

THE OGC ADVISER



Office of The General Counsel

VOLUME 1

JULY 1977

NUMBER 4

ARTICLE:

Revision of the GAO Code of Ethics

Raymond J. Wyrsh 1

COMMENT:

Legal Representation for Federal Employees

5

NOTES:

GAO As A Conduit of Information

8

User Charges Revisited

9

From The Editors

In this issue of *The Adviser*, we discuss two subjects of interest to all GAO employees: the recent revision of the GAO Code of Ethics and the newly issued Justice Department guidelines for the representation of Federal employees. We hope that our readers will find the treatment of these topics, together with the Notes on the User Charge Statute and another wrinkle in GAO access to records, informative.

This issue concludes the first volume of *The Adviser*. We would like to express our deep appreciation to those who have contributed to the success of Volume I, and to you, our readers, for your warm response.

The OGC Adviser—Published by the Office of the General Counsel for the professional staff of the United States General Accounting Office.

General Counsel—Paul G. Dembling
Editors—Ralph L. Lotkin - Donald I. Mirisch

REVISION OF THE GAO CODE OF ETHICS

Raymond J. Wyrsh¹

“Government service requires unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and special Government employees. This assures the proper performance of Government business and confidence in the Government on the part of the citizens.

“Over the years, the General Accounting Office has achieved a reputation for integrity and objectivity in carrying out its mission. All of us, as employees of GAO, have a stake in maintaining this reputation. This revision of GAO Order 0841.1—Code of Ethics Including Employees’ Responsibilities and Conduct—is primarily an effort to strengthen our safeguards for preventing financial conflicts of interest.”

The above remarks by the Comptroller General introduce and set out the motivation for the recent revision of GAO Order 0841.1, the GAO Code of Ethics. To insure the Order’s effectiveness, all GAO employees will want to thoroughly familiarize themselves with its provisions. This article is intended to assist in that effort by briefly describing the various standards of conduct and enforcement mechanisms.

A. Specific Standards of Conduct

1. Acceptance of Gifts and Entertainment

The Order prohibits any employee from soliciting or accepting, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or other thing of monetary value from a person who: (a) has, or is seeking to obtain, contractual or other business relations with the Government (*e.g.*, a Government contractor), or (b) conducts operations or activities that are subject to audit, investigation, decision, or regulation by GAO (*e.g.*, an official of another

Government agency), or (c) has interests that may be substantially affected by the performance or nonperformance of the employee’s official duty (*e.g.*, an industrial farming operation which may be adversely affected by a proposed recommendation in an agriculture report).

This does not mean that an employee is prohibited from accepting or soliciting anything of value from every individual and organization. An employee is permitted to accept: (a) a gift, loan, etc., which stems from and is motivated by a family relationship, (b) food and refreshments of nominal value during an infrequent luncheon or dinner meeting, (c) loans from financial institutions on customary terms to finance normal everyday affairs (*e.g.*, home mortgage and car loans), and (d) unsolicited advertising or promotional material of nominal value (*e.g.*, calendars).

There are certain restrictions with respect to an employee being reimbursed by private sources for travel and living expenses. When an employee is not on official business he is not precluded from accepting bona fide reimbursement, unless other-

¹Attorney Adviser, Office of the General Counsel (Special Studies and Analysis), GAO.

wise prohibited by law, for such necessary (but not excessive) expenses. On the other hand, with certain exceptions, an employee cannot be reimbursed for travel and living expenses from a private source while he is traveling on official business.

2. Outside Employment

The Order prohibits any employee from engaging in outside employment or other activity, for or without compensation, not compatible with his Government employment. Incompatible activities include but are not limited to: (a) acceptance of a fee or compensation which may result in or create the appearance of a conflict of interest (*e.g.*, contract auditors being employed part time by a major Government contractor), (b) outside employment which tends to impair his ability to perform his Government duties and responsibilities in an acceptable manner (*e.g.*, working on a full-time all-night shift), or (c) outside employment or activity that is likely to result in criticism of, or cause embarrassment to, GAO.

In certain cases, outside employment may be permissible, but the employee cannot make that judgment by himself. Rather, he must request and receive from the Office official permission, the specific procedures for which are specified in the Order. (See paragraphs 4-7 of chapter 4.) Permission to engage in outside employment extends only to the specific employment described in the request (*i.e.*, no *carte blanche* approvals will be granted) and will normally cover 3 years, unless sooner revoked or modified. Professional employees who receive permission to engage in outside employment are subject to additional restrictions, designed to preclude one from presenting himself to the public as a private practitioner. For employees in grade GS-13 and above, permission generally will not be given unless good reasons are shown (*e.g.*, financial difficulties), and, if given, it is good for 1 year only.

3. Outside Compensation for Government Services

Implementing a criminal statute,² the Order

prohibits any GAO employee from receiving any salary or anything of value from a private source as compensation for the performance of his Government duties and responsibilities. This prohibition is distinguishable from the above restriction and relates only to the performance of Government duties. It is aimed at preventing not only the actual or apparent occurrence of bribery, but also the possible compromising of an employee's independent judgment. The prohibition extends to payments from any private source and is not confined to such sources having direct or indirect dealings with GAO.

4. Assistance to Private Parties Dealing with the Government

Again implementing a criminal statute,³ the Order prohibits any GAO employee from acting on behalf of a private party in any matter in which the Government is a party or has a direct and substantial interest. This prohibition refers to the situation where an employee assists a third person who has some type of claim against or dispute with a Government agency. Of course, the prohibition does not prohibit an employee from representing himself in a matter involving the Government, nor does it preclude an employee from assisting a fellow employee in a personnel proceeding, provided the employee does not receive a fee for his assistance.

5. Postemployment Restrictions

Once an employee leaves Government service, he should keep in mind two restrictions that are also criminal in nature. First, there is a permanent ban against any former employee acting as an agent or attorney in a matter in which the Government is a party or has an interest and in which he participated personally and substantially as a Government employee. Second, there is a 1-year ban against any former employee appearing personally before any court or Government agency as an agent or attorney in any matter that was under his official responsibility during the last year of his Government employment.⁴

²18 U.S.C. 209 (1970).

³18 U.S.C. 205 (1970).

⁴18 U.S.C. 207 (1970).

B. Actual and Apparent Conflicts of Interest

Aside from the above specific and identifiable standards of conduct, there is the basic conflict-of-interest principle that no public servant shall use his public office or position for private gain. Consistent with this principle and reflective of the criminal prohibition in 18 U.S.C. 208(a) (1970), the Order prohibits any employee from participating in any GAO assignment in which he, his spouse, minor child, partner, or other specified related organization or person has a financial interest, unless he first obtains written approval.⁵ When confronted with such a conflict-of-interest situation—*however small or insignificant the financial interest may be (e.g., one share of stock)*—the employee must submit details of the case, in writing, to the appropriate reviewing official. The employee will be considered disqualified from the assignment in question until the matter is resolved, the precise procedure for which is set forth in the Order (see paragraph 4 of chapter 7).

C. Prohibited Financial Interests

As a means of preventing the occurrence of a conflict-of-interest situation in the first instance, as well as removing the appearance of impropriety, the Order places a blanket restriction on the financial interests of employees. Specifically, the Order prohibits any employee from having a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his Government duties and responsibilities. It should be emphasized that this restriction does not necessarily refer to any one GAO assignment of an employee but rather to his general duties and responsibilities. For example, the ownership of stock in an energy company by an employee assigned to the Energy and Minerals Division, or in a large defense contractor by an employee assigned to the Procurement and Systems Acquisition Division, may be questionable in a given case.

D. Confidential Statement of Employment and Financial Interests

Perhaps the most significant revision effected by the Order relates to the filing of the Confidential Statement of Employment and Financial Interests (GAO Form 310), the primary purpose of which is to enable reviewing officials to compare the financial interests and non-Government employment of their staff members with their official duties and assignments, in order to determine whether any have questionable financial interests.

Under the new Order, all professional employees are required to submit statements to the appropriate reviewing official. "Professional employees" are those in statutory positions, positions in grade GS-7 and above in 2-grade interval series, and all other positions in grade GS-13 and above. Also, reviewing officials are now authorized to designate certain nonprofessional positions under their supervision as being susceptible to conflicts of interest because of the nature of their work. Incumbents of these positions will be required to file confidential statements.

Each designated employee, once he has filed an initial confidential statement, must submit an additional statement with appropriate amendments by June 30 of each year, and whenever he is reassigned or detailed for a period of 30 days or more to a different division or office. The appropriate reviewing official must review each statement within 15 days of the date of submission. If he finds no apparent conflict of interest, he shall so certify. If he finds a conflict, the employee will be given an opportunity to explain. The procedures for resolving such a case are set forth in detail in the Order (see paragraph 12 of chapter 7).

E. Interpretative and Advisory Service—Ethics Counselors

From time to time various conflict-of-interest

⁵Briefly, the Order states that an actual conflict-of-interest situation exists whenever (1) a private interest (financial, personal, or one resulting from non-Government employment) of an employee might affect the performance of his official duties or (2) information gained through an employee's official duties is used for his personal benefit. An apparent conflict of interest exists whenever a reasonable person, judging from outward appearances, might suspect the existence of an actual conflict.

questions, both administrative and legal in nature, will naturally arise. To provide effective advice and counsel on legal questions the Order provides for the appointment of an Ethics Counselor, together with as many deputy ethics counselors as may be appropriate. Complementing this interpretative and

advisory service, the publication of an instructive, simply written booklet is planned. In the meantime, please do not hesitate to contact OGC if you have any questions regarding the revised Order, or any conflict-of-interest matter.

LEGAL REPRESENTATION FOR FEDERAL EMPLOYEES

The issue of when a Federal employee is entitled to legal representation at Government expense is of interest to us all. Recently, the Department of Justice issued new guidelines that describe the situations in which Department representation is to be provided to a Federal employee who is involved in his *individual capacity* in civil or criminal proceedings.

The guidelines, codified at 28 C.F.R. § 50.15-50.16, provide that:

1. The Department will represent a Government employee who is sued or subpoenaed in his individual capacity if the acts that constitute the subject of the proceeding reasonably appear to have been performed within the scope of his employment, so long as he is not the subject of a Federal criminal investigation with respect to such acts.

2. Where evidence of specific participation in a crime is present, but the employee reasonably appears to have been acting within the scope of his employment, the Department will pay for a private attorney. The guidelines require advance approval of private counsel by the Department.

3. When the Department determines that several employees who are entitled to representation have sufficiently conflicting interests that the Department could not represent all of them, it will pay for an approved private attorney.

4. The Department will neither represent nor pay for the representation of an employee with respect to acts for which an indictment or information has been filed against him by the United States, or where a pending Department investigation indicates that his acts constitute a

criminal offense.

5. Likewise, the Department will neither provide nor pay for representation where the positions taken would oppose positions maintained by the United States itself.

Representation is limited to state criminal proceedings and civil and congressional proceedings. A Federal employee who has committed a Federal crime is, by definition, acting outside the scope of his employment, and, in any event, the Justice Department cannot both prosecute and defend an employee charged with a crime.

What about the rare situations in which the Department will not provide or pay for legal counsel under the new guidelines? The guidelines state that representation at Federal expense will be provided *only* in the instances discussed above. If this were construed as barring payment of employee legal fees by any other Federal agency, it might conflict with recent GAO decisions.

GAO has considered the matter of provision of legal representation for employees by Government agencies on a number of occasions. In those instances, the Department of Justice declined to provide counsel to an employee, either because of its view that he is not entitled to it or because of a conflict with a position taken by the United States in a particular dispute.

In a 1973 case,¹ the Comptroller General held that, under the circumstances, appropriations for the Administrative Office of United States Courts could be used to pay for representation of Federal judges by private attorneys. The principal criteria established are: (1) the Justice Department has been asked and has declined, or has previously

¹53 Comp. Gen. 301 (1973).

stated that it would decline, to provide representation in a particular case or class or cases and (2) the agency determines that it is in the best interest of the United States, and necessary for the purpose of the particular appropriation involved, that the individual or body be represented by counsel. This decision was made notwithstanding the provisions of 28 U.S.C. 515-519, under which, unless otherwise authorized by law, the conduct and supervision of litigation in which the United States or an agency or officer thereof is a party is reserved to the Department of Justice.

An additional bar not present in the 1973 case was the provision of 5 U.S.C. 3106² that restricts the employment of attorneys or counsel for the conduct of litigation to which the United States or a Federal agency or employee is a party. This restriction applies only to the heads of executive and military departments and does not affect the judiciary, which was the subject of the decision.

In another matter, the Comptroller General followed the 1973 decision in allowing the Small Business Administration to reimburse an employee's attorney fees where the United States Attorney had withdrawn from a case, requiring the employee to hire private counsel.³ The decision notes that SBA is not an executive department but an "independent establishment," so that 5 U.S.C. 3106 would not apply. However, the case also suggests that 5 U.S.C. 3106, like 28 U.S.C. 515-519, would not be a bar to payment of an attorney's fees by an agency where the Department of Justice had declined to afford counsel, and where it was determined to be in the best interest of the United States to provide representation.

The rationale for the Comptroller General's approach appears to rest on two principles. First, section 3106 seems to be designed as a supplement to 28 U.S.C. 515-519, to assure that all litigation involving the United States, an agency, or an employee will be controlled by the Justice Department. Thus, when the Department has, for some reason unrelated to whether it is in the Government's interest to defend the employee, declined

the case, the agency in which the matter arose should be free to use its best judgment in hiring private counsel.

Second, strict application of section 3106 could contravene the general rule that, where an officer of the United States is sued because of some act done in the discharge of his official duties, the expense of defending the suit should be borne by the United States.⁴ The rationale for this rule was aptly set forth in a letter of July 25, 1975, from the Assistant Attorney General, Civil Division, to the Comptroller General:

"* * * The United States acts through its employees. Accordingly, upholding the authority and propriety of actions taken by employees in furtherance of their duties serves as well to protect the Federal Government as the employee.* * * The Government would face obvious morale problems if it failed to defend employees carrying out official policy. Federal employees would be less vigorous in upholding Federal law and in discharging their duties if, when sued, they had to absorb their expense of litigation. For these and other reasons it has long been the general policy of the Department of Justice to afford representation to employees sued for acts taken in the performance of their official duties * * *."⁵

The recent Justice Department policy statement on representation of Federal employees should be read with the foregoing background in mind. Hopefully, the guidelines will enable employees to be properly represented in most cases.

However, even where Department counsel may be unavailable pursuant to the new guidelines, the

²"* * * [T]he head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party * * * but shall refer the matter to the Department of Justice * * *."

³55 Comp. Gen. 408 (1975). See also, 56 Comp. Gen. 640 (B-137762, B-143673, May 16, 1977).

⁴See, *Konigsberg v. Hunter*, 308 F. Supp. 1361, 1363 (W.D. Mo. 1970); 6 Comp. Gen. 214 (1926); 53 Comp. Gen. 301, 305 (1973).

⁵Letter quoted at 55 Comp. Gen. 412.

agency employing the individual sued may still be able to pay for legal counsel, under the applicable Comptroller General decisions, where such is determined by the employing agency to be in the best interest of the United States.⁶ Presumably, such a determination would require that the employee being sued was acting within the scope of his official duties. Where the Justice Department's refusal to provide representation is based on its determination that such would not be in the best interest of the United States, the employing agency may be expected to consult with the Department and to accord great weight to its determination. However, as the facts in the Comptroller General decisions discussed in this Comment make clear, the Justice Department is not necessarily the most appropriate determiner of the best interest of the United States in all cases, particularly those in which the Department and the employing agency may have conflicting interests.

Should they be sued, most employees will be concerned primarily with the mechanics of obtaining representation. The Justice Department guidelines set out the procedure for this. An employee who believes he is entitled to representation after becoming a party to or being subpoenaed in a state criminal proceeding, or a civil or congressional proceeding, must submit a request for representation, together with copies of all papers served upon him, to his immediate supervisor or the person designated by the head of the agency for such purpose. The employing agency will then forward to the Civil Division of the Department of Justice a statement of whether the employee was acting within the scope of his employment, together with its recommendation as to whether representation should be provided.

All supporting data must also be submitted with the agency report; however, any communication between the employee and any person acting as an attorney at his employing agency will be subject to the attorney-client privilege. This means that such information may not be disclosed or used by the Department of Justice without the permission of the employee who initiated the request for repre-

sentation.⁷ The Department will apply the criteria discussed earlier in this Comment and will inform the agency and/or the employee whether representation will be provided. If the Department declines, the employee may still discuss with the agency whether it can pay for private representation itself, under the applicable Comptroller General decisions.

Within GAO, attorneys in the Office of the General Counsel are available to discuss any aspect of the Justice Department guidelines and to advise employees who are or may become involved in legal proceedings resulting from the performance of their official duties. Don't hesitate to contact OGC if you have a problem in this area.⁸

⁶In this connection compare the Comptroller General decisions that allowed payment of attorneys' fees for *private* litigants where the United States had a beneficial interest in the outcome, 42 Comp. Gen. 595 (1963), and the recent decision allowing regulatory agencies to pay the attorneys' fees of persons who wish to participate in proceedings before the agency, 56 Comp. Gen. 111 (1976). See also, B-92288, Feb. 19, 1976; B-139703, July 24, 1972.

⁷28 C.F.R. §50.15(a)(1).

⁸See also, "The GAO Auditor in Court," *The OGC Adviser*, Vol. I, No. 1 (October 1976), for a discussion of what to do if you are subpoenaed.

NOTES

GAO AS A CONDUIT OF INFORMATION

Occasionally, Members of Congress, acting in their individual capacities, ask us to obtain for them information or documents from Federal agencies that they have been, or would be, unable to get on their own. This type of request—in effect, for GAO to act as a conduit of information—has both policy and legal implications.

The Policy Issue

It is GAO's general policy not to act on behalf of Members of Congress (or, for that matter, anyone else) to secure information or documents from Federal agencies that an individual would not be entitled to if the request for the information or document were made directly to the agency.

It is not difficult to foresee how a policy of accepting requests for information as a conduit for an individual requester could strain GAO's resources. It is not a remote possibility that, in a short period of time, GAO would be viewed as a clearinghouse for Federal documents and information. This role would require the diversion of audit and legal manpower from normal GAO assignments to information gathering. Acting as a conduit also affects our legal status *vis-a-vis* Federal agencies when requesting access to records.

Legal Implications

As discussed in Vol. 1, No. 1 of *The Adviser*, the authority of the General Accounting Office to have access to records maintained by the various Federal agencies is found in §313 of the Budget and Accounting Act of 1921, 31 U.S.C. 54:

“All departments and establishments shall furnish to the

Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 107 of this title.”

While this law clearly authorizes GAO complete access to records when carrying out its audit responsibilities, when we request such documents on behalf of an individual Member of Congress, the provisions of 5 U.S.C. 552 (the Freedom of Information Act (FOIA)), *not* those of 31 U.S.C. 54, authorize, as well as potentially limit, that access.

Individuals requesting information from Federal agencies typically do so under the FOIA. (For a discussion of this act, see Vol. 1, No. 3 of *The Adviser* at pages 4-5.) GAO has interpreted the FOIA provisions to the effect that, while there is no authority to withhold information from the Congress, the word “Congress” as used in the statute applies to congressional *committees* and does not include Members of Congress acting in their individual capacities. This ruling is supported

by the legislative history of the statute. For example, H.R. Rep. No. 1497, 89th Cong., 2d Sess., pp. 11-12, states:

“Members of the Congress have all the rights of access guaranteed to ‘any person’ * * *.”

Accordingly, with regard to the disclosure of restricted information, individual Members of Con-

gress are subject to the same limitations as are members of the public.

Suggested Course of Action

If, in the future, you are asked by a Member of Congress acting in his individual capacity to obtain information from a Federal agency, you should refer to and be guided by GAO’s policy as set forth in this Note. Should you have any questions concerning implementation of this policy, please contact Robert A. Evers of OGC (275-3140).

USER CHARGES REVISITED

If you plan to rely on the User Charge Statute¹ to encourage a Federal agency to attempt to recover the full cost of its public service activities, you should be aware that GAO recently reviewed the extent to which a Government agency may recover the cost of providing services to the public under this law, in light of several recent court decisions dealing with that agency’s fees. These decisions may significantly limit the costs that agencies may collect under the statute. In one decision, the Supreme Court invalidated the Federal Communication Commission’s 1970 fee schedule.² The Court remanded the case to the Commission, instructing it to reappraise the annual fee imposed on community antenna television (CATV) systems. Shortly thereafter, FCC suspended collection of these charges.

Two subsequent lawsuits were brought with respect to FCC’s 1970 fee schedule. One suit³ attacked the entire schedule after FCC tried to limit the scope of the Supreme Court’s decision to annual fees for broadcast and cable television systems. The other action⁴ challenged particular fees assessed by the Commission.

During the course of this litigation, FCC adopt-

ed a revised fee schedule, effective March 1, 1975. This scheme was promptly challenged by two additional lawsuits.⁵

All four cases ultimately reached the United States Court of Appeals for the District of Columbia Circuit. The precedent-setting Supreme Court opinions provided little guidance to the Court of Appeals as to how, if at all, an agency should go about the quantitative task of assessing charges for its services. In *National Cable Television*, the Supreme Court had said that FCC should not consider those costs that inure to the benefit of the public in computing a fee base. The Court indicated that the Commission could assess a fee measured by the *special benefit* received by CATV operators. Rather than confronting the constitutional issue of whether IOAA represented a permissible delegation of the Congress’ taxing power to Federal agencies, the Supreme Court decided that FCC could properly achieve the congressional intention that broadcasting companies defray some of the Commission’s regulatory costs by assessing fees based on the value of FCC’s services to the recipient, rather than on a public policy or interest-served basis.

¹Independent Offices Appropriations Act, 1952, §501, 65 Stat. 290, as codified, 31 U.S.C. §483a (1970) (referred to as IOAA).

²*National Cable Television Association, Inc. v. United States*, 415 U.S. 336 (1974); see also, *Federal Power Commission v. New England Power Co.*, 415 U.S. 345 (1974)—establishing standards that agencies must meet in order to charge fees under IOAA.

[Footnotes continued on p. 10]

On December 16, 1976, the Court of Appeals issued four related decisions, remanding to FCC several of the agency's orders involving the collection of fees from Commission regulatees. The Court of Appeals interpreted the two 1974 Supreme Court decisions and attempted to provide FCC with the criteria it would need to assess a permissible fee.

In order to avoid assessing a fee based on public policy or interest served, the Court of Appeals instructed FCC to charge its regulatees for services which assist them in complying with their statutory duties. These are necessary services that are proper even though they might be based partly on some incidental public interest served. The Court of Appeals ruled that, to the extent a fee recovers more than necessary costs, it represents a charge for the independent public interest served and constitutes a tax that, according to the Supreme Court, FCC has no power to levy.

FCC took the position that the court cases provided insufficient guidance to enable it to devise any valid fee schedule and proposed to return all the fees. The House and Senate Subcommittees on Communications asked GAO to interpret the four Court of Appeals decisions. The subcommittees wish to prevent FCC from refunding \$164.1 million in total fees collected from 1970 to 1976.

On May 6, 1977, GAO issued a report entitled, "Establishing a Proper Fee Schedule Under the Independent Offices Appropriation Act, 1952," CEDD-77-70. The GAO report expresses the belief that sufficient guidance is contained in the Court of Appeals' decision to permit the establishment of fee schedules for services provided by Government agencies. GAO believes a reasonable interpretation of the court's decisions requires FCC to (1) separate regulatees into "recipient classes," (2) calculate the cost basis for each fee to be assessed against each recipient class, identifying costs and excluding the "independent public interest" served, and (3) apportion the allowable identified costs among the members of each recipient class.

FCC submitted a written response to the GAO report dated June 24, 1977, disagreeing with the GAO contention that the four Court of Appeals decisions provide sufficient guidance to devise a permissible fee schedule. The Commission also maintains that it does not now have and cannot obtain the data necessary to recalculate what the lawful fee would have been in the past. Lastly, FCC prefers that the Congress enact new legislation, rather than FCC attempting to adopt yet another fee schedule under the User Charge Statute in face of the confusing and ambiguous court decisions.

FCC has requested a meeting with the appropriate congressional committees in order to decide on a course of action. GAO is preparing an answer to the FCC response and will most likely remain closely involved in this matter until all the issues are resolved.

Meanwhile, because the Supreme Court did not reach the constitutional issue of whether IOAA represented a permissible delegation of the Congress' taxing power to Federal agencies, it is uncertain whether a Federal agency, under authority of IOAA, may lawfully assess a fee that is based on any element of public policy or interest served. The Court of Appeals' approach, distinguishing independent from incidental public interest through the device of necessary services, has not been reviewed by the Supreme Court or tested in other jurisdictions. Moreover, no one is certain about the scope of the Supreme Court's decisions. They may apply solely to the litigants—FPC and FCC; or they may apply only to Federal regulatory agencies; or they may apply to all Federal agencies.

If IOAA is again the subject of litigation that reaches the Supreme Court, the Court might well interpret IOAA differently. It is noteworthy that two of the nine justices presently sitting on the Court did not participate in the 1974 cases, and one who did is no longer on the Court. Further, two justices dissented in the *National Cable Television* case. In other words, five of the nine present Supreme Court justices either have expressed no

³*National Association of Broadcasters, et al., v. Federal Communications Commission*, Nos. 75-1087, et al. (D.C. Cir., Dec. 16, 1976). 554 F.2d 1118, 180 U.S. App. D.C. 259 (1976)

⁴*Capital Cities Communications, et al., v. Federal Communications Commission*, Nos. 75-1503, et al. (D.C. Cir., Dec. 16, 1976). 554 F.2d 1135, 180 U.S. App. D.C. 276 (1976)

⁵*National Cable Television Association, Inc., et al., v. Federal Communications Commission*, Nos. 75-1053, et al. (D.C. Cir. Dec. 16, 1976), and *Electronics Industries Association, et al., v. Federal Communications Commission*, Nos. 75-1120, et al. (D.C. Cir. Dec. 16, 1976).

¹⁰*NCTA, Inc. v. F.C.C.*, 554 F.2d 1094, 180 U.S. App. D.C. 235 (1976)
Electronic Industries Assoc., 554 F.2d 1109, 180 U.S. App. D.C. 280 (1976)

formal opinion concerning IOAA or disagree with the present status of the law as expressed in the two Supreme Court cases.

Because of the confusion presently surrounding application of IOAA, the General Counsel has encouraged all GAO employees to contact

Richard R. Pierson (275-2888) or John Higgins (275-6263) of OGC regarding reports or projects that involve either 31 U.S.C. 483a (1970) or OMB Circular A-25 (issued September 23, 1959), which implements the User Charge Statute.—*Steve Sorett*

Aeronautical Radio, Inc. v. U.S., 335 F.2d 304 (7th Cir. 1964)

Help Us Help You

Have any suggestions for changes, improvements
or topics you would like to see in future
Advisers?

Send them to:

Editors, *OGC Adviser*
Room 7026, GAO Building
441 G St., N.W.
Washington, D.C. 20548