

CHAPTER 14:



LIABILITY OF ACCOUNTABLE OFFICERS

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CHAPTER 14

LIABILITY OF ACCOUNTABLE OFFICERS

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CHAPTER 14

LIABILITY OF ACCOUNTABLE OFFICERS

I. REFERENCES.

- A. 10 U.S.C. § 2773a (authorizing DOD to hold accountable officials liable).
- B. 31 U.S.C. § 3325 (requiring certifying officers within DOD).
- C. 31 U.S.C. § 3528 (specifying when the Comptroller General may relieve certifying officers from liability).
- D. 31 U.S.C. § 3527 (specifying when the Comptroller General may relieve other accountable officers from liability).
- E. Dep't of Defense Reg. 7000.14-R, Financial Management Regulation, Volume 5, Disbursing Policies and Procedures [hereinafter DOD FMR, Vol. 5], *available at* <http://comptroller.defense.gov/fmr>.
- F. Principles of Federal Appropriations Law [hereinafter "GAO Redbook"], Third Edition, Volume II, Chapter 9 (Liability and Relief of Accountable Officers).
- G. DFAS-IN (Defense Finance and Accounting Service-Indianapolis) Reg. 37-1, Finance and Accounting Policy Implementation, *available at* <http://www.asafm.army.mil/secretariat/document/37-1reg/37-1reg.asp>.

II. TYPES OF ACCOUNTABLE OFFICERS.

- A. Definitions.
 - 1. An accountable officer is any government officer or employee who by reason of his or her employment is responsible for or has custody of government funds. See Relief from Liab. for Erroneous Payments from U.S. Bankr. Court's Registry Fund, B-288163, June 4, 2002; Lieutenant Commander Michael S. Schwartz, USN, B-245773, May 14, 1992 (unpub.); Mr. Charles L. Hartgraves, B-234242, Feb. 6, 1990 (unpub.).

2. The DOD refers to this broad universe of persons as “accountable officials.” The DOD definition includes military members or civilian employees “to whom public funds are entrusted, or who participate in the process of certifying vouchers for payment, in the connection with the performance of government business.” DOD FMR, Vol. 5, Glossary. Examples of “accountable officials” include: Agents of Disbursing Officers; Cashiers; Certifying Officers; Change Fund Custodians; Departmental Accountable Officials (DAO); Deputy Disbursing Officers; Disbursing Officers; Imprest Fund Cashiers; and Paying Agents.
3. “Pecuniary Liability” is “personal financial liability for fiscal irregularities of disbursing and certifying officers, and DAOs. It acts as an incentive to guard against errors and theft by others, and also to protect the government against errors and dishonesty by the officers themselves.” DOD FMR, Vol. 5, Glossary.
4. Any government officer or employee, military or civilian, who handles government funds physically, even if only once or occasionally, is “accountable” for those funds while they are in his or her **custody**. Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (1992); Finality of Immigration & Naturalization Serv. Decision on Responsibility of Accountable Officer for Physical Losses of Funds, B-195227, 59 Comp. Gen. 113 (1979).
5. Absent statutory authority, agency officials who are not designated as accountable officers are not personally liable for **illegal, improper, or incorrect payments**. Veteran Affairs – Liab. of Alexander Tripp, B-304233, 2005 U.S. Comp. Gen. LEXIS 158 (Aug. 8, 2005) (concluding that certain acts of an “approving official” did not carry financial responsibility); Dep’t of Def. – Auth. to Impose Pecuniary Liab. by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).

B. Certifying Officers, Disbursing Officers and Other Accountable Officers, and Departmental Accountable Officials. In general terms, accountable officers fall into several broad categories. First, certifying officers are typically responsible for authorizing payments; yet, they do not have custody of public funds. Second, disbursing officers, their agents, and other accountable officers such as collections agents, are responsible for making payments and collecting funds. These accountable positions are typically authorized to have custody of funds. Additionally, government employees may become accountable officers by virtue of the fact that they (even occasionally) become custodians of federal funds. Last, within DOD, certain individuals comprise a third category of accountable officials. Departmental Accountable Officials (DAO), are those officials that provide information or data that is subsequently relied upon by a certifying officer. See GAO Redbook, Vol. II, 9-11; DOD FMR, Vol.5, Ch. 2 and Glossary.

1. Certifying Officer. A “certifying officer is a government officer or employee whose job is or includes certifying vouchers for payment.” GAO Redbook, Vol. II, 9-13. A certifying officer differs from other accountable officers in that the certifying officer does not have physical custody of government funds. Certifying Officer liability is established by 31 U.S.C. § 3528.
 - a. Within DOD, a certifying officer is defined as a an “individual appointed in writing to attest to the correctness of statements, facts, accounts, and amounts appearing on a voucher, and certifying that voucher for payment.” DOD FMR, Vol. 5, Glossary. DOD Certifying Officers must be appointed in writing on a DD Form 577. DOD FMR, Vol. 5, Ch. 33, para. 3306.
 - b. Certification is “the act of attesting to the legality, propriety and accuracy of an item or action, e.g. a voucher for payment” as provided for in 31 U.S.C. §3528. DOD FMR, Vol. 5, Glossary.
 - c. Certifying officers perform inherently governmental functions and therefore must be Federal Government employees. DOD FMR, Vol. 5, Ch. 33, para. 330202.

2. Disbursing Officers and Agents. Generally, a disbursing officer “is an officer or employee of a federal department or agency, civilian or military, designated to disburse moneys and render accounts in accordance with laws and regulations governing the disbursement of public funds.” GAO Redbook, Vol. II, 9-14. The DOD FMR lists various additional positions as “agents of disbursing officers” including collections officers and other agents who are specifically appointed and who are authorized to have custody of government funds. DOD FMR, Vol. 5, Ch. 2 and Glossary.
- a. Disbursing Officer (DO). “An individual appointed to perform any and all acts relating to the receipt, disbursement, custody, and accounting for public funds.” DOD FMR, Vol. 5, Glossary. A “Deputy DO” (DDO) may be appointed to act in the name of the DO. All DO and DDO appointees must be U. S. citizens. See generally 31 U.S.C. § 3321; DOD FMR, Vol. 5, Ch. 2.
 - b. Disbursing Agents. A disbursing agent is an agent of the DO who is NOT a DDO. Disbursing agents typically operate disbursing offices that are geographically separated from the DO’s office. Unlike DO’s and DDO’s, disbursing agents cannot sign or issue US Treasury checks. DOD FMR, Vol. 5, Ch. 2, para. 020205.B and Glossary.
 - c. Cashier. Appointed to perform limited cash-disbursing functions or other cash-handling operations to assist a finance officer or other subordinate/assistant of the finance officer. Cashiers disburse, collect, and account for cash, and perform other duties as required concerning the receipt, custody, safeguarding and preparation of checks. DOD FMR, Vol. 5, Ch. 2, para. 020205.C; Mr. David J. Bechtol, B-272615, 1997 U.S. Comp. Gen. LEXIS 270 (May 19, 1997) (disbursing officer and his subordinate cashiers are jointly and severally liable for loss of funds and must separately petition for relief).
 - d. Paying Agents. Paying agents are appointed only when adequate payment, currency conversion, or check cashing services cannot otherwise be provided. Paying agents cannot act as purchasing officers or certifying officers. DOD FMR, Vol. 5, Ch.2, para. 020205.D.

- e. Collection Agents. Collection agents receive funds generated from activities such as hospitalization fees and other medical facility charges, rentals, and other charges associated with housing, reproduction fees, and other similar functions. DOD FMR, Vol. 5, Ch. 2, para. 020205.E.
 - f. Change Fund Custodians. A change fund custodian receives a change fund from the parent disbursing office and uses it to make change for sales transactions. DOD FMR, Vol. 5, Ch. 2, para. 020205.F.
 - g. Imprest Fund Cashiers. Imprest fund cashiers make authorized cash payments for purchases of materials and non-personal services, maintain custody of funds, and account for and replenish the imprest fund as necessary. DOD FMR, Vol. 5, Ch. 2, para. 020205.G. Imprest Funds are generally not authorized for DOD activities, but there are exceptions for contingency and classified operations. In most cases, the government purchase card is the vehicle used to make micro-purchases. DOD FMR, Vol. 5, Ch. 2, para. 0204; FAR 13.305.
3. Departmental Accountable Officials (DAO). A DAO is an “individual who provides certifying officers information, data, or services that the certifying officers rely upon directly in certifying vouchers for payment.” DOD FMR, Vol. 5, Glossary. See also, 10 U.S.C. § 2773A (Departmental Accountable Officials); DOD FMR, Vol. 5, Ch. 33, para. 3305. DAOs must also be appointed in writing on a DD Form 577. DOD FMR, Vol. 5, Ch. 33, para. 3306. Pecuniary liability for DAOs is established by 10 U.S.C. § 2773A. DAOs perform inherently governmental functions and therefore must be Federal Government employees. DOD FMR, Vol. 5, Ch. 33, para. 330202.

III. LIABILITY OF ACCOUNTABLE OFFICERS.

A. Certifying Officers.

- 1. A certifying officer:
 - a. Is responsible for the correctness of the facts recited in the certificate, or otherwise stated on the voucher or supporting papers;

- b. Is responsible for the correctness of computations on the voucher;
- c. Is responsible for the legality of the proposed payment under the appropriation or fund involved; and
- d. Is accountable for any payment:
 - (1) Determined to be prohibited by law,
 - (2) Determined to be illegal, improper, or incorrect because of an inaccurate or misleading certificate, or
 - (3) Determined to not represent a legal obligation under the appropriation or fund involved. 31 U.S.C. § 3528; DOD FMR, Vol. 5, Ch. 33, para. 330303.E.
- e. Certifying officers are accountable for illegal, improper, or incorrect payments made as a result of their certifications *even though they may have relied on information, data, or services of other departmental accountable officials*. “A critical tool that certifying officers have to carry out this responsibility is the power to question, and refuse certification of, payments that may be improper.” Mr. Jeffery Elmore-Request for Relief of Financial Liability, B-307693 (Apr. 12, 2007); but see, National Institute of Food and Agriculture – Biotechnology Risk Assessment Grant Payment, B-322898 (May 24, 2012) (stating that “[i]ncluded in the certifying officer’s burden is questioning items on the face of vouchers or supporting documents that simply do not look right” but then concluding that a “certifying officer’s statutory liability does not extend to the exercise of discretion and judgment [] resid[ing] with agency program officials.”).
- f. If more than one certifying officer is involved in a given payment, the officer who certified the original payment is still responsible for the correctness of the voucher. Subsequent certifying officers are responsible for additional related vouchers or for changes to the original voucher that they have certified. DOD FMR, Vol. 5, Ch. 33, para. 330704.

C. DoD Departmental Accountable Officials.

1. Previously, DOD FMR, Vol. 5, Ch. 33 purported to impose pecuniary liability on “accountable officials” as a matter of policy. “Accountable officials” were defined as personnel “who are designated in writing and are not otherwise accountable under applicable law, who provide source information, data or service (such as a receiving official, a cardholder, and an automated information system administrator) to a certifying or disbursing officer in support of the payment process.” The rationale was (and is) that it is extremely difficult for any single official to ensure the accuracy, propriety, and legality of every payment, and that therefore certifying officers and disbursing officers, as a practical matter, must rely upon information provided by others in performing this difficult task.
2. The GAO held, however, that this regulatory imposition of financial liability against such persons was improper because, unlike certifying officers and disbursing officers, there was no statutory basis for imposing liability against “accountable officials,” and agencies may impose pecuniary liability against someone only if there is a statutory basis for doing so. Dep’t of Def. – Auth. to Impose Pecuniary Liab. by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).
3. The 2003 Defense Authorization Act, codified at 10 U.S.C. § 2773a, has since provided that statutory authority. Section 2773a states that departmental accountable officers may be held financially liable for illegal or erroneous payments resulting from their negligence. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, §1005, 116 STAT 2458, 2631-32 (2002).
4. The DOD FMR now provides that Departmental Accountable Officials “may be pecuniarily liable under 10 U.S.C. 2773a(c) for an illegal, improper or incorrect payment resulting from information, data, or services they negligently provide to a certifying officer, and upon which that certifying officer directly relies in certifying the voucher supporting that payment.” Any liability is joint and several with that of any other officer or employee of the United States or member of the uniformed services who is also pecuniarily liable for such loss. 10 USC § 2773a(c) (3); DOD FMR, Vol. 5, Ch. 33, para. 330905.

5. Departmental Accountable Officials are defined as individuals who provide certifying officers information, data, or services that the certifying officer subsequently relies upon to certify a voucher for payment. DOD FMR, Vol. 5, Glossary. DAOs may include such persons as approving officials, authorizing officials, resource managers, fund holders, and funds certifying officials. Employees who enter into obligations such as contracting officers and those who make payment eligibility determinations may also be DAOs. DoD Financial Management, GAO-11-950T, (Sep. 22, 2011).
6. Departmental Accountable Officials are designated by DD Form 577 and are notified in writing of the designation and of their pecuniary liability for all illegal, improper or incorrect payments that result from negligent performance of their duties. DOD FMR, Vol. 5, Ch. 33, para. 3306.
7. The GAO looked at the DOD practice of hiring foreign local nationals as Departmental Accountable Officials and found no specific authority that restricted DOD from appointing such employees who were paid from appropriated funds. The GAO, however, questioned the wisdom of appointing Departmental Accountable Officials who potentially could be shielded from liability by host nation law. Dep't of Def. Accountable Officials – Local Nat'ls Abroad, B-305919, 2006 U.S. Comp. Gen. LEXIS 56 (Mar. 27, 2006).

D. “Possessory” Accountable Officers.

1. Someone who has custody of funds is an accountable officer even though he or she is not a certifying or disbursing officer. Those entrusted with funds are liable for **any and all** losses. This liability is based on the broad responsibilities imposed by 31 U.S.C. § 3302, which requires government officials or agents in custody of government funds to keep the funds safe.
2. DOD does not use the term “Possessory” Accountable Officers, but defines Accountable Officials to include deputy disbursing officers, agents, cashiers and other employees who by virtue of their employment are responsible for or have custody of government funds. DOD FMR, Vol. 5, Glossary. See, e.g., B-220492 (holding that an ATF special agent in possession of a “flash roll” used in undercover activities, was an accountable officer and was strictly liable for the funds in his custody even though the funds were stolen from the glove compartment of his car, which he parked in a high-crime area).

3. There is no liability limitation for these accountable officers, though they may be granted relief if warranted by the facts. Sergeant Charles E. North--Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586 (July 11, 1990) (holding that although Secret Service agent was an accountable officer by virtue of his employment and custody of government funds, the facts regarding his hotel room break-in and burglary supported granting relief).

E. The Nature of Accountable Officer Liability.

1. Accountable officers (with the exception of departmental accountable officials – see paragraph 5 below) are strictly liable for losses or erroneous payments of public funds. A series of very old cases recognized two exceptions to the strict liability rule: 1) overruling necessity (e.g. acts of God); and 2) public enemy, however subsequent cases rendered these exceptions extremely limited. *United States v. Prescott*, 44 U.S. (3 How.) 578 (1845); *United States v. Thomas*, 82 U.S. (15 Wall.) 337 (1872); *Serrano v. United States*, 612 F.2d 525 (Ct. Cl. 1979); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (Aug. 14, 1974); To the Postmaster General, B-166174, 48 Comp. Gen. 566 (Feb. 28, 1969); GAO Redbook, Vol. II, Ch. 9, para. B.1a.
2. Accountable officers are in effect, “insurers” of public funds in their custody or for which they are otherwise responsible. Ms. Bonnie Luckman, B-258357 (Jan. 3, 1996) (refusing to grant relief to an imprest fund cashier who arguably did not lose any funds, but could not account for a number of purchases due to lost supporting documentation).
3. Liability arises by operation of law at the moment a physical loss occurs or an erroneous payment is made. Fault or negligence on the part of the accountable official does not excuse this legal liability. However, the lack of fault or negligence may provide a basis for relief from the obligation to repay the loss. Relief does not excuse the legal liability, but rather is a separate process that may take fault or negligence into consideration to the extent authorized by the governing statute. If relief is granted, the duty to repay is excused. 31 U.S.C. §§ 3527, 3528; Mr. David J. Bechtol, B-271608, 1996 U.S. Comp. Gen. LEXIS 333 (June 21, 1996); Captain John J. Geer, Jr., B-238123, 70 Comp. Gen. 298 (Feb. 27, 1991); Mr. Anthony Dudley, B-238898, 70 Comp. Gen. 389 (Apr. 1, 1991); Sergeant Charles E. North--Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586 (July 11, 1990); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (Aug. 14, 1974); DOD FMR, Vol. 5, Ch. 33, para. 3309.

4. Certifying officers and disbursing officers are automatically liable when a “fiscal irregularity,” i.e., physical loss or erroneous payment, occurs. A fiscal irregularity creates the “presumption of negligence” on the part of the certifying or disbursing officer. This presumption shifts the burden to the accountable official to prove, during the relief process, that he or she was either not negligent or not the proximate cause of the irregularity. DOD FMR, Vol. 5, Ch. 33, para. 330903 and Ch. 6, para. 060206.B.
5. Departmental accountable officials may be held liable for an illegal, improper, or incorrect payment that results from their fault or negligence. 10 U.S.C. § 2773a(c); Dep’t of Def. Accountable Officials – Local Nat’ls Abroad, B-305919, 2006 U.S. Comp. Gen. LEXIS 56 (Mar. 27, 2006); DOD FMR, Vol. 5, Ch. 33, sec. 3309. Until April 2005, DOD FMR, Vol. 5, Ch. 33, sec. 3309 and appendix C, para. G, provided that DOD “accountable officials” were not strictly liable, and that no presumption of negligence applied to those personnel. In April 2005, this language was deleted. The current DOD FMR indicates that the presumption of negligence does **not** apply to DAOs. DOD FMR, Vol. 5, Ch. 33, sec. 3309 and Glossary.

IV. PROTECTION AND RELIEF FROM LIABILITY.

A. Advance Decisions from the Comptroller General.

1. A certifying officer, disbursing officer, or head of an agency may request an opinion concerning the propriety of a certification or disbursement. 31 U.S.C. § 3529; DOD FMR, Vol. 5, Ch. 25, para. 250302.A.
2. Upon request, the Comptroller General will decide any question involving:
 - a. A payment the disbursing official or the head of the agency proposes to make; or
 - b. A voucher presented to a certifying official for certification.
3. As of April 2005, DOD does not recognize the statutory authority of the Comptroller General to shield DOD personnel from financial liability by issuing advance decisions on the use of appropriated funds. DOD FMR, Vol. 5, Ch. 1, para. 010801 (April 2005 version).

- a. An old version of DOD FMR, Vol. 5, Ch. 1, para. 010802.E explained:

While an opinion of the CG [Comptroller General] may have persuasive value, it cannot itself absolve an accountable official The Department of Justice has concluded as a matter of law that the statutory mechanism that purports to authorize the CG to relieve Executive Branch Officials from liability (*i.e.*, 31 U.S.C. §§ 3527, 3528, and 3529) is unconstitutional because the CG, as an agent of Congress, may not exercise Executive power, and does not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch.

DOD FMR, Vol. 5, Ch. 1, para. 010801 (April 2005 version); Memorandum, Department of Justice, to Department Employees, subject: Legality of and Liability for Obligation and Payment of Government Funds by Accountable Officers (DOJ Order 2110.39A) (15 Nov. 1995).

- b. The 1995 DOJ memorandum was based on a 1991 DOJ Office of Legal Counsel opinion which concluded that the statutes were unconstitutional insofar as they purport to empower the Comptroller General to relieve Executive Branch officials from liability. Memorandum for Janis A. Sposato, General Counsel, Justice Management Division, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Comptroller General's Authority To Relieve Disbursing and Certifying Officials From Liability (Aug. 5, 1991).
- c. The April 2005 DOD action in changing DOD FMR consistent with the DOJ opinion followed similar action initiated by the Department of Treasury in 2004. Memorandum, U.S. Department of Justice, Office of the Assistant Attorney General, to U.S. Department of Treasury General Counsel, subject: Response to Department of Treasury (28 Jan. 2004).
- d. The current version of the DOD FMR deleted this explanation and history. It provides a means to request advance decisions, but those decisions do not go beyond DOD. See section IV.B. below. DOD FMR, Vol. 5, Ch. 25, para. 2503 and Appendix E.

B. Advance Agency Decisions.

1. DoD FMR, Vol. 5, Ch. 25, para. 2503, and Appendix E (updated Jan. 2011).
2. Historically, per the General Accounting Office Act of 1996, Pub. L. 104-316, § 204, 110 Stat. 3826, 3845-46, the following were authorized to issue advance decisions for designated claims categories.
 - a. DOD (DOD General Counsel): military member pay, allowances, travel, transportation costs; survivor benefits; and retired pay.
 - b. Office of Personnel Management (OPM): civilian compensation and leave.
 - c. General Services Administration Board of Contract Appeals (GSBCA): civilian employee travel, transportation, and relocation allowances.
3. **For DOD**, a disbursing officer, certifying officer, or head of an agency, may seek an advance decision on the propriety of any prospective payment from an authorized official enumerated in the current version of Appendix E to DOD FMR, Vol. 5. DOD FMR, Vol. 5, Ch. 25, para. 250302.A.
 - a. Such advance decisions will effectively “shield” the employee from liability in that DOD will not seek to recover a payment from the employee if the appropriate authorized official issued an opinion advising that the payment could legally be made.
 - b. The DOD FMR cautions however, that these advance decisions are not applicable to payments already made, or to hypothetical cases. Further, advance decisions are conclusive only regarding the particular payment involved. Accountable officials are encouraged, however, to use the principles cited in advance decisions in making other entitlement decisions. DOD FMR, Vol. 5, Ch. 25, para. 250302 and 250304.

- c. As of January 2011, DOD FMR, Vol. 5, Appendix E, directs employees to the following responsible offices for advance decisions:
 - (1) Use of appropriated funds: Office of the Secretary of Defense, Office of the Deputy General Counsel (Fiscal).
 - (2) Military members' pay, allowances, travel, transportation, retired pay, and survivor benefits: Office of the Secretary of Defense, Office of the Deputy General Counsel (P&HP).
 - (3) Federal civilian employees' compensation and leave: Office of Personnel Management (Office of Merit Systems Oversight and Effectiveness).
 - (4) Federal Civilian employees' travel, transportation and relocation expenses and allowances: Civilian Board of Contract Appeals.

- d. Requests for advance decisions are submitted through the General Counsel of the DOD component or of DFAS, to the Deputy General Counsel (Fiscal) (DOD (DCG(F)) for determination. The DOD FMR provides that an "appropriate General Counsel may return cases involving entitlement questions[, which] have been clearly decided authoritatively, with a determination that no advance decision is necessary." DOD FMR, Vol. 5, Ch. 25, para. 250303.

C. Relief of Non-DOD Certifying Officers. 31 U.S.C. § 3528(b).

- 1. The Comptroller General may relieve a certifying officer from liability if:
 - a. The officer based the improper certification on official records and the officer did not know, or reasonably could not have known, that the information was incorrect. 31 U.S.C. § 3528(b)(1)(A); Relief of Accountable Officer Sally V. Slocum – Am. Embassy, Brazzaville, Rep. of the Congo, B-288284.2, 2003 U.S. Comp. Gen. LEXIS 223 (Mar. 7, 2003); or

b. The obligation was in good faith, no law specifically prohibited the payment, and the government received some benefit. 31 U.S.C. § 3528(b)(1)(B); Env'tl. Prot. Agency, B-262110, 97-1 CPD ¶ 131 (Mar. 19, 1997) (certifying officials not required to second-guess discretionary decisions of senior agency officials); Ms. Trudy Huskamp Peterson, B-257893, 1995 U.S. Comp. Gen. LEXIS 337 (June 1, 1995).

2. The Comptroller General will deny relief if the agency did not attempt diligently to collect an erroneous payment.

D. Relief of Non-DOD Disbursing Officers for Illegal, Improper, or Incorrect Payments.

1. The Comptroller General may, on his own initiative, or on the written recommendation of the head of an agency, relieve a disbursing official responsible for a deficiency in an account because of an illegal, improper, or incorrect payment when the Comptroller General decides that the payment was not made as a result of bad faith or lack of reasonable care by the official. 31 U.S.C. § 3527(c).

2. The Comptroller General may deny relief if the agency did not pursue collection action diligently. 31 U.S.C. § 3527(c).

E. Relief of Other Non-DOD Accountable Officers.

1. **Applicability.** The Comptroller General may relieve an accountable official or an agent from liability for the physical loss or deficiency of public money, vouchers, checks, securities, or records when:

a. The agency head finds that:

(1) The officer or agent was carrying out official duties when the loss or deficiency occurred or the loss or deficiency occurred because of an act or failure to act by a subordinate of the officer or agent; *and*

- (2) The loss or deficiency was not the result of fault or negligence of the officer or agent. Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (Nov. 3, 1992).
 - b. The loss or deficiency was not the result of an illegal or incorrect payment; *and*
 - c. The Comptroller General agrees with the decision of the head of the agency. 31 U.S.C. § 3527(a).
- 2. The Comptroller General has delegated to agency heads the authority to resolve physical losses or deficiencies when a loss is less than \$3,000. U.S. Gov't Accountability Office, Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, § 8.9.C, *available at* <http://www.gao.gov/assets/80/76194.pdf>; Mr. Frank Palmer, B-252809, 1993 U.S. Comp. Gen. LEXIS 485 (Apr. 7, 1993); Mr. Thomas M. Vapniarek, B-249796, 1993 U.S. Comp. Gen. LEXIS 248 (Feb. 9, 1993); Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (Nov. 3, 1992). This delegation is limited, however, with respect to improper payments. GAO Redbook, Vol. II, p. 9-40.
- 3. Alternatively, the Comptroller General may authorize reimbursement of amounts paid by the responsible official as restitution.

F. Relief of **DOD** Certifying Officers for Illegal, Incorrect, or Improper Payments.

- 1. The DOD FMR, Vol. 5, Ch. 6, para. 060301, defines illegal, incorrect, or improper payments as “erroneous” payments, which include:
 - a. Any payment that should not have been made or that is an incorrect overpayment under statutory, contractual, administrative, or other legally applicable requirement; and
 - b. Any payment to an ineligible recipient, any payment for an ineligible service, any duplicate payment, payment for services not received, and any payment that does not account for credit for applicable discounts.

2. 31 U.S.C. § 3527(b)(1)(B) provides that the Comptroller General shall relieve a certifying officer of the “armed forces” for an illegal, improper, or incorrect payment resulting from an inaccurate or misleading certificate, provided the Secretary of Defense, after taking a diligent collection action, finds that the criteria of 31 U.S.C. § 3528(b)(1) are satisfied (see section IV.C. above). The Comptroller General determined that “armed forces” under the statute refers to the Army, Navy, Air Force, and Marines but not to defense agencies. Mr. Jeffrey Elmore, B-307693, 2007 U.S. Comp. Gen. LEXIS 70 (Apr. 12, 2007) (concluding that GAO had authority to consider a request for relief submitted under 3527(b) from an employee of the Defense Logistics Agency (DLA)). The DOD FMR does not make such a distinction and under its broad language, appears to require all relief requests to be determined by DOD. DOD FMR, Vol. 5, Ch. 6, para. 0604 (“The determination of the Secretary of Defense that relief should be granted is binding.”).

3. The Secretary of Defense has delegated authority to the Director, DFAS or his designee, to make the required determinations and to grant or deny relief. DOD FMR, Vol. 5, Ch. 6, sec. 060401. Currently, that authority has been re-delegated to the Director of DFAS-NP.

4. The standard for relief of certifying officers under 31 U.S.C. § 3528 (and also DOD FMR, Vol. 5, Ch. 6, para. 060305.B):
 - 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

 - b. The obligation was incurred in good faith; no law specifically prohibited the payment; and the U.S. Government received value for payment.

5. The statute also says that the Comptroller General may deny relief when the Comptroller General decides that the head of the agency did not diligently carry out efforts to recover the payment. 31 U.S.C. § 3528(b)(2). DoD FMR, Vol. 5, Ch. 6, para. 060305.B, echoes the statute by requiring a determination that “diligent collection efforts were made to recover the payment.” 31 U.S.C. § 3527(b)(1)(B) incorporates these determinations within the Secretary of Defense’s findings. It further provides that the “finding of the Secretary involved is conclusive on the Comptroller General.” 31 U.S.C. § 3527(b)(2). This language would appear to preclude the Comptroller General from denying relief based on failure to diligently pursue a collection action if there is an appropriate DOD finding to the contrary. In light, however, of GAO’s decision described above (that “armed forces” under 31 U.S.C. § 3527 do not include defense agencies (see Mr. Jeffrey Elmore, B-307693)), it is unclear if the Comptroller General can deny relief to DOD certifying officers outside the Army, Navy, Air Force, and Marines.

G. Relief of **DOD** Disbursing Officers for Illegal, Incorrect, or Improper Payments.

1. The statute provides that the Comptroller General shall relieve an accountable officer of the armed forces who makes an improper, illegal, or incorrect payment, if, after taking diligent collection action, the Secretary of Defense finds that:
 - a. The payment 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
 - b. The obligation was incurred in good faith; no law specifically prohibited the payment; and the U.S. Government received value for payment. 31 U.S.C. § 3527(b)(1)(B); 31 U.S.C. § 3528(b)(1). See generally Mr. David J. Bechtol, B-272615, 1997 U.S. Comp. Gen. LEXIS 270 (May 19, 1997).
2. DOD FMR, Vol. 5, Ch. 6, para. 060305.A provides only this simplified two-prong standard for relief of a disbursing official in a case of erroneous payment:
 - a. The payment was not the result of bad faith or lack of reasonable care; and

b. Diligent collection efforts by the disbursing officials and the agency were made.

3. Apparently, the reason DOD FMR does not include the first prong of the statutory standard (that the payment was based on official records and the official did not know, and by reasonable diligence/inquiry, could not have discovered, the correct information) is because the DOD FMR specifically states that disbursing officers are not liable for payments that are properly certified by certifying officers even if the payments turn out to be illegal, improper, or incorrect. DoD FMR, Vol. 5, Ch. 33, para. 330901.
4. The Secretary of Defense has delegated authority to the Director, DFAS or designee, to make the required determinations and grant or deny relief. DOD FMR, Vol. 5, Ch. 6, sec. 0604.

H. Relief of **DOD** Disbursing Officers and Accountable Individuals for Physical Losses.

1. The statute provides that the Comptroller General shall relieve a disbursing official of the armed forces who is responsible for the physical loss or deficiency of public money, vouchers, or records when:
 - a. The Secretary of Defense determines that the officer was carrying out official duties when the loss or deficiency occurred;
 - b. The loss or deficiency was not the result of fault or negligence by the official; and
 - c. The loss or deficiency was not the result of an illegal or incorrect payment. 31 U.S.C. § 3527(b)(1)(A).
2. The DOD FMR, Vol. 5, Ch. 6, para. 060207, contains the identical standard and applies it to disbursing officials as well as other accountable individuals in cases of physical losses. Accordingly, this standard would also apply to other accountable officials such as DOD departmental accountable officials, deputy disbursing officers, agents, cashiers, and other employees who by virtue of their employment are responsible for and have custody of government funds.

3. Under the statute (31 U.S.C. § 3527(b)), the SECDEF finding binds the Comptroller General. For this reason, the Comptroller General does not require military departments to forward these relief determinations for approval. U.S. Gov't Accountability Office, Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, § 8.10; Mr. William Duff, B-271859, 1996 U.S. Comp. Gen. 490 (Sep. 26, 1996).
4. The SECDEF has delegated authority to the Director, DFAS or his designee (Director, DFAS-NP) to make the required determinations and grant or deny relief. DOD FMR, Vol. 5, Ch. 6, para. 060401.

I. Relief of **DOD** Departmental Accountable Officials for Illegal, Incorrect, or Improper Payments.

1. DOD FMR, Vol. 5 does not state any standards for relief of departmental accountable officials (DAOs).
2. However, because 10 U.S.C. § 2773a requires fault or negligence on the part of a departmental accountable official in order to subject that person to financial liability to begin with, it follows that a lack of negligence, at a minimum, will result in relief of liability.
3. Further, as stated above and in the DOD FMR, the presumption of negligence does not apply to DAOs.
4. The DOD FMR does specifically provide that pecuniary liability of a DAO for a loss of government funds due to illegal, incorrect, or improper payment may be joint and several with that of any other officer or employee who is also pecuniarily liable. DOD FMR, Vol. 5, Ch. 33, para. 330905.

J. Judicial Relief – U.S. Court of Federal Claims.

1. Disbursing officers. Under 28 U.S.C. § 1496, the court has jurisdiction to review disbursing officer cases.

2. Any individual. If an agency withholds the pay of any individual, that person may request that the employing agency report the balance due to the Attorney General, who shall then initiate a suit against the individual. 5 U.S.C. § 5512(b). By doing this, the individual can get his matter heard in federal court.
 3. See GAO Redbook, Vol. II, Ch. 9, sec. E., for a description of other potential relief statutes.
- K. Legislative Relief. Private and collective relief legislation. Historically, this means of relief is what gave rise to the current regime of relief statutes (e.g. 31 U.S.C. § 3527) and is rarely used today.

V. ESTABLISHING LIABILITY.

A. DOD Required Action.

1. Before initiating collection for a loss, the appropriate agency must establish the accountable officer's liability "permanently." Lieutenant Colonel S.C. Shoemake, Jr., B-239483.2, 70 Comp. Gen. 616, 622 (July 8, 1991). Liability is "permanently" established when the officer has agreed to repay the loss or the appropriate authority has denied relief.
2. The DOD FMR requires a formal investigation for all physical losses of funds or for erroneous payments induced by fraud. The commander may investigate other losses formally as well. DoD FMR, Vol. 5, Ch. 6. The dollar value of the loss will typically affect the level of formality of the investigation required. Chapter 6 provides detailed guidance on when investigations must be conducted as well as the procedures that must be followed during the investigation.

B. Statute of Limitations. 31 U.S.C. § 3526(c)(1).

1. The statute of limitations for settling accounts of an accountable officer is three years after agency accounts are substantially complete. Lieutenant Colonel S.C. Shoemake, Jr., B-239483.2, 70 Comp. Gen. 616 (July 8, 1991); Lieutenant Colonel S.C. Shoemake, Jr., B-239483, 70 Comp. Gen. 420 (Apr. 15, 1991). After this period, the account is settled by operation of law, and an accountable officer has no personal financial liability for the loss in question. Mr. John S. Nabil, B-258735, 1994 U.S. Comp. Gen. LEXIS 950 (Dec. 15, 1994); Mr. Clarence Maddox, B-303920, 2006 U.S. Comp. Gen. LEXIS 54 (Mar. 21, 2006) (statute of limitations reduced potential liability of \$1,443.22 to \$485.60).
2. “Substantially complete” means the time when, absent fraud by the officer, the agency can audit the paperwork upon which the officer based his action. Relief of Anna L. Pescod, B-251994, 1993 U.S. Comp. Gen. LEXIS 991 (Sept. 24, 1993).
3. If the loss is due to embezzlement, fraud, or other criminal activity, the three-year statute of limitations is not triggered until the loss has been discovered and reported. Steve E. Turner, B-270442.2, 1996 U.S. Comp. Gen. LEXIS 75 (Feb. 12, 1996).
4. The statute of limitations does not apply if a loss is due to fraud or other criminal acts of an accountable officer. 31 U.S.C. § 3526(c)(2).

VI. MATTERS OF PROOF.

A. Evidentiary Showing.

1. To qualify for relief from liability for a loss or deficiency under the applicable relief statutes, an accountable officer generally must prove that he was:
 - a. acting in an official capacity; and
 - b. was either not negligent or that his negligence did not cause the loss. 31 U.S.C. § 3527; Mr. S.M. Helmrich, B-265856, 1995 U.S. Comp. Gen. LEXIS 717 (Nov. 9, 1995).

B. The “Reasonable Care” Standard.

1. In determining whether an officer was negligent, the Comptroller General applies a “reasonable care” standard. Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (Aug. 14, 1974).
 - a. Liability results when an accountable officer’s conduct constitutes simple or ordinary negligence. Gross negligence is not required.
 - b. The standard is whether the accountable officer did what a reasonably prudent and careful person would have done to safeguard his/her own property under similar circumstances.
 - c. This is an “objective” standard. It does not vary with such factors as the level of experience or the age of the particular accountable officer concerned.
 - d. Failure to follow laws/regulations is negligent. Hence, accountable officers must familiarize themselves with applicable laws/regulations. DOD FMR, Vol. 5, ch.1, para. 010302.
2. That a loss or deficiency has occurred creates a rebuttable presumption of negligence on the part of the accountable officer. This presumption arises from the accountable officer’s strict liability for any loss or deficiency. The accountable officer can rebut this presumption of negligence by presenting affirmative evidence that he exercised due care. *Serrano v. United States*, 612 F.2d 525 (Ct. Cl. 1979); *Melvin L. Hines*, B-243685, 1991 U.S. Comp. Gen. LEXIS 985 (July 1, 1991); *Mr. Frank D. Derville*, B-241478, 1991 U.S. Comp. Gen. LEXIS 1488 (Apr. 5, 1991); *To the Postmaster General*, B-166174, 48 Comp. Gen. 566 (Feb. 28, 1969). The burden is on the accountable officer seeking relief to present evidence that he or she exercised the requisite degree of care.
3. As noted previously, the DOD FMR indicates that the presumption of negligence does not apply to acts of Departmental Accountable Officials.

C. Proximate Cause.

1. If the accountable officer was negligent, the Comptroller General will consider whether the negligence was the proximate cause of the loss or deficiency. Again, however, it is the burden of the individual seeking relief to “show that some other factor or combination of factors was the proximate cause of the loss, or at least that the totality of evidence makes it impossible to fix responsibility.” GAO Redbook, Vol. II, p. 9-52. The government need not prove proximate cause.
2. If negligence occurred and it was the proximate cause of the loss or deficiency, the Comptroller General may not grant relief from liability. 31 U.S.C. § 3527(a).
3. If an accountable officer was negligent, but the negligence was not the proximate cause of the loss or deficiency, the Comptroller General may grant relief under the statute. See B-201173 (Aug. 18, 1981) (granting relief to an accountable officer who negligently failed to lock a safe, but whose negligence was not the proximate cause of the loss because the safe containing the funds was in the process of being physically carried away by armed burglars when the door of the unlocked safe swung open).

VII. DEBT COLLECTION.

- A. Collection is pursuant to 31 U.S.C. §§ 3701- 3720E (Debt Collection Act) and 5 U.S.C. § 5512(a) (allowing offset against government employee or retiree pay). See 5 U.S.C. § 5514 (allowing payment by installment and limiting amount per period to 15%); 37 U.S.C. § 1007(a) (governing withholding of military officer pay); 10 U.S.C. § 9837(d) (remission of indebtedness); 10 U.S.C. § 1552 (correction of records).
- B. DOD has published detailed collection procedures. DoD FMR, Vol. 5.

VIII. CONCLUSION.