31 U.S.C. § 3711(b)(1); *see* 31 C.F.R. § 900.3(a).

funds, *see Comptroller General's Authority to Relieve Disbursing and Certifying Officials from Liability*, 15 Op. O.L.C. 80, 80 (1991) ("*Comptroller General's Authority*"). Congress has also purported to make those settlement determinations "conclusive on the executive branch." 31 U.S.C. § 3526(d). Despite these provisions, we have advised that, even if the Comptroller General purports to make a settlement determination, an agency must decide for itself whether a potential claim against a certifying official has legal merit. *Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 20 Op. O.L.C. 214, 229 (1996) ("*Involvement of the GPO*"). If the Comptroller General were involved in making such a determination, an agent subject to congressional control, *see* 31 U.S.C. § 703(e)(1)(B), would have a role in deciding whether a particular payment is covered by section 3528(a)(4). That would violate the separation of powers, since "exercis[ing] judgment concerning facts that affect the application of [an] Act" and "interpret[ing] the provisions of [that] Act to determine precisely what" is required or prohibited are "the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986); *see also Comptroller General's Authority*, 15 Op. O.L.C. at 83. Because Congress may not constitutionally vest the Comptroller General with the claims-settlement authority provided under section 3526, an agency must decide for itself whether it has a valid claim against a certifying official.

We turn, then, to how section 3528(a)(4) applies to payments that violate federal regulations. Section 3528(a)(4) embodies the longstanding principle that an accountable official, including a certifying official, is strictly liable for improper payments. *See United States v. Prescott*, 44 U.S. (3 How.) 578, 588 (1845); 2 GAO Redbook 3d at 9-7 (noting that the liability of an accountable official "is automatic and arises by operation of law at the moment . . . an erroneous payment is made"). Section 3528(b)(1)(A) underscores that principle, providing that a certifying official "may" be relieved of liability if "the official did not know, and by reasonable diligence and inquiry could not have discovered," that the payment was improper. Thus, if a payment is covered by section 3528(a)(4), the official who certified the payment is liable for repaying it, even if he did not act negligently.

Section 3528(a)(4) covers payments "prohibited by law." 31 U.S.C. § 3528(a)(4)(B). To say that a payment violates either the FTR or the

FAR, however, is not necessarily to say that the payment is prohibited by statute. As the Supreme Court has recognized, a statute simply vesting an agency with rulemaking authority "does not prohibit anything," including conduct that violates the regulations eventually promulgated under the statute. *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 395 (2015). A payment that violates the FTR or the FAR, therefore, is not prohibited by the statutes that authorize those regulations and set forth broad objectives for them to achieve. *See* 5 U.S.C. §§ 5706–07; 41 U.S.C. § 1303(a)(1). Likewise, the Purpose Act—which requires that appropriations be paid only for those objects provided by law, 31 U.S.C. § 1301(a)—does not necessarily prohibit travel expenses paid in violation of the FTR or the FAR. Travel expenses may satisfy the Purpose Act by "mak[ing] a direct contribution to the agency's mission" even if they violate the FTR or the FAR. *See State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments*, 36 Op. O.L.C. 77, 88 (2012).

We think, though, that some payments made in violation of the FTR or the FAR are "prohibited by law" under section 3528(a)(4)(B) because the term "law" is broad enough to encompass not only statutes but also binding agency regulations. *See Hamlet v. United States*, 63 F.3d 1097, 1105 (Fed. Cir. 1995) (explaining when a regulation is "entitled to the force and effect of law" in personnel actions). The statutory history of section 3528 strongly suggests that "law" is not limited to statutes. As enacted in 1941, the original version of section 3528 made certifying officials liable for payments "prohibited by law," while purporting to authorize the Comptroller General to relieve such officials from liability if (among other conditions) "the payment was not contrary to any *statutory provision* specifically prohibiting payments of the character involved." Act of Dec. 29, 1941, Pub. L. No. 77-389, § 2, 55 Stat. 875, 875–76 (emphasis added). When Congress uses two different terms in a single statutory section, there is a strong "presum[ption] that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014). The enacting Congress's use of "statutory provision" in one place and "law" in another strongly suggests it did not mean for "law" to refer only to statutes.

When Congress enacted title 31 of the United States Code as positive law, it repealed the original version of section 3528 and replaced it with the current version, which contemplates relief if (among other conditions)

"no *law* specifically prohibited the payment." *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, sec. 1, § 3528(b)(2)(B), 96 Stat. 877, 966 (emphasis added). The 1982 Act thus removed the material variation between "law" and "statutory provision" that existed under the 1941 Act. But the 1982 Act expressly stated that it "may not be construed as making a substantive change in the laws replaced." *Id.* sec. 4(a), 96 Stat. at 1067. Thus, "prohibited by law" as used in section 3528(a)(4)(B) should be given the same meaning that the phrase had under the 1941 Act—a meaning that encompasses more than just statutes. *See Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 282 (2014) (when determining whether a statutory preemption provision applied to common-law rules, discounting omission of the terms "rule[s]" and "standard[s]" from a recodified version of the provision in light of Congress's direction that the "recodification did not effect any 'substantive change'" (alterations in original)). This conclusion is also consistent with the longstanding principle that the scope of a government agent's authority may either be "explicitly defined by Congress or be limited by [an agency's] properly exercis[ing] . . . the rule-making power." *Merrill*, 332 U.S. at 384. We therefore conclude that section 3528(a)(4)(B) provides for the recovery of unauthorized payments that violate either statutes or regulations with the force and effect of law.

Both the FTR and the FAR are regulations that, for purposes of section 3528(a)(4)(B), have the force and effect of law. A regulation that is "binding on [an] agency itself " can have the "'force and effect of law,'" "'regardless of whether [it] was published or promulgated under the standards set out in the APA,'" and regardless of whether it is "binding on the public." *Farrell v. Dep't of Interior*, 314 F.3d 584, 590–91 (Fed. Cir. 2002) (second alteration in original) (quoting *Hamlet*, 63 F.3d at 1105); *see Authority of the Environmental Protection Agency to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property,* 32 Op. O.L.C. 79, 84–85 (2008) ("*Authority of the EPA*"). To determine whether a regulation aimed primarily at agencies is binding, courts assess "whether the [issuing] agency intended the statement to be binding," *Farrell*, 314 F.3d at 590, as evidenced by (among other factors) "the agency's own characterization of its action" and its "publication or lack thereof in the Federal Register or the Code of Federal Regulations," *Tozzi v. Dep't of Health & Human Servs.*, 271 F.3d 301, 310 (D.C. Cir. 2001) (internal quotation marks omitted). Both the FTR and the FAR state

that they are binding on federal agencies. *See* 41 C.F.R. § 300-2.22; 48 C.F.R. § 1.202. And both are published in the Code of Federal Regulations. *See* 41 C.F.R. § 300-1.1 *et seq.*; 48 C.F.R. § 1.000 *et seq.* Thus, both those regulations are binding on agencies and should be considered "law" for purposes of section 3528(a)(4)(B).

Further, at least some provisions of the FTR and the FAR "prohibit[]" payments within the meaning of section 3528(a)(4)(B). The FTR states that an "agency may pay *only* those expenses essential to the transaction of official business," which the FTR defines to include (but not to be limited to) the "transportation expenses" specified in "part 301-10 of this chapter." 41 C.F.R. § 301-2.2 (emphasis added). An authorization to pay *only* specified transportation expenses is substantively identical to a prohibition against paying all other transportation expenses. The FAR, meanwhile, provides that "[a] contracting officer shall not . . . award [a] contract without providing for full and open competition *unless*" the officer takes certain steps, including "justif [ying] . . . the use of such [an award] in writing." 48 C.F.R. § 6.303-1(a) (emphasis added). A provision making sole-source contracts impermissible *unless* certain criteria are satisfied is a prohibition against such contracts where the criteria remain unsatisfied. At least some payments that violate the FTR and the FAR are therefore "prohibited by law" within the meaning of section 3528(a)(4)(B),[9] and an agency has a valid claim against an official who certified such a payment.[10]

In certain circumstances, though, an agency need not attempt to collect a valid claim against a certifying official. Section 3528(b) provides (in relevant part):

> (1) The Comptroller General may relieve a certifying official from liability when the Comptroller General determines that—

[9] The FTR recognizes expressly that "[t]he certifying officer assumes ultimate responsibility under 31 U.S.C. § 3528" for payments that violate the FTR. 41 C.F.R. § 301-71.203.

[10] We agree with the Comptroller General, however, that an agency does not have a valid claim against a certifying official for "any amounts recovered from the recipient" of an unlawful payment. 2 GAO Redbook 3d at 9-31. Nor does an agency have a valid claim for any amounts "not recovered [from the recipient] because of a compromise" authorized by the FCCA and FCCS. 31 U.S.C. § 3711(c); *see* 2 GAO Redbook 3d at 9-130 to -131.

> (A) the certification was based on official records and the official did not know, and by reasonable diligence and inquiry could not have discovered, the correct information; or
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> (B) (i) the obligation was incurred in good faith;
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> (ii) no law specifically prohibited the payment; and
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> (iii) the United States Government received value for payment.

This provision, we have advised, violates the separation of powers in three ways: by authorizing the Comptroller General, an "agent of Congress," to "issue interpretations of the law that are binding on the executive branch"; by "usurp[ing] the Executive's prosecutorial discretion"; and by "prevent[ing] the President from exercising his inherent supervisory authority over the conduct of executive branch [certifying] officers." *Comptroller General's Authority*, 15 Op. O.L.C. at 82–83 (relying on *Bowsher*, 478 U.S. at 732–33).

By stating that section 3528(b)(1) intrudes on "prosecutorial discretion," we necessarily acknowledged that the Executive Branch may decide not to pursue a claim against a certifying official. And, despite its deficiencies, section 3528(b)(1) embodies congressional intent, as well as longstanding practice before *Bowsher*, as to when not pursuing such a claim would be appropriate. In light of that intent and practice, we conclude that, when an agency has a valid claim against a certifying official, it may look to the relief standards of section 3528(b)(1) for guidance in determining whether to attempt collection or to forgo collection efforts.[11] If the agency concludes (among other things) that "the obligation was incurred in good faith," then the agency has discretion to cease collection efforts under the FCCA. 31 U.S.C. § 3528(b)(1)(B)(i). These relief standards do not define the limits of an agency's enforcement discretion, but they serve as appropriate guideposts for exercising that discretion.

We believe that the agency's discretion in that regard is consistent with the FCCA. As a general matter, an agency is presumed to be able to exercise enforcement discretion absent clear statutory language to the

[11] We note that, with respect to certifying officials within the Department of Justice, the Attorney General has already directed Department officials to "consult the standards of . . . 31 U.S.C. § 3528(b)(1)" when deciding whether to attempt collection. Department of Justice Order No. 1401, at 6 (Mar. 11, 2015) ("DOJ Order 1401").

contrary. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 833–34 (1985); *cf. Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (recognizing the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands"). The FCCA provides that an agency "shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency." 31 U.S.C. § 3711(a)(1). The implementing regulations further provide that agencies "shall aggressively collect all debts arising out of activities of . . . that agency." 31 C.F.R. § 901.1(a). But we do not read these provisions to eliminate all agency discretion in deciding whether to collect on such a claim. "'[S]hall' is not a term that invariably admits of no exceptions without regard to the circumstances." Memorandum for Jeh Charles Johnson, General Counsel, Department of Defense, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Obligation of the Department of Defense to Acquiesce or Nonacquiesce in* Witt v. Department of the Air Force, *527 F.3d 806 (9th. Cir. 2008)* at 13 (Mar. 25, 2010) (citing *Town of Castle Rock*, 545 U.S. at 759–60). We think that an agency has discretion to decline to pursue collection when it is relying on the same factors that, in section 3528(b)(1), Congress found sufficient to support a decision to extinguish liability entirely against a certifying official.

We turn, then, to the proper interpretation of section 3528(b)(1)'s standards for relieving certifying officials from liability—one of which is that "no law specifically prohibited the payment." 31 U.S.C. § 3528(b)(1)(B)(ii). The reference to "law" in the provision concerning the relief of certifying officials should be construed, in light of the statutory history discussed above, as referring only to statutes, and not to violations of the FTR or the FAR. *See supra* p. 164. That reading, we acknowledge, bucks the presumption that words are used consistently throughout a statute. But that presumption may be rebutted by clear "indications that the same [word] used in different parts of the same statute means different things." *Barber v. Thomas*, 560 U.S. 474, 484 (2010). Such clear evidence exists here because the statute originally referred to "statutory provision[s]" and Congress expressly stated, when it replaced that phrase with "law," that it did not intend any "substantive change" Act of Sept. 13, 1982, § 4(a), 96 Stat. at 1067. Because a payment that violates the FTR or the FAR is not necessarily prohibited by any statute, *see supra* p. 163, such a payment may satisfy subparagraph (B)(ii).

Turning from officials who certify payment vouchers to those who actually disburse payments, we consider 31 U.S.C. § 3325, which provides (in relevant part):

> (a) A disbursing official in the executive branch of the United States Government shall—
>
> (1) disburse money only as provided by a voucher certified by—
>
> (A) the head of the executive agency concerned; or
>
> (B) an officer or employee of the executive agency having written authorization from the head of the agency to certify vouchers;
>
> (2) examine a voucher if necessary to decide if it is—
>
> (A) in proper form;
>
> (B) certified and approved; and
>
> (C) computed correctly on the facts certified; and
>
> (3) except for the correctness of computations on a voucher or pursuant to payment intercepts or offsets pursuant to [31 U.S.C. §§ 3716 or 3720A] be held accountable for carrying out clauses (1) and (2) of this subsection.

As noted above, although a separate provision purports to vest the Comptroller General with authority to settle claims against an "accountable official," an agency must itself decide whether a potential claim against such an official is valid. *See supra* p. 162 (discussing 31 U.S.C. § 3526(c)(1)). And as subsection (a)(3) of section 3325 makes clear, an agency has a valid claim against a disbursing official only if he failed to perform one of the duties set forth in subsections (a)(1) or (a)(2). Neither of those subsections requires a disbursing official to ensure that a payment is consistent with any provision outside section 3325. Accordingly, a contract payment's inconsistency with the FTR or the FAR does not give rise to a valid claim against the official who disbursed the payment.[12]

[12] This conclusion is consistent with 31 U.S.C. § 3527(c), which addresses "reliev[ing] a present or former disbursing official . . . for a deficiency in an account because of an illegal, improper, or incorrect payment." A payment that violates subsections (a)(1) or (a)(2) of section 3325 is an "illegal" one for which a disbursing official may be held liable under subsection (a)(3) of that section.

Next, we address whether an agency has a valid claim against other agency employees, including those who benefited from goods or services purchased in violation of the FTR or the FAR. No government-wide statute directly subjects employees other than certifying officials to liability for improper payments. *See* 2 GAO Redbook 3d at 9-12. And Congress has specifically authorized at least one agency to extend such liability to other employees. *See* 10 U.S.C. § 2773a(a) ("The Secretary of Defense may designate any civilian employee . . . as an employee . . . [who] may be held accountable through personal monetary liability for an illegal, improper, or incorrect payment made by the Department of Defense."). That strongly suggests that an agency's general rulemaking authority under 5 U.S.C. § 301 (or a similar "housekeeping" provision) does not include the authority to subject employees other than certifying officials to liability for improper payments.[13] *See Authority of the EPA*, 32 Op. O.L.C. at 85–86 n.5.

The history behind 10 U.S.C. § 2773a is especially powerful evidence that an agency needs specific statutory authority to make employees liable for improper payments. Beginning in 1998, Department of Defense ("DoD") regulations made certain employees other than "certifying and disbursing officers . . . pecuniarily liable for erroneous payments resulting from the negligent performance of their duties." 5 DoD Financial Management Reg. No. 7000.14-R, ch. 33, ¶ 3302 (Aug. 1998) ("DoD 7000.14-R"). In reviewing those regulations, the Comptroller General concluded that, "absent statutory authority, an agency may not administratively impose pecuniary liability on federal employees" for improper payments. *Matter of Department of Defense—Authority to Impose Pecuniary Liability by Regulation*, B-280764, 2000 WL 812093, at *3 (Comp. Gen. May 4, 2000) ("*Pecuniary Liability*"). The Comptroller General relied on such

[13] An agency's authority under 5 U.S.C. § 301 or another "housekeeping" provision does, however, include the authority to "set[] standards of care for employee use of government property and to impose liability for breaches of those standards." *Authority of the EPA*, 32 Op. O.L.C. at 81. Section 301 authorizes each executive department to "prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property." Some organic statutes vest other agencies with similar authority. *Authority of the EPA*, 32 Op. O.L.C. at 83. Congress has never separately and specifically given any department or agency the authority to subject certain employees to liability for misuse of government property, and there is thus no indication that departments and agencies lack such authority under section 301 or similar statutory provisions.

cases as *United States v. Gilman*, 347 U.S. 507 (1954), in which the Court held that the United States could not recover indemnification from an employee whose negligence had caused a third party's injuries, resulting in a finding of liability against the United States. The Court noted that "a complex of relations between federal agencies and their staffs [was] involved," that "[t]he selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised," and that this "function is more appropriately for those who write the laws, rather than those who interpret them." *Id.* at 511–13. The Comptroller General found no statutory authority underpinning the DoD regulations, *Pecuniary Liability*, 2000 WL 812093, at *6, and thus necessarily concluded that 5 U.S.C. § 301, the "housekeeping" provision applicable to DoD, did not supply the requisite authority. *See also Matter of Veterans Affairs—Liability of Alexander Tripp*, B-304233, 2005 WL 1940183, at *2 (Comp. Gen. Aug. 8, 2005) (concluding that the Department of Veterans Affairs, which also has housekeeping authority under 5 U.S.C. § 301, may not subject employees to liability for improper payments).[14] Two years later, Congress responded to *Pecuniary Liability* by enacting 10 U.S.C. § 2773a, but that statute enabled only DoD to extend liability for improper payments beyond certifying and disbursing officials.[15] And, indeed, HHS has not subjected any of its employees to such

[14] DOJ Order 1401 could be understood as a rule, issued pursuant to 5 U.S.C. § 301, that purports to extend liability for improper payments. The Order defines "Accountable Officers" to include employees other than certifying and disbursing officials. DOJ Order 1401, at 4. And the Order provides that any "Accountable Officer may be held personally liable for the physical loss or deficiency of public funds or for an erroneous or improper payment of funds for which the officer is accountable." *Id.* at 5. But a loss or payment "for which [an] officer is accountable" could mean a loss or payment for which, under existing statutory authority, an officer may be subjected to liability. Under that reading, only certifying and disbursing officials could be held liable for improper payments, while a broader class of employees could be held liable for physical losses. *See* 2 GAO Redbook 3d at 9-36 (interpreting 31 U.S.C. § 3527 as authorizing agencies to subject employees other than certifying and disbursing officials to liability for physical losses). In light of our conclusions here, we would read DOJ Order 1401 to have this narrower application in the case of improper payments.

[15] Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, div. A, § 1005, 116 Stat. 2458, 2631–32 (2002). At points, 10 U.S.C. § 2773a tracks almost verbatim the language of the DoD regulations at issue in *Pecuniary Liability*. *Compare* 10 U.S.C. § 2773a(b), *with* 5 DoD 7000.14-R, ch. 33, ¶ 331001 (Aug. 1998). The Comptroller General accordingly understands 10 U.S.C. § 2773a as a direct response

liability. We therefore conclude that an agency does not have a valid claim against an employee who benefited from an improper payment, unless Congress has specifically authorized the agency to extend liability to the employee.[16]

We acknowledge that, taken together, these conclusions are not intuitive. Certifying officials, who do not personally benefit from payments made in violation of federal regulations, are strictly liable for those payments, though agencies are not always obligated to seek recovery from those officials. Employees who *do* personally benefit, on the other hand, are generally not liable at all. Those conclusions, however, follow directly from the governing statutes, which have long been understood to impose strict liability on certifying officials but do not provide for recovery from employees who may benefit from improper payments.

IV.

Although the bulk of the payments addressed by the Audit Report went to charter airlines, HHS OIG also concluded that HHS improperly reimbursed Secretary Price and other agency officials a total of $2,960 for travel expenses not reimbursable under the FTR. Audit Report at 23. We now address whether an agency may or must seek to recover reimbursements that it paid to employees in violation of the FTR.

An agency employee is strictly liable for repaying a payment from his agency that violates a statute or regulation. *See Balick v. Office of Pers. Mgmt.*, 85 F.3d 586, 589 (Fed. Cir. 1996); *see also, e.g.*, *Matter of Robert W. Webster—Attorney's Fee for Construction Contract*, 63 Comp. Gen. 68, 70 (1983) (concluding that agencies may recover reimbursements that violate the FTR from employees who received them through no fault of their own). Nevertheless, in certain circumstances, an agency may waive its claim against an employee.

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to that decision. *See Matter of Department of Defense Accountable Officials—Local Nationals Abroad*, B-305919, 2006 WL 771405, at *2 n.3 (Comp. Gen. Mar. 27, 2006); *see also* Maj. Michael L. Norris, *Liability of Accountable Officers*, 2006-Jan. Army Law. 167, 170 (also characterizing 10 U.S.C. § 2773a as a direct response to *Pecuniary Liability*).

[16] This conclusion does not mean that an employee would not be liable if, for example, he or she induced, though fraud or other misrepresentation, an agency to make an unlawful payment. But we have no occasion to address such questions here.

Under 5 U.S.C. § 5584, the head of an agency may "waive[] in whole or in part" a claim of the United States "arising out of an erroneous payment of travel . . . expenses" if the following conditions are met: (i) collecting from the recipient employee "would be against equity and good conscience and not in the best interest of the United States"; (ii) there is no "indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver"; and (iii) the employee's "application for waiver is received [within the] 3 years immediately following the date on which the erroneous payment . . . was discovered." *Id.* § 5584(a)(1), (b)(1), (b)(5), (g)(2).[17] Thus, if an employee requests a waiver and the requirements set forth in section 5584 are met, an agency may, but is not obligated to, waive a claim for an unlawful travel reimbursement.[18]

Finally, we address whether an agency has a valid claim against an official who certified an unlawful travel reimbursement.[19] Because the FTR has the force and effect of law and prohibits payments not specifically authorized by the regulation, a reimbursement that violates the FTR generally constitutes "a payment . . . prohibited by law" for purposes of 31 U.S.C. § 3528(a)(4)(B). Therefore, when an agency determines that a reimbursement violates the FTR, the agency generally has a valid claim against the responsible certifying official. A certifying official may not be held liable, however, if the agency already recovered the reimbursement from the recipient employee. *See* 2 GAO Redbook 3d at 9-31 to -32. Nor may a certifying official be held liable if the agency waived its claim against the employee. *See* 5 U.S.C. § 5584(d) ("In the audit and settlement of the accounts of any accountable official, full credit shall be given for

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[17] For claims aggregating $1,500 or less, the waiver authority is vested directly in the head of the agency. 5 U.S.C. § 5584(a)(2). For greater claims, the authority is, as relevant here, vested in the Director of OMB. *Id.* § 5584(a)(1), (g)(2). As noted above, however, the Director of OMB has delegated that waiver authority to "the Executive Branch agency that made the erroneous payment." OMB Delegation, att. A.

[18] The compromise and termination provisions of the FCCA and FCCS also apply to claims arising out of unlawful travel reimbursements. *See* 5 U.S.C. § 5584(f) ("This section does not affect any authority under any other statute to litigate, settle, compromise, or waive any claim of the United States.").

[19] For the reasons set forth above, a travel reimbursement's inconsistency with the FTR does not give rise to a valid claim against the official who disbursed the reimbursement funds. *See supra* pp. 169–70.

any amounts with respect to which collection by the United States is waived under this section."); 2 GAO Redbook 3d at 9-130. Further, if an agency determines that the relief requirements of 31 U.S.C. § 3528(b)(1) are satisfied, it need not attempt to collect from a certifying official.

V.

As a general matter, where an agency has made a payment that violates the FTR or the FAR to a contractor that has fully performed its contract obligations, the agency may recover the payment only if the violation was plain on the face of the regulation. On the other hand, an agency may generally recover a payment that violates the FTR or the FAR from the responsible certifying official or from the employee who received the payment, even if the regulatory violation was not clear. Where the requirements of 5 U.S.C. § 5584 or the FCCS are satisfied, an agency may waive or end collection action on a claim against a recipient contractor or employee. And where the standards of 31 U.S.C. § 3528(b)(1) for relieving a certifying official of liability are satisfied, an agency need not attempt to collect from the certifying official.

Please let us know if we may be of further assistance.

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