



G A O

Accountability \* Integrity \* Reliability

Office of the Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

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June 15, 2010

The Honorable Charles E. Grassley  
Ranking Member  
Committee on Finance  
United States Senate

The Honorable Richard C. Shelby  
Ranking Member, Subcommittee on Commerce,  
Justice, Science, and Related Agencies  
Committee on Appropriations  
United States Senate

As requested in your letter of May 4, 2010, this response addresses the Government Accountability Office's (GAO) access to information. Specifically, this letter updates matters we described in our September 28, 2009 letter in response to a September 2 request from Senator Grassley, and describes access issues as well as positive developments arising since then. It also describes several legislative developments that could impact GAO's access authorities.

It is important at the outset to reiterate that the majority of departments and agencies are very cooperative in providing access to the information we need. The rarity of occasions to the contrary reflects the well-established nature of our broad right of access to agency records under 31 U.S.C. § 716, and the fact that GAO has established constructive working relationships with many executive branch officials that enable us to obtain the information we need to assist Congress in its oversight responsibilities. As noted in our September letter, it is fairly rare for an agency to deny GAO access to information and rarer still that an agency will not work toward an accommodation that allows GAO to do its work.

Notwithstanding this extensive cooperation, there are areas where GAO continues to encounter access issues. Some of these are agency-specific, stemming from long-standing processes and procedures that impede our access; others reflect misinterpretations of GAO's authorities. As you are aware, in these instances, we aggressively pursue our access rights with senior agency officials, and keep our congressional requesters informed of new developments and potential impacts on our work. This letter describes the variety of access issues we have encountered as well as the means by which we have or are seeking to overcome them, including

legislative solutions that are currently pending. The following presents the status of our access issues at key agencies, along with legislative developments.

## **Department of Justice**

As described in our previous letter, Department of Justice (DOJ) protocols for working with GAO impose a centralized process for screening all GAO document requests and for arranging all meetings and interviews, thus delaying the release of requested documentation and requiring GAO to work through liaisons before gaining direct access to DOJ subject matter experts. This results in numerous delays in GAO access to information and unnecessary administrative and legal burdens for both DOJ and GAO. For example, because of the processes used by DOJ and its components, we have encountered long delays in our review of coordination among DOJ law enforcement components (the Bureau of Alcohol, Tobacco, Firearms, and Explosives; the Drug Enforcement Agency (DEA); the Federal Bureau of Investigation (FBI); and the U.S. Marshals Service). On this engagement, we have experienced delays in obtaining documents and conducting a survey of line-agents.<sup>1</sup>

In November 2009, I met with then-Deputy Attorney General David Ogden to discuss our problems with DOJ's protocols, and to pursue access to the information we need to carry out our review of vacancies in the FBI's Counterterrorism Division, discussed below. Notwithstanding numerous follow-up inquiries, including a discussion with the Deputy Attorney General in early February 2010, we saw no progress on either issue. On May 18, 2010, we sent a letter to DOJ reiterating the need for the Department to change its protocols and asserting our access rights with respect to the FBI information we are seeking. On June 10, GAO officials met with DOJ's Associate Deputy Attorney General to further pursue these issues. With regard to DOJ's protocols, we came to an agreement to establish a high-level DOJ-GAO working group to discuss issues associated with DOJ's processes for working with GAO.

With respect to the FBI issue, however, at our June 10 meeting, DOJ officials indicated that they do not intend to change their position on GAO access to information we require for our review of vacancies in the FBI's Counterterrorism Division. While the FBI has provided some information related to overall staffing vacancies at its headquarters and efforts it has taken to address them, it has not provided information related to specific national security divisions, which Senator Grassley, the Chairmen of the House and Senate Judiciary Committees, and the Chairman and Ranking Minority Member of the House Subcommittee on Crime, Terrorism, and Homeland Security were specifically concerned about in their request

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<sup>1</sup> Although DOJ initially responded positively in January 2010 to our intent to survey certain employees, its components raised additional concerns and we engaged in negotiations with DOJ and those components over the content and logistics of the survey for a 4-month period. After elevating this matter within DOJ, GAO is now in the process of administering the survey. We have also experienced numerous delays in obtaining documents, primarily from the FBI. Documents we have requested include guidance for performance reviews, a list of training courses, and memorandums of understanding regarding interagency coordination. Nine of the 23 documents requested from the FBI for this review were not provided to us for 7 months after the initial request was made. In addition, six documents are still outstanding, some of which date back to fall 2009. We continue to press for the release of these materials.

to GAO.<sup>2</sup> In denying us this information, DOJ and FBI officials continue to maintain that counterterrorism positions are part of the National Intelligence Program budget and thus outside the realm of GAO's authority. In our previous letter, we described how a DOJ legal opinion regarding GAO's authority to conduct intelligence oversight has had a broad negative impact on our access to information at the FBI and several other agencies that are part of the intelligence community. GAO strongly disagrees with this legal opinion, issued in 1988 by DOJ's Office of Legal Counsel.<sup>3</sup> Moreover, we are concerned that this position is now being extended to cover agencies and activities that have long been subject to GAO oversight, such as human capital practices and vacancies within the FBI's Counterterrorism Division. As discussed below, there is ongoing legislative activity in this area that could significantly affect the nature of our relationship with the intelligence community.

We have encountered substantial delays in other reviews at the FBI as well. For example, in our review of the FBI's Public Transportation Information Sharing and Analysis Center, it took the FBI as long as 4 months to provide us with critical documents.<sup>4</sup> In a review involving implementation of provisions of the PROTECT Our Children Act of 2008, we experienced long delays in obtaining materials on forensic analysis of digital evidence produced by the FBI's Office of Technology Development.<sup>5</sup> We understand that the delays were due to multiple reviews of the materials within the FBI and DOJ. In addition to pursuing access in these individual cases, we have elevated to senior FBI officials the need to address the broader pattern of delays we are experiencing at the FBI. I intend to meet with FBI Director Mueller to discuss these issues.

Our results in gaining access on other engagements have been better but still mixed. For example, with regard to our review of federal funding, oversight, and investigations, as well as prosecutions of ACORN organizations, DOJ components--particularly the Office of Justice Programs, the Office of the Inspector General, and the Executive Office of U.S. Attorneys--were very cooperative in responding to us in a timely manner. However, again, the FBI was not as responsive, taking several months to provide the required information.<sup>6</sup> The information the FBI eventually

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<sup>2</sup> As noted above, we have aggressively worked to resolve this issue with DOJ since it arose in May 2009. In all of our discussions with DOJ and in our May 18, 2010, letter, we have challenged DOJ's arguments and vigorously asserted GAO's audit and access authority with respect to information on FBI's counterterrorism vacancies. Unfortunately, these efforts have not resolved the issue.

<sup>3</sup> Dep't of Justice, Office of Legal Counsel Op., *Investigative Authority of the General Accounting Office*, 12 Op. O.L.C. 171 (Aug. 16, 1988).

<sup>4</sup> A number of documents requested in January 2010 were not provided until May 2010.

<sup>5</sup> Our request was originally made on December 15, 2009, and renewed on January 14, 2010. The FBI sent a portion of the documents to GAO in April 2010 and made the remainder of the documents available on May 26.

<sup>6</sup> Specifically, on February 3, 2010, we submitted a formal request to the FBI for descriptions and outcomes of investigations its staff has conducted of ACORN organizations since fiscal year 2005. The FBI did not provide us with this information until May 7, 2010, and in the interim did not respond to our voice mail and email messages regarding the status of our request. The FBI did not provide an explanation as to the cause of the delay, although it did not dispute our access to the requested records.

provided was helpful in meeting our audit objectives, but receiving it so late complicated our ability to comprehensively address the information in our report, which was issued in mid-June.

Finally, we recently resolved a matter regarding DOJ resistance to providing GAO with access to the Social Security numbers of physicians in the DEA registrant database for our review of Medicare prescription drug abuse. Even though GAO has a statutory right to this information, DOJ raised concerns about providing it. After we explained that our objectives could be satisfied by accessing the information on-site at DEA, we were provided on-site access to the entire database.<sup>7</sup>

## **Department of Homeland Security**

As discussed in detail in our September letter, the Department of Homeland Security (DHS) has posed challenges for GAO since it began operations in 2003. DHS processes for dealing with GAO have historically involved centralized control over our access requests and layered and time-consuming reviews of documents before they are released to GAO. Congress has taken action to improve GAO's access at DHS by imposing reporting and other requirements on the Department.<sup>8</sup> In addition, we have been working cooperatively with DHS to revise its protocols for working with GAO, with particular attention to the need for DHS to give GAO direct access to program officials; speed up internal review processes; provide GAO with immediate access to records that are readily available and should not require review; and provide GAO access to certain draft and other non-final documents.<sup>9</sup>

On June 8, 2010, the Secretary of Homeland Security signed a Directive revising the Department's overall protocol for dealing with GAO. The revised protocol represents an important step toward DHS improving its processes and signals a commitment to providing GAO with more timely access. DHS officials are continuing to work on the implementing instruction.<sup>10</sup> We hope that DHS moves expeditiously to finalize and implement the instruction in coordination with GAO so that systemic changes can begin to take place to improve GAO's access.

As noted with respect to DOJ, DHS has in some instances resisted providing information based on the "intelligence" aspects of some of its operations. For example, as discussed in our September letter, we have experienced delays in

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<sup>7</sup> GAO initially requested the information in October 2009, and was granted access in March 2010.

<sup>8</sup> For example, the fiscal year 2009 appropriations act for DHS required it to submit quarterly reports to the Senate and House Appropriations Committees and GAO of each instance where a GAO request for records was not granted within 20 calendar days and where a GAO request for an interview was not granted within 7 calendar days. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, 122 Stat. 3574, 3652 (2008).

<sup>9</sup> The reports submitted by both the Senate and House Appropriations Committees accompanying the respective DHS fiscal year 2010 appropriations bills urged DHS to adopt the practices of other federal agencies regarding interaction with GAO, specifically including these four areas. S. REP. NO. 111-31, at 12 (2009); H.R. REP. NO. 111-157, at 19 (2009).

<sup>10</sup> DHS has been working on the revised protocol and the implementing instruction for more than a year.

obtaining documents for our ongoing review of DHS efforts to share information with state and local partners through its Office of Intelligence and Analysis. In one instance, it took DHS more than 6 months to provide us with a DHS-sponsored study that evaluated the office's programs and activities, which was central to addressing our objectives.<sup>11</sup> DHS has also cited the 1988 DOJ legal opinion on intelligence, discussed earlier in this letter and in our previous letter, in declining to provide certain information—including standard operating procedures—even though the review does not focus on intelligence activities. Although we did not receive the full scope of the information initially requested, we ultimately obtained enough to satisfy the objectives of our review.

## **Department of Health and Human Services**

As we described in our September 2009 letter, the Department of Health and Human Services (HHS) typically cooperates with our access requests, and few significant problems arise. For example, we successfully obtained improvements to GAO's access to automated data information systems maintained by the Centers for Medicare & Medicaid Services (CMS), negotiating an agreement with HHS that reflects our access authority and our responsibilities to Congress. However, HHS continues to deny GAO access to the National Directory of New Hires (NDNH)—a database of employment information that it maintains—for our investigation of federal benefits fraud and other matters. HHS has construed the relevant statute (42 U.S.C. § 653) as precluding GAO access to NDNH because GAO is not listed as an authorized recipient of the data. GAO has utilized alternative means to acquire this data so that we may meet the needs of our congressional requesters. For example, on a current review, GAO is acquiring hiring data from the states that originally supplied the information to HHS. Every state receives federal grant funds to provide the data to HHS, and GAO has made requests utilizing its access-to-grantee records authority. While this approach has yielded success from most states, two states denied GAO access to the databases after receiving advice from HHS not to respond, based on its view that GAO is not entitled to the data. As discussed below, pending legislation—the Government Accountability Office Improvement Act of 2010, H.R. 2646, and a companion bill, S. 2991—would confirm GAO access rights in cases like this one by refuting agency interpretations that deny GAO access simply because a program statute does not explicitly reference GAO.

As noted in our previous letter, the Food and Drug Administration (FDA) is generally responsive to our requests, but we have experienced significant delays in obtaining requested information from FDA and scheduling meetings with FDA officials. A recent example occurred during a GAO review of surrogate endpoints in the drug approval process, where it took approximately 5 months for FDA to provide complete and accurate information on certain drugs approved using surrogate endpoints<sup>12</sup> and

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<sup>11</sup> GAO requested an April 2009 Homeland Security Institute Report on the Office of Intelligence and Analysis in July 2009, but did not receive it until January 2010.

<sup>12</sup> As an alternative to demonstrating a drug's effectiveness by its impact on a clinical endpoint, sponsors may submit and FDA may approve applications based on clinical trials that demonstrate a new drug's impact on a surrogate endpoint—a laboratory measure or physical sign used as a substitute for a clinical endpoint—that reasonably predicts a clinical benefit.

the status of required follow-up studies by drug manufacturers.<sup>13</sup> The causes of these delays are unclear. However, we are in the process of holding discussions with senior FDA officials—specifically, the Principal Deputy Commissioner and the Acting Deputy Commissioner for Policy, Planning, and Budget—to address this matter.

In addition, FDA's restrictive interpretation of section 301(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 331(j)) has continued to result in delays and unnecessary procedural steps for GAO and our congressional requesters.<sup>14</sup> In an ongoing GAO review of medical device recalls, FDA has declined to provide GAO with access to recall files until trade secrets information can be redacted. In another review, involving the FDA response to heparin contamination,<sup>15</sup> the FDA inappropriately redacted information that it initially—and inaccurately—identified as trade secrets from reports provided to GAO, thus delaying the response.<sup>16</sup> As noted above, the pending GAO Improvement Act of 2010 would remedy this problem by confirming GAO's statutory right of access to information such as that maintained by FDA under the Federal Food, Drug, and Cosmetic Act.

### **Department of State**

The State Department has generally provided GAO with the information needed to carry out its mission and has built-in mechanisms to ensure that overall interaction is positive. As you know, however, we experienced protracted difficulties in obtaining passport recipient data from the State Department to respond to Senator Grassley's and Senator Baucus' request for an investigation of the number of passport recipients who have failed to pay their federal taxes or are registered sex offenders. After numerous attempts to negotiate access to the data over the course of a year, we ultimately obtained the data and are in the process of issuing our report on the investigation.<sup>17</sup>

### **Department of Defense**

Overall, GAO has good access at the Department of Defense (DOD), and we routinely receive the information we need to carry out our responsibilities. In our September letter, however, we noted that GAO has had difficulty over the past year getting access to operational plans and information regarding potential future military operations due to a revision to a Department of Defense (DOD) Instruction governing

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<sup>13</sup> GAO initially requested the information in July 2008 and received it in December 2008.

<sup>14</sup> FDA narrowly interprets its authority to disclose trade secrets information under that section as precluding direct access by GAO, allowing GAO access only for studies conducted at the request of a chair of a committee or subcommittee of jurisdiction, and then only if the request specifically refers to trade secrets information. In part because of the way FDA maintains data, its position has adversely affected GAO's access to information beyond trade secrets. It also leads to the anomalous result that GAO can obtain certain information when conducting work for a committee chair, but not when we conduct the same work for the ranking member.

<sup>15</sup> Heparin is a medication used to prevent and treat blood clots.

<sup>16</sup> In one example, GAO requested a document in October 2009, received a redacted version of the document in January 2010, and eventually received an unredacted version in April 2010.

<sup>17</sup> GAO originally requested the data in September 2008, and received it in October 2009.

how DOD responds to GAO requests for access to records.<sup>18</sup> Since that time, GAO has continued to engage in high-level discussions with DOD leadership regarding the policy. DOD agreed in November 2009 to provide GAO with broader access to a category of “civil support plans,” which should result in greater cooperation in the future on critical work examining domestic operations planned and conducted by Northern Command. In addition, in January 2010, DOD agreed that the language of its Instruction may not appropriately reflect GAO’s authority and assented to new language to modify the policy.<sup>19</sup> We will continue to monitor the actual impact on GAO’s access to ensure we obtain operations plans and related information in a timeframe consistent with meeting our reporting obligations to Congress.

We cited several specific examples of ongoing issues resulting from DOD’s plans policy in our September letter. On one of those matters, DOD’s refusal to provide requested plans for our work to determine how DOD is incorporating contractor support into its operational planning processes, we were unable to reach a successful resolution with DOD. Our report, issued in March 2010 after a long delay, contained a scope limitation reflecting this issue.<sup>20</sup> On two matters, regarding interagency coordination for homeland defense and civil support missions and DOD requirements for defense support to civil authorities, DOD’s decision to provide GAO with broader access to civil support plans ultimately resulted in our ability to review the required documents.<sup>21</sup> Finally, after determining that the document should not have been withheld under the Instruction in the first place, DOD eventually provided a “Troops-to-task” study analyzing how many Army Brigade Combat Teams should be stationed in Europe for our ongoing review of Army realignment.<sup>22</sup>

As you note in your letter, we encountered access issues at the Navy during our review of the ongoing Littoral Combat Ship competition. In particular, we experienced delays in obtaining requested cost estimation documentation, contracts, and cost and schedule performance data.<sup>23</sup> While we were able to work with the Navy to resolve the situation and all required information was eventually provided, delays extending over 6 months negatively impacted the efficiency of GAO’s work.

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<sup>18</sup> The new Instruction, DOD Instruction 7650.01, was pending during 2008 and issued in January 2009. It currently states that GAO “will not normally be granted access to operational plans or to information about potential future military operations” unless an “exception” is granted by the Under Secretary of Defense for Policy on a case-by-case basis.

<sup>19</sup> The Deputy Secretary of Defense endorsed a revision of the policy in an April 6, 2010, letter to GAO. Formal revision of the Instruction is still pending.

<sup>20</sup> GAO initially requested and was denied access to certain operational plans in December 2008. Because of these delays we were not able to issue our report until 6 months after our planned issuance date. GAO, *Warfighter Support: DOD Needs to Improve Its Planning for Using Contractors to Support Future Military Operations*, GAO-10-472 (Washington, D.C.: March 30, 2010).

<sup>21</sup> GAO was not provided access to certain documents requested in March 2009 until March 2010.

<sup>22</sup> GAO requested a copy of the study in July 2009, and DOD provided read-only access to it in November 2009.

<sup>23</sup> GAO requested a number of documents in May and June of 2009, but did not resolve all access issues until December 2009.

In our review of the Navy's transition from the Navy-Marine Corps Intranet to a replacement system known as NGEN, the Navy has generally cooperated with our document request; however, we have experienced delays in obtaining access to two key reports. In early January 2010, GAO requested the reports, which were prepared by a consulting firm for the Navy regarding the valuation of certain contractor assets involved in the transition to NGEN. Despite GAO's clear statutory right of access to those reports, and assurances provided with respect to our intended use of the information, the Navy initially refused to make the reports available on the grounds that they included "attorney-work product" or "source-selection sensitive" information. GAO elevated the matter through formal correspondence to the Navy asserting our access rights and direct discussions with the Navy General Counsel. The Navy recently provided us with one of the reports in its entirety and a redacted version of the second report. We will continue to press for access to all of the information we need to complete our review.

### **National Aeronautics and Space Administration**

The National Aeronautics and Space Administration (NASA) is generally cooperative in providing information needed to conduct our audit work. However, for GAO's first two annual assessments of NASA's major projects, published in March 2009 and February 2010, NASA denied GAO's requests for access to certain project information, known as the Cost Analysis Data Requirement (CADRe).<sup>24</sup> As we prepared to publish our first annual assessment without having received the information, language included in the explanatory statement accompanying the Omnibus Appropriations Act, 2009, directed NASA to provide such information in the future.<sup>25</sup> However, NASA again denied access to the CADRe information for our second annual review, which was issued in February 2010. While we were still able to meet our basic objectives of reporting cost, schedule, and performance status of NASA's major projects, this limited our ability to develop longer term perspectives on projects earlier in development and to assess NASA's efforts to improve preliminary cost and schedule estimating. NASA has since agreed to provide the CADRe documents for GAO's third annual review, which is currently underway, and we received those documents in early June.

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<sup>24</sup> These annual assessments are conducted pursuant to a reporting requirement established by the Appropriations Committees in December 2007, directing GAO to prepare project status reports on selected large-scale NASA programs, projects, and activities. House Comm. on Appropriations, 110<sup>th</sup> Cong., *H.R. 2765/Public Law 110-161 Legislative Text and Explanatory Statement*, at 300 (Comm. Print 2008).

<sup>25</sup> The explanatory statement provided that

NASA is directed to cooperate fully and to provide timely program analysis, evaluation data, and relevant information to GAO so that it can conduct this review and meet the annual Congressional mandate. Such information includes, but is not limited to, copies of preliminary cost estimates, access to relevant online agency applications, databases, and web portals, and access to information from contractor and agency personnel.

31 Cong. Rec. H1824-25 (Feb. 23, 2009). The Act itself specified that the explanatory statement was to have the same effect as a joint explanatory statement of a committee of conference. Pub. L. No. 111-8, § 4 (2009).



## Non-Federal Entities

GAO generally does not have a right of access to the records of non-federal entities. However, GAO may have a right to such records where provided by law or agreement, such as in the grant context.<sup>26</sup> Alternatively, it may request that non-federal entities provide information voluntarily.

As noted above, in an ongoing investigation of federal benefits fraud and other matters, GAO has gained access to new hire data from a number of states, although two states declined to cooperate, citing HHS' advice that GAO is not entitled to the data. In another investigation involving different federally funded databases (child abuser registries), a number of states have cooperated, but a few have resisted based on state confidentiality laws. In this case, HHS is actively assisting GAO in resolving the issue with the states that have not responded.

On another matter, in connection with a study of private investment in nursing homes for Senator Grassley, we contacted 10 private investment firms for information on nursing home ownership and involvement in nursing home operations. One firm did not respond to our repeated inquiries. In addition, we experienced significant delays in obtaining information from several other firms and were only able to do so after repeated inquiries using a variety of methods.<sup>27</sup>

## Legislative Developments

### The GAO Act

Since our September letter, the Government Accountability Office Improvement Act of 2010, H.R. 2646, passed the full House of Representatives,<sup>28</sup> and a companion bill—S. 2991—was introduced in the Senate.<sup>29</sup> These bills would strengthen GAO's access authority in several significant respects. For example, both bills contain a legislative remedy for the district court's decision in *Walker v. Cheney*, the case arising from GAO's efforts to obtain information about the operations of Vice President Cheney's energy task force.<sup>30</sup> Specifically, they reaffirm and make express GAO's authority

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<sup>26</sup> There are a number of crosscutting statutory provisions that give GAO access to certain classes of grantees, such as 31 U.S.C. § 7304 and 31 U.S.C. § 6503(h). Alternatively, specific grant program statutes may authorize GAO to access the records of federal grant recipients. GAO's access rights are also addressed in the grant management "common rules" and OMB guidance applicable to grants to state, local, and tribal governments.

<sup>27</sup> We have provided further details on this matter under separate cover, as requested by Senator Grassley's staff.

<sup>28</sup> H.R. 2646 was passed by the House on January 13, 2010.

<sup>29</sup> S. 2991 was introduced in the Senate on February 4, 2010, by Senators McCaskill and Collins.

<sup>30</sup> 230 Fed. Supp. 2d 51 (D.D.C. 2002). In *Walker v. Cheney*, the U.S. District Court for the District of Columbia decided—wrongly, in our view—that the Comptroller General lacked standing to sue to enforce GAO's right of access to records. While we believe another court considering this issue would likely reach a different decision, passing new legislation is the most expedient way to confirm the authority of the Comptroller General.

under 31 U.S.C. § 716(b) to pursue litigation to enforce its rights of access. The bills also contain a rule of construction intended to confirm GAO's access authority in 31 U.S.C. § 716(a) by providing that it may not be limited other than through express statutory language.<sup>31</sup> This confirmation of our authority refutes agency interpretations that deny GAO access simply because a program statute does not explicitly reference GAO. As discussed above, examples include HHS' interpretation of the Social Security Act pertaining to the National Directory of New Hires, as well as the FDA's interpretation of section 301(j) of the Federal Food, Drug, and Cosmetic Act.<sup>32</sup> Enactment of the rule of construction would result in enhanced congressional oversight in these areas. Additional provisions clarify GAO's authority in certain respects such as by confirming our right to copy agency records.<sup>33</sup>

### Patient Protection and Affordable Care Act

In our September 2009 letter, we noted that HHS, while generally cooperative, had taken the position that the Social Security Act prohibited the Centers for Medicare & Medicaid Services from providing GAO and others with certain data collected from sponsors of Medicare Part D plans. The recently enacted Patient Protection and Affordable Care Act resolved this matter, amending the Social Security Act to expressly provide for GAO access to the information in dispute for purposes of, and to the extent necessary, in carrying out health oversight activities.<sup>34</sup> While this recent change will facilitate GAO's contributions to congressional oversight of Part D, it could have the unintended consequence of undermining GAO's statutory right of access to agency records.<sup>35</sup> A rule of construction like the one described above, in the proposed GAO Improvement Act of 2010, would be consistent with the recent action on Part D, while also addressing this potential effect.

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<sup>31</sup> The rule of construction states:

No provision of any law in existence on the date of enactment of this section or enacted after such date shall be construed to limit, amend, or supersede the authority of the Comptroller General to obtain any information, to inspect any record, or to interview any officer or employee under this section, except to the extent such provision expressly and specifically refers to this section and provides for such limitation, amendment, or supersession.

<sup>32</sup> An additional example, which would be addressed by the rule of construction, is the Federal Trade Commission's (FTC) interpretation of the Hart-Scott-Rodino Act, as amended. The FTC has cited a provision of this act, which exempts information from public disclosure but states it is not intended to prevent disclosure to any authorized congressional committee or subcommittee, to deny GAO access to premerger information. 15 U.S.C. § 18a(h).

<sup>33</sup> While GAO's authority to inspect records includes the right to copy them—as recognized by the courts in analogous contexts—agency officials have occasionally insisted that GAO review agency records only on site, without making copies, even where no practical justification exists.

<sup>34</sup> Pub. L. No. 111-148, § 6402(b)(1), 124 Stat. 119, \_\_\_\_ (2010) (amending section 1860D-15(f)(2) of the Social Security Act, codified at 42 U.S.C. § 1395w-115(f)(2)).

<sup>35</sup> GAO has long taken the position that, in light of its clear and unambiguous statutory right of access and the well-established presumption against implied repeals, disclosure to GAO need not be expressly provided for where disclosures are otherwise limited.

## Intelligence

As previously described, the DOJ position regarding GAO authority to conduct intelligence oversight has had a broad negative impact on our access to information at several agencies that are part of the intelligence community. As noted in our September letter, the Senate intelligence authorization bill for fiscal year 2010 contained a provision confirming our authorities and refuting DOJ's position.<sup>36</sup> Since that time, the House has passed its own version of the intelligence authorization, with a provision that would require the Director of National Intelligence to ensure that GAO is provided with access to information necessary for intelligence community work on behalf of congressional committees of jurisdiction.<sup>37</sup> The Administration responded by warning that the President's senior advisors would recommend that the President veto the intelligence authorization if it included either of these provisions.<sup>38</sup> In my letter dated March 18, 2010, copy enclosed, I advised the intelligence committees of GAO's statutory right of access to the information involved and clarified several misstatements of law and fact within the Administration's response.<sup>39</sup> There have been no formal developments with respect to the intelligence authorization bills since that time, but recently, the House adopted another GAO intelligence access provision as a floor amendment to the House version of the National Defense Authorization Act for Fiscal Year 2011.<sup>40</sup>

## Federal Reserve

The Emergency Economic Stabilization Act requires GAO to report at least every 60 days on the findings resulting from our oversight of the actions taken under the Troubled Asset Relief Program (TARP). However, as described in our September

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<sup>36</sup> Section 335 of the Senate bill, S. 1494, would amend title 31 of the United States Code by reaffirming GAO's authority to perform audits of elements of the intelligence community at the request of relevant committees of jurisdiction. Intelligence Authorization Act for Fiscal Year 2010, S. 1494, 111th Cong. § 335 (as passed by the Senate, Sep. 16, 2009). It would also permit GAO to conduct an audit "involving intelligence sources and methods or covert actions," upon request of one of the congressional intelligence committees, while also establishing new procedures and directing elements of the intelligence community to cooperate fully with GAO.

<sup>37</sup> Section 335 of the House bill, H.R. 2701, would amend title V of the National Security Act of 1947 (50 U.S.C. § 413 et seq.) by directing the Director of National Intelligence to ensure that GAO personnel are provided with "access to all information in the possession of an element of the intelligence community" necessary to conduct an audit requested by a committee of Congress with jurisdiction over the program or activity. Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, 111th Cong. § 335 (as passed by the House, Feb. 26, 2010). It would also provide an exception restricting access to such information where the Director of National Intelligence determines the information "is necessary to protect the vital national security interests of the United States."

<sup>38</sup> Letter from Peter R. Orszag, Director, Office of Management and Budget, to the Honorable Dianne Feinstein, Chairwoman, Select Committee on Intelligence, United States Senate (March 15, 2010).

<sup>39</sup> Letter from Gene L. Dodaro, Acting Comptroller General, U.S. Government Accountability Office, to the Chairman and Vice Chairman, Select Committee on Intelligence, United States Senate, and Chairman and Ranking Republican, Permanent Select Committee on Intelligence, House of Representatives (March 18, 2010).

<sup>40</sup> National Defense Authorization Act for Fiscal Year 2011, H.R. 5136, 111<sup>th</sup> Cong. § 923 (as passed by the House, May 28, 2010).

letter, GAO's ability to review the Term Asset-Backed Securities Loan Facility (TALF), which was launched by the Federal Reserve and Treasury on March 3, 2009, is limited by the Federal Banking Agency Audit Act's (31 U.S.C. § 714) prohibition on GAO auditing the Federal Reserve's monetary policy and discount window lending activities. We limited the scope and conduct of our recently-completed audit of TALF accordingly, describing in our report the limits on GAO's authority.<sup>41</sup> To enable us to audit TARP most effectively, we continue to support legislation to provide GAO with the authority to audit the Federal Reserve's operational and administrative actions in connection with TALF.<sup>42</sup>

Along with these ongoing legislative efforts, we continue to devote a high level of attention to monitoring and aggressively pursuing access issues as they arise. We appreciate your attention to GAO's access difficulties, and we will continue to work with you and other Members of Congress to ensure that you are apprised of access problems that impede or delay our work. In addition, as you may know, we are annually reporting on the status of GAO's access at various departments and agencies in our performance and accountability reports.<sup>43</sup>

Thank you for your continued support of GAO and interest in these matters.

Sincerely yours,



Gene L. Dodaro  
Acting Comptroller General  
of the United States

Enclosure

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<sup>41</sup> GAO, *Troubled Asset Relief Program: Treasury Needs to Strengthen Its Decision-Making Process on the Term Asset-Backed Securities Loan Facility*, GAO-10-25 (Washington, D.C.: February 5, 2010).

<sup>42</sup> H.R. 4173, the Wall Street Reform and Consumer Protection Act of 2009, was passed by the House in December 2009, and on May 20, 2010, the Senate passed its version of H.R. 4173, the Restoring American Financial Stability Act of 2010. Both bills would provide GAO with expanded audit and access authority with respect to the Federal Reserve, including the authority we lacked to conduct the full TALF audit.

<sup>43</sup> GAO, *Performance & Accountability Report, Fiscal Year 2009*, GAO-10-234SP (Washington, D.C.: November 13, 2009).