

CHAPTER 12:



REPROGRAMMING AND TRANSFER AUTHORITY

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CHAPTER 12

REPROGRAMMING AND TRANSFER

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CHAPTER 12
REPROGRAMMING AND TRANSFER

I. INTRODUCTION. Upon completing this instruction, the student will understand:

- A. The difference between reprogramming and transferring funds.
- B. The procedural rules involved in reprogramming funds.
- C. The special rules involved in reprogramming for military construction purposes.

II. REFERENCES

- A. Annual Department of Defense Appropriations Act and Conference Report (or equivalent).
- B. 31 U.S.C. § 1532 (Transfer Statute) “An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law. Except as specifically provided by law, an amount authorized to be withdrawn and credited is available for the same purpose and subject to the same limitations provided by the law appropriating the amount. A withdrawal and credit is made by check and without a warrant.”
- C. DOD Regulation 7000.14-R, Financial Management Regulation, volume 3, chapters 3 (Jan. 2011), 6 (Mar. 2011), and 7 (Mar. 2011) [hereinafter DOD FMR] available at <http://comptroller.defense.gov/fmr/current/03/index.html>.
- D. Defense Financial and Accounting Service - Indianapolis 37-1, Finance and Accounting Policy and Implementation, ch. 3, para. 0306 (February 2010) available at <http://asafm.army.mil/offices/BU/Dfas371.aspx?OfficeCode=1200>.
- E. Air Force Instruction 65-601, Volume I, ch. 2, para. 2.3, Budget Guidance and Procedures (16 August 2012) available at <http://www.e-publishing.af.mil>.

- F. Department of Navy, NAVSO P-1000, Financial Management Policy Manual, ch. 1, pt. D (12 December 2002) available at <http://www.fmo.navy.mil/policies/regulations.htm>.
- G. U.S. Government Accountability Office, Principles of Federal Appropriations Law, 2-24 to 2-33 (3d ed., vol. I, Jan. 1, 2004) [hereinafter GAO Principles of Fed. Appropriations Law] available at <http://www.gao.gov/legal/redbook.html>.
- H. Office of Management and Budget, Circular No. A-11, Preparation, Submission, and Execution of the Budget (August 2012) available at http://www.whitehouse.gov/omb/circulars/a11/current_year/a11_toc.html.

III. DEFINITIONS

- A. **Reprogramming.** Reprogramming is the use of “funds in an appropriations account for purposes other than those contemplated at the time of appropriation.” Specifically, when an agency reprograms funds, it is moving funds within an appropriation (i.e. from one “budget activity” to another “budget activity”). Frequently—although not always—reprogramming is accomplished by notice to or approval by the appropriate Congressional subcommittees. DOD FMR, vol. 2A, ch. 1, para. 010107.B.51 (October 2008).
- B. **Transfer Authorities.** “Annual authorities provided by the Congress via annual appropriations and authorization acts to transfer budget authority from one appropriation or fund account to another.” DOD FMR, vol. 2A, ch. 1, para. 010107.B.58 (October 2008). Transfer authority exists in the annual appropriation/authorization acts as well as in permanent legislation. In contrast to reprogramming (which moves funds within a single appropriation), when an agency transfers funds, it is moving funds from one appropriation to another appropriation. Transfers often require notice to the appropriate Congressional subcommittees. Some transfers even require the approval of OMB or the President. DOD FMR, vol. 3, ch. 3, para. 030202 (January 2011). OMB Circular No. A-11, p. 43, Sec. 20.4 (2012).

IV. TRANSFERS DISTINGUISHED FROM REPROGRAMMING

- A. **Transfers.** GAO, Principles of Fed. Appropriations Law, p. 2-24.

1. Transfers shift money between appropriations accounts.
2. There are generally three types of transfers.
 - a. Transfers between accounts within the same agency, e.g., Operation and Maintenance account to Military Personnel account.
 - b. Transfers between agencies, e.g., Department of Defense to Department of State.
 - c. Transfers to/from fixed “earmarks,” e.g., where Congress includes an “earmark” for a specific purpose within a general appropriation. Matter of John D. Webster, B-278121, 98-1 CPD ¶ 19.
3. Transfers require statutory authority. 31 U.S.C. § 1532; The Honorable Peter Hoekstra, B-279886, 1998 WL 229292 (C.G.).
 - a. 31 U.S.C. § 1532 prohibits transfers without statutory authority. This statute provides:

An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law. Except as specifically provided by law, an amount authorized to be withdrawn is available for the same purpose and subject to the same limitations provided by the law appropriating the amount.¹

¹ Several GAO decisions have interpreted 31 U.S.C. § 1532 to mean that unless a particular statute authorizing the transfer provides otherwise, transferred funds are subject to the same purpose and time limitations applicable to the donor appropriation—the appropriation from which the transferred funds originated. GAO, Principles of Fed. Appropriations Law, p.2-28. So, if funds from a one-year appropriation were transferred into a five-year appropriation, the transferred funds would be available only for one year. Nevertheless, the annual DOD appropriation acts typically provide a number of exceptions to this rule thereby authorizing the donor appropriation to assume the “fiscal identity” of the appropriation into which it is transferred.

- b. Generally speaking, there are two types of transfer authority: general and specific.
- (1) General Transfer Authority. General Transfer Authority is provided in either appropriations acts or in permanent legislation.
 - (a) Typically, Congress provides general transfer authority to DOD in its annual appropriations acts. Often, transfer authority is found in authorization acts as well. See, e.g., Department of Defense Appropriations Act (DODAA) FY 2009, Pub. L. No. 110-329, § 8005 (2008); DODAA FY 2010, Pub. L. No. 111-118, § 8005 (2009).
 - (b) Some transfer authority is contained in permanent legislation. See, e.g., 7 U.S.C. § 2257 (authorizing transfers between Department of Agriculture appropriations in an amount not to exceed seven percent of the “donor” appropriation).
 - (c) DOD must notify Congress promptly of all transfers made pursuant to the General Transfer Authority. DOD FMR, vol. 3, ch. 3, para. 030202 (Jan. 2011); DODAA FY 2010, Pub. L. No. 111-118, § 8005 (2009).
 - (2) Specific Transfer Authority. Congress authorizes or directs the movement of funds to support specific programs. See, e.g., Defense Drug Interdiction and Counter-Drug Activities, DODAA FY 2010, Pub. L. No. 111-118, Title VI, (2009). This provision allows the transfer of nearly \$1.1B to appropriations for military personnel of the reserve components to carry out counter-drug activities.
- c. The prohibition against transferring funds without statutory authority applies even though the transfer is intended as a temporary expedient and the agency contemplates reimbursement. To the Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).

d. An unauthorized transfer also violates the purpose statute, 31 U.S.C. § 1301(a), and constitutes an unauthorized augmentation of the receiving appropriation.

(1) Exception. 31 U.S.C. § 1534 authorizes an agency to charge one appropriation for expenditure benefiting another appropriation of the same agency. See Use of Agencies' Appropriations to Purchase Computer Hardware for Department of Labor's Executive Computer Network, 70 Comp. Gen. 592 (1991). Amounts must be available in both the benefitting and benefited appropriations, and reconciliation must take place within the fiscal year.

e. Examples of transfers

(1) **General Transfer Authorities**

(a) Transfers from Working Capital Funds. Normally, in the annual DOD Appropriation Acts, there is broad authority to transfer a specified amount of funds from the DOD working capital funds to any DOD Appropriation (except to the military construction appropriation).²

(b) Transfers from the Army Operations and Maintenance Appropriation. A recurring provision in the annual DOD Appropriation Acts gives the Secretary of Defense the authority to transfer funds from the Army's operations and maintenance appropriation.³

² For example, section 8005 of the FY 2012 Consolidated Appropriations Act permits DOD to transfer up to \$3.75B from DOD's working capital funds to any DOD appropriation (except the military construction appropriation) "for military functions" so long as the Secretary of Defense notifies Congress & OMB approves it. Consolidated Appropriations Act for FY 2012, Pub.L. No. 112-74, § 8005 (2012).

³ For example, section 8072 of the FY 2010 DOD Appropriations Act permits the Secretary of Defense to transfer up to \$106.7M from the Army's operations and maintenance appropriation to any other DOD appropriation for "other activities of the Federal Government." Department of Defense Appropriations Act for FY 2010, Pub.L. No. 111-118, § 8072 (2009); *see also* Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 8069 (2011).

(2) **Specific Transfers Authorities**

- (a) **Military Pay.** There is a recurring provision in the DOD Appropriation Acts concerning transferring funds from DOD-wide O&M to appropriations for military pay.⁴
- (b) **RDT&E and Procurement.** There is a recurring provision in the DOD Appropriation Acts concerning transferring funds from an RDT&E appropriation to a procurement appropriation.⁵
- (c) **DOD Pilot Mentor Protégé Program.** There is a recurring provision in the DOD Appropriation Acts concerning the transfer of funds appropriated to the DOD for the Pilot Mentor Protégé Program.⁶

4. Generally, proposals to exercise transfer authority should be submitted formally to the DOD comptroller for processing. DOD FMR, vol. 3, ch. 3, para. 0304.

⁴ Section 8051 authorizes the transfer of up to \$30,000,000 from the DOD-wide operations and maintenance appropriation to any other DOD appropriation which is made available for the pay of military personnel. Consolidated Appropriations Act for FY 2012, Pub.L. No. 112-74, § 8051 (2012). The purpose of this authorization to transfer funds is to reimburse other DOD appropriations for the costs of supporting non-DOD programs pursuant to 10 U.S.C. § 2012.

⁵ Section 8071 authorizes the transfer up to \$235.7M from the RDT&E-Defense-wide appropriation (originally designated for the Israeli Cooperative Programs) to any of the DOD appropriations “available for the procurement of weapons and equipment.” Consolidated Appropriations Act for FY 2012, Pub.L. No. 112-74, § 8071 (2012).

⁶ Section 8015 authorizes the transfer of funds appropriated for the Pilot Mentor Protégé Program to any other DOD appropriation for the specific purpose of implementing “the Mentor-Protégé Program developmental assistance agreement” under this authority. Consolidated Appropriations Act for FY 2012, Pub.L. No. 112-74, § 8015 (2012). The purpose of this program is to assistance small businesses by providing incentives to large businesses to partner with small businesses in performing government contracts. See Section 831 of the National Defense Authorization Act for Fiscal Year 1991, Pub.L. No 101-510).

B. **Reprogramming.** See generally, GAO, Principles of Fed. Appropriations Law, p. 2-29.

1. There are a variety of reasons that agencies move funds within an appropriation. Former Deputy Secretary of Defense William H. Taft IV stated:

The defense budget does not exist in a vacuum. There are forces at work to play havoc with even the best of budget estimates. The economy may vary in terms of inflation; political realities may bring external forces to bear; fact-of-life or programmatic changes may occur. The very nature of the lengthy and overlapping cycles of the budget process poses continual threats to the integrity of budget estimates. Reprogramming procedures permit us to respond to these unforeseen changes and still meet our defense requirements.⁷

2. In contrast to transfers, “reprogramming” shifts money within an appropriations account. (For more detailed information about reprogramming actions, see Section V of this outline.)
 - a. There is no change in the total amount available in the appropriations account.
 - b. Reprogramming is not a request for additional funds; rather, it is a reapplication of funds.
3. When Congress appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions on the expenditure of the funds. LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203.

⁷ *Reprogramming Action Within the Department of Defense: Hearing Before the House Armed Services Committee* (Sept 30, 1985) (remarks prepared for delivery by The Honorable William H. Taft IV, Deputy Secretary of Defense, unprinted).

4. Subdivisions of an appropriation contained in the agency's budget request or in conference or committee reports are not legally binding upon the department or agency concerned unless they are specified in the appropriations act itself. Newport News Shipbldg. and Dry Dock Co., B-184830, 55 Comp. Gen. 812 (1976).⁸

5. Reprogramming is based on minimal congressional and legislative guidance. There "is no general statutory provision either authorizing or prohibiting it, and it has evolved largely in the form of informal (i.e. non-statutory) agreements between various agencies and their congressional oversight committees."⁹ There are some general limitations to reprogramming:
 - a. Agencies must comply with the requirements of 31 U.S.C. § 1301.

 - b. Agencies must check appropriations acts for statutory prohibitions to proposed reprogramming. The DOD Appropriation Act usually sets out broad guidelines.

 - c. Agencies must follow their internal policies and procedures. For DOD, there are detailed procedures located in the DOD FMR, vol. 3, ch. 3 and 6.

6. Items eligible for reprogramming. Congress, in the annual appropriation act, typically states that DoD may submit actions only for higher priority items, based on unforeseen military requirements, than those for which the funds were originally appropriated. See Consolidated Appropriations Act for FY 2012, Pub.L. No. 112-74, § 8005 (2012).

⁸ Since the 2009 NDAA, Congress has started adding funding tables to the authorization act so that the conference reports have the legal force of law. See NDAA 2009, P.L. 110-417, Section 1005, 14 October 2008, for the first joint explanatory statement. Each year since that time, the NDAA has included funding tables, usually at Division D.

⁹ GAO, Principles of Fed. Appropriations Law, p.2-30 to 2-31.

7. Items ineligible for reprogramming. Annually, Congress prohibits DoD from submitting reprogramming actions on items for which funds have previously been requested from Congress but denied. See Consolidated Appropriations Act for FY 2012, Pub.L. No. 112-74, § 8005 (2012). GAO has stated that in the absence of a similar statutory provision, a reprogramming that has the effect of restoring funds deleted in the legislative process is okay. See Propriety of LEAA Funding of Urban Crime Prevention Program, B-195269, Oct. 15, 1979.
8. **All DOD reprogramming actions must be approved by the DOD Comptroller.** Additionally, some reprogramming actions require notice to or approval by the appropriate congressional subcommittees. DOD FMR, vol. 3, ch. 6 and 7. Regarding the routing of requests, “Military Departments must submit proposed DD 1415 [reprogramming] actions formally by memorandum addressed to the USD(C) from the Assistant Secretary (Financial Management and Comptroller) of the Military Department.” DOD FMR, vol 3, ch. 6, para. 060407.

V. REPROGRAMMING TYPES

- A. **Reprogramming Actions Requiring Prior Approval of Congressional Committees.** DOD FMR vol. 3, ch. 6, para. 060401, A-F. *See also* Conference Report accompanying annual DOD appropriations acts.
 1. If a DOD Component (i.e. Army, Air Force, Navy, Marines) wants to reprogram funds (requiring Congressional approval), then the Component Comptroller will forward a formal request to the DOD Comptroller explaining the details of the reprogramming request. The DOD Comptroller will forward the request to Congress for consideration (the House Armed Services Committee, the Senate Armed Services Committee, the House Appropriations Committee, and the Senate Appropriations Committee). The DOD Comptroller will receive letters from each of these committees and will notify the Component Comptroller if its request has been approved or disapproved. If the request is denied, then the Component Comptroller will not reprogram the funds.
 2. The following types of reprogramming requests require Congressional approval.

- a. Any reprogramming that involves an item designated as a Congressional special interest item.
- b. Any increase in the procurement quantity of a major end item, such as an individual aircraft, missile, naval vessel, tracked combat vehicle, and other weapon or torpedo and related support equipment.
- c. Any reprogramming action that involves the application of funds which *exceed thresholds* agreed upon by the congressional committees and DOD:
 - (1) Military Personnel: cumulative increases in a budget activity¹⁰ of \$10 million or more. (This example did not appear in the CAA for 2012).
 - (2) Operation and Maintenance: net changes in a budget activity of \$15 million or more.
 - (3) Procurement: cumulative increases for any program year of \$20 million or more (or 20 percent of the appropriated amount, whichever is less); cumulative decreases for any program year of \$20 million or more (or 20 percent of the appropriated amount, whichever is less).
 - (4) Research, Development, Test, and Evaluation (RDT&E): cumulative increases for any program year of \$10 million or more in an existing program element (or 20 percent of the appropriated amount, whichever is less); cumulative decreases for any program year of \$10 million or more (or 20 percent of the appropriated amount, whichever is less).

¹⁰ “Budget activities” are defined as categories within each appropriation and fund accounts that identify the purposes, projects, or types of activities financed by the appropriation or fund. DOD FMR, vol. 3, ch. 6. For an example of budget activities, see the Joint Explanatory Statement of The Committee of Conference for the FY 2012 Consolidated Appropriations Act, which breaks down the budget activities in some detail. For example, prior appropriation acts required approval if the Air Force wanted to perform a reprogramming action in its Military Personnel, Air Force appropriation by moving \$15 million from one budget activity to another budget activity (because it exceeded the \$10 million threshold for the military personnel appropriation).

- (5) Additional sub-activity thresholds as specified by Congress.¹¹
- d. New Starts: a program, subprogram, modification, project or subproject not previously justified by DOD and funded by Congress is considered a “new start.” Congressional committees discourage the use of reprogramming to initiate new starts. Congress normally states in the annual DOD Appropriations Acts that before funding any new start, the requester must first notify the Secretary of Defense and Congress.¹² For specific notification and approval procedures. DOD FMR, vol. 3, ch. 6, para. 060401.E.
- e. Termination of programs that result in elimination of certain procurement programs and subprograms and RDT&E elements, projects, and subprojects. DOD FMR, vol. 3, ch. 6, para. 060401.E.
- f. Most fund shifting/movements that make use of *general transfer authority*.¹³ DOD FMR, vol. 3, ch. 6, para. 060401.C, for exceptions.

B. “Internal” Reprogrammings. DOD FMR, vol. 3, ch. 6, para. 060402.

¹¹ See e.g. Explanatory Statement for the FY 2009 DODAA, listing multiple sub-activities (such as Army Land Forces Depot Maintenance), for which transfers out of the sub-activity in excess of \$15M require Prior Approval Reprogramming; DOD FMR vol. 3, ch. 6, para. 060401.D.2.

¹² Section 8076 states, “None of the funds provided in this Act shall be available for obligation or expenditure through a reprogramming of funds that creates or initiates a new program, project, or activity unless such program, project, or activity must be undertaken immediately in the interest of national security and only after written prior notification to the congressional defense committees.” Consolidated Appropriations Act for FY 2012, Pub.L. No. 112-74, § 8076 (2012).

¹³ Note that DOD uses a “Reprogramming Action” (DD 1415-1) to accomplish both reprogrammings *and* transfers. There are different forms for internal (DD 1415-3) reprogramming actions (again, a term which includes those actions ‘using transfer authority’), versus those that require prior approval (1415-2). Thus, the wording of the FMR can be confusing in that it uses the terms “reprogramming” and “transfer” in the same section when referring to this process. For example, the FMR’s reprogramming chapter states that reprogramming actions that “use general transfer authority” require Congressional approval. Bottom line, beware the distinction between “reprogramming” as defined in this outline, and a “reprogramming action” as used in the FMR. See e.g. DOD FMR, vol 3, ch. 6, para. 060401C (March 2011).

1. “Internal” reprogrammings are not, technically, formal reprogramming actions. Internal reprogrammings are “audit-trail type actions processed within the Department to serve various needs.” DOD FMR, vol. 3, ch. 6, para. 060402.
2. Internal reprogrammings fall into three general categories:
 - a. Reclassification Actions. Actions involving a reclassification or realignment of funds within budget activities or within budget line items/program elements. These reclassifications do not involve any change in the substance of the program and the funds will be used to for the same purposes originally contemplated when submitted to Congress;
 - b. Transfer Appropriations.¹⁴ “Transfer accounts” are appropriations with funding that will be transferred to other appropriations for execution. Reprogramming to or from transfer accounts is generally permissible without relying upon statutory authority such as the general transfer authority. Examples of transfer accounts include: Overseas Contingency Operations Transfer Fund and Foreign Currency Fluctuations, Defense.
 - c. Procurement Quantities. Approval to increase quantities of major end items where Congress has specified that approval is not required.
3. Technically, funding changes within program elements are not regarded as “reprogramming.” The Honorable Roy Dyson, House of Representatives, B-220113, 65 Comp. Gen. 360 (1986).
4. Internal reprogrammings are not subject to dollar thresholds.
5. Internal reprogrammings do not require prior congressional approval or notification. Such actions are audit-trail type actions processed within DOD Secretary of Defense, Comptroller.

¹⁴ The language of the DOD FMR refers to “transfer appropriations” in the chapter on reprogramming, which it then describes as reprogramming actions related to transfer accounts. *See* DOD FMR, vol 3, ch. 6, para. 060402.B.

C. **Below Threshold Reprogrammings.** DOD FMR, vol. 3, ch. 6, para. 0608.

1. Below threshold reprogrammings are those reprogramming actions that do not exceed the thresholds identified above in this outline at paragraph V.A.2.c, individually or when combined with other below-threshold reprogramming actions.
2. Below-threshold reprogramming actions “provide DOD Components with the discretionary flexibility to realign, within prescribed limits, congressionally approved funding to satisfy unforeseen, higher priority requirements.” DOD FMR, vol. 3, ch. 6, para. 060801. Additionally, such reprogramming actions are minor actions that do not require congressional approval. When the DOD Components accomplish these reprogramming actions, they measure these actions “cumulatively” over the course of the appropriation’s period of obligation.
3. For example, the Army could accomplish a below-threshold reprogramming of funds in its Military Personnel, Army appropriation by moving funds from one budget activity (i.e. Pay and Allowances, Officer) to another (i.e. Pay and Allowances, Enlisted) so long as the total amount was less than \$10 million.
4. Congress performs oversight through the DOD’s semiannual submission of its DD 1416, Report of Programs.

D. **Letter Notifications.** DOD FMR, vol. 3, ch. 6, para. 060403.

1. Letter notifications apply to the initiation and termination of certain projects, including some below-threshold procurements.
2. Notification to the appropriate committees requires a 30-day automatic hold on funds. The reprogramming action may be implemented 30-days after notification if no objection is received.

E. **Intelligence Related Reprogrammings.** DOD FMR, vol. 3, ch. 6, para. 0606.

1. Generally, the same rules apply to reprogramming intelligence resources as provided for other reprogramming actions under DOD FMR, vol. 3, ch. 6, para. 060602.
2. Some special rules do apply:
 - a. Actions reprogramming DOD appropriations that impact the National Foreign Intelligence Program are subject to additional guidelines.
 - b. The Office of the Director of National Intelligence issues specific guidance on processing certain intelligence reprogramming actions and on below-threshold determinations. DOD FMR, vol. 3, ch. 6, para. 0606.

VI. MILITARY CONSTRUCTION REPROGRAMMING. DOD FMR, vol. 3, ch. 7.

- A. **General.** The congressional subcommittees concerned with the appropriation and authorization of military construction and family housing funds have agreed that, in executing approved programs, some flexibility is required in adjusting approved funding levels to comply with new conditions and to effectively plan programs to support assigned missions. Departmental adjustments or reprogrammings may be required for a number of reasons including but not limited to:
1. Responding to emergencies;
 2. Restoring or replacing damaged or destroyed facilities;
 3. Accommodating unexpected price increases; and
 4. Implementing specific program provisions provided for by Congressional committees.

B. Procedures. DOD FMR, vol. 3, ch. 7.

1. Proposed military construction action must be approved by the DOD comptroller before submission to the appropriate congressional committees. In many cases, the DOD comptroller is simply required to notify Congress (vice obtain approval) and then wait a certain period of time; if Congress does not act upon the notification, then DOD may proceed with the reprogramming action.
2. While most military construction reprogramming actions must be submitted to Congress, there are some “below threshold” actions that may be approved at the DOD comptroller level.

C. Authority

1. **Approval by Congress Required Prior to Reprogramming (partial list):**
 - a. Any increase exceeding 25% of the reprogramming base (originally approved, or subsequently approved project value) or \$2M—whichever is less—to MILCON projects and family housing new construction projects, or family housing improvement projects (exceeding \$2M base value), or for which the base has been increased or decreased by a previously approved action.
 - b. For any increase, regardless of amount, to a MILCON project that has been previously reduced in scope by Congress in acting on the appropriation.
 - c. To increase the amount appropriated for UMMC.
 - d. To increase the amount appropriated for architectural and engineering service and contraction design.
 - e. For any Base Realignment and Closure projects.
 - f. For any family housing project relocation project to be accomplished by 10 U.S.C. 2827.

2. **Notice to Congress is Required**¹⁵ Prior to Reprogramming (partial list):

a. **10 U.S.C. § 2803.** Provides permanent authority to obligate and reprogram up to \$50 million annually for emergency construction if a project is:

- (1) Not otherwise authorized by law;
- (2) Vital to national security or to the protection of health, safety, or the quality of the environment; and
- (3) So urgent that waiting until the next budget submission would be inconsistent with national security, or the protection of health, safety or environmental quality.

*Note: The Secretary of Defense must submit a written report (“**notify**” only) to the appropriate committees of Congress on this decision. This report must include (1) the justification for the project and the cost estimate, (2) the justification for carrying out the project using this section, and (3) a statement of the source of the funds to be used to carry out the project. The project may then be carried out only after the end of the 21-day waiting period beginning on the date that the notification is received by the congressional committees, or if earlier, the end of the 7-day period beginning on the date on which a copy of the notification is provided in an electronic medium.

b. **10 U.S.C. § 2854.** Provides permanent authorization for the repair, restoration or replacement of facilities (including a family housing unit) damaged/destroyed due to natural disasters. If the estimated cost of the project exceeds the UMMC threshold (i.e., \$2 million), the Secretary concerned must notify the appropriate committees of Congress.

¹⁵ DOD FMR, vol 3, ch. 7, para. 070302 includes these statutory provisions in the list of actions requiring “Prior Approval Reprogramming”. These statutes only require notice to (vice “approval” by) the appropriate congressional subcommittees. The FMR requires the use of “Prior Approval Reprogramming” for both notification and approval actions.

*Note: The Secretary of Defense must **notify** the appropriate committees of Congress in writing of this decision. This notice must include (1) the justification for the project and the cost estimate, (2) the justification for carrying out the project using this section, and (3) a statement of the source of the funds to be used to carry out the project. The project may then be carried out only after the end of the 21-day waiting period beginning on the date that the notification is received by the congressional committees, or if earlier, the end of the 7-day period beginning on the date on which a copy of the notification is provided in an electronic medium.

3. **Approval by (or Notice to) Congress is *NOT Required* Prior to Reprogramming**

- a. When none of the criteria listed in the DOD FMR, Vol 3, ch 7 apply (to require Congressional approval).
- b. Some specific examples when Congressional approval not required:
 - (1) For projects utilizing Environmental Restoration, Defense funds authorized under 10 U.S.C. § 2810.
 - (2) When a DOD Component takes action to reprogram funds between or among family housing operations and maintenance account.
 - (3) For any project being completed with expired funds for valid upward adjustments of pre-existing commitments.
 - (4) When none of the criteria listed in DOD FMR, vol, 3, ch 7, para. 070302 apply.

D. Restrictions on Reprogrammings. DOD FMR, Vol 3, Chap 7.

1. DOD will not submit a request for reprogramming:
 - a. For any project or effort that has not been authorized unless permitted under 10 U.S.C. §§ 2803, 2854 or 2853;
 - b. For any project or effort that has been denied specifically by Congress; or
 - c. To initiate programs of major scope or base realignment actions, when Congress has not authorized such efforts.

2. DOD Comptroller sends MILCON reprogrammings (which require congressional notification or approval) to the House and Senate Armed Services Committees and the House and Senate Appropriations Committees.
 - a. Generally, committee review process is non-statutory.
 - b. An agency generally will observe committee review and approval procedures as part of its informal arrangements with the various committees, although they are not legally binding. GAO, Principles of Fed. Appropriations Law, p. 2-25.

VII. CONCLUSION