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Federal Government Corporations: An Overview

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Summary

This report provides an overview of federal government corporations, a category currently consisting of some 18 corporate agencies performing functions assigned to them in law. A government corporation, as defined in this report, is an agency of government, established by Congress to provide a market-oriented public service and intended to produce revenues that meet or approximate its expenditures. Corporations cover the spectrum in size and function from large, well-known entities, such as the U.S. Postal Service and the Federal Deposit Insurance Corporation, to small, low-visibility corporate bodies, such as the Federal Financing Bank in the Department of the Treasury and Federal Prison Industries (UNICOR) in the Department of Justice.

Although no two government corporations are entirely alike, there are sufficient commonalities to make possible generalizations about their authorities, organization, mission, and depository practices. This said, it is also noted in the report that the dominant thrust in recent years with respect to regular executive agencies and corporations has been toward autonomy and disaggregation. Most proposed corporations, for instance, call for independent status outside the departmental structure, and in some instances outside the executive branch altogether.

Special attention is given to the Government Corporation Control Act of 1945 (GCCA), as amended. The Control Act is not a general incorporation act as is in effect in the states. The charter for each federal government corporation is the separate legislation passed by Congress, thus permitting wide variance in legal and organizational structure. What the Control Act does, however, is provide for standardized budget, auditing, debt management, and depository practices for those corporations listed in the act.

Within the executive branch, there is little central management agency oversight or supervision of government corporations as a class of agency. Congress, at present, does not conduct comprehensive management oversight of government corporations by a single committee, preferring instead that oversight be performed by subject-field committees on a corporate-specific basis.

The need for the executive branch and Congress to develop new organizational structures that take into account both the public law requirements of governmental status, and the flexibility that properly accompanies corporate bodies dependent upon revenues for services, will probably increase, rather than diminish, thereby ensuring the continuing attraction of the government corporation option.

This report will be updated annually.

Contents

Context	1
Evolution of the Federal Government Corporation	4
Characteristics of a Government Corporation	6
Legal Status	6
Budget and Finance	8
Location and Governance	10
Central Management Agency Oversight	12
Government Corporations as Transition Organizations	14
Conclusion	16
Selected Bibliography	19

List of Tables

Appendix 1. Federal Government Corporations	18
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Federal Government Corporations: An Overview

Context

There is continuing interest in Congress, the executive branch, and the scholarly community in a class of entities known collectively as government corporations.¹ The first question to raise respecting this continuing interest is: What is a federal government corporation, or, more precisely, what are the essential characteristics of a government corporation?

As defined in this report, a government corporation is an agency of government, established by Congress to perform a public purpose, which provides a market-oriented product or service and is intended to produce revenue that meets or approximates its expenditures. By this definition, there are 18 entities that are government corporations.²

The U.S. Code does not provide a single definition of the term “government corporation.” Title 5 of the *U.S. Code* defines “government corporation” as “a corporation owned or controlled by the Government of the United States” (5 U.S.C.

¹ Thomas H. Stanton and Ronald C. Moe, “Government Corporations and Government-Sponsored Enterprises” in Lester M. Salamon, ed., *The Tools of Government: A Guide to the New Governance* (New York: Oxford University Press, 2002), pp. 80-116; Jerry Mitchell, *The American Experiment with Government Corporations* (Armonk, NY: M.E. Sharpe, 1999); A. Michael Froomkin, “Reinventing the Government Corporation,” *University of Illinois Law Review*, (1995), pp. 543-634; Harold Seidman, *Politics, Position and Power: The Dynamics of Federal Organization*, 5th ed. (New York: Oxford University Press, 1998), pp. 189-96; U.S. General Accounting Office, *Government Corporations: Profiles of Recent Proposals*, GAO/GGD-95-57FS (Washington: GAO, 1995); U.S. Senate, Committee on Governmental Affairs, *Managing the Public’s Business: Federal Government Corporations*, by Ronald C. Moe, S.Prt. 104-18, 104th Cong., 1st sess. (Washington: GPO, 1995).

² For a list of federal government corporations, as defined in this report, please consult Appendix 1. This report’s definition of “government corporation” excludes a great many federal entities. It excludes private corporations created by federal statute (e.g., Securities Investor Protection Corporation, Fannie Mae) and congressionally chartered corporations (American National Red Cross). It also excludes some corporations that Congress itself has called “government corporations.” For example, the 108th Congress established the Millennium Challenge Corporation (MCC) as a “government corporation.” (P.L. 108-199) Though clearly a federal entity, MCC is not included on this report’s list because MCC does not provide market-oriented products or services — MCC is a grant-awarding agency that is not expected to be financially self-sufficient.

103).³ Meanwhile, the Government Corporation Control Act ((GCCA) 31 U.S.C. 9101-10) states that the term “government corporation” means “a mixed-ownership Government corporation and a wholly-owned government corporation.” It then lists 25 entities as government corporations (31 U.S.C. 9101).⁴

In addition to the enumeration of corporations provided in the GCCA, there have been several other listings of corporations available, each different and based upon the definition employed by the compiler. Corporations cover the spectrum from such large, well-known corporations as the United States Postal Service and the Federal Deposit Insurance Corporation to such small, low-visibility corporate bodies as the Federal Financing Bank in the Treasury Department and Federal Prison Industries (UNICOR) in the Justice Department.

The number of federal corporations is in moderate flux. New corporations are added from time to time (e.g., National Veterans Business Development Corporation in 1999), whereas others are dissolved and disestablished (e.g., Pennsylvania Avenue Development Corporation in 1996 and National Veterans Business Development Corporation in 2004).⁵

Government corporations should not be confused with other corporate organizations with ties to the federal government, such as government-sponsored enterprises (GSEs). A GSE (e.g., Fannie Mae)⁶ is a privately owned, federally chartered financial institution with nationwide scope and lending powers that benefits from an implicit federal guarantee to enhance its ability to borrow money. GSEs are important institutions worthy of separate analysis, but they are not discussed, except in passing, in this report.⁷ Finally, there are corporate bodies that are part of the growing “quasi government,” to use Harold Seidman’s phrase, where the legal and political lines of accountability are both intentionally and unintentionally made

³ This definition holds only for “the purpose of this title,” i.e., Title 5 of the *U.S. Code*.

⁴ This definition, it must be noted, the law declares to be only “for the purpose of this chapter,” i.e., chapter 91 of Title 31 of the *U.S. Code*.

⁵ The 2004 Omnibus Appropriations Act (P.L. 108-447, Div. K, Sec. 146) declared that the National Veterans Business Development Corporation (NVBDC), thought by some to be a government corporation, was “a private entity and is not an agency, instrumentality, authority, entity, or establishment of the United States Government.” On NVBDC as a government corporation, see Office of the Legal Counsel, United States Department of Justice, *Memorandum for Jennifer Newstead, General Counsel, Office of Management and Budget*, March 19, 2004. As page 6 of this report indicates, just because Congress has declared NVBDC to be a government corporation does not necessarily make it one.

⁶ In 1996, the board of directors of the Federal National Mortgage Association changed its name to Fannie Mae, although the law still refers to the organization by its former name.

⁷ For a discussion of GSEs, consult CRS Report RS21663, *Government-Sponsored Enterprises: An Institutional Overview*, by Kevin R. Kosar; and Thomas H. Stanton, *Government-Sponsored Enterprises: Mercantilist Companies in the Modern World* (Washington: AEI Press, 2002).

tenuous.⁸ In 1996, for instance, the Office of Personnel Management (OPM) created the United States Investigation Services Corporation as an employee stock-ownership plan (ESOP), an entry into the quasi government category that has sparked debate regarding its status and authority.⁹

Interest in the government corporation option, and variations on this theme, has increased in recent years.¹⁰ Three factors contributing to this interest are worth noting. First, the restrictive character of the federal budget encourages agencies to develop new sources of revenue (e.g., outsourcing services to the private sector and to other agencies) and to attempt to avoid increasing outlays.¹¹ Second, experience suggests that it is politically easier for corporate bodies to be exempted by Congress from general management law provisions (e.g., Freedom of Information Act, personnel and compensation ceilings) than it is for traditional agencies. Finally, the corporate concept appears to many, correctly or otherwise, to be supportive of the “New Public Management” that emphasizes entrepreneurship, risk-taking, and private sector practices in federal administration.¹²

In a typical contemporary session of Congress, several bills are introduced to establish government corporations. These actions prompt questions as to their legal character, their utility vis-a-vis traditional agencies, and their limitations as units of

⁸ Harold Seidman, “The Quasi World of the Federal Government,” *The Brookings Review*, vol. 2, summer 1988, pp. 23-27; CRS Report RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*, by Ronald C. Moe; Jonathan G. S. Koppell, *The Politics of Quasi Government: Hybrid Organizations and the Dynamics of Bureaucratic Control* (Cambridge, UK: Cambridge University Press, 2003); Ronald C. Moe, “The Emerging Federal Quasi Government: Issues of Management and Accountability,” *Public Administration Review*, vol. 61, May/June 2001, pp. 290-312.

⁹ U.S. General Accounting Office, *Privatization of OPM’s Investigations Service*, GAO/GGD-96-97 (Washington: GAO, 1996); Ronald P. Sanders and James Thompson, “Live Long and Prosper: How One Former Federal Organization Is Adjusting to Life After Government,” *Government Executive*, vol. 29, Apr. 1997, pp. 51-53; Stephen Barr, “OPM, in a First, Acts to Convert an Operation into Private Firm,” *Washington Post*, Apr. 14, 1996, p. A4; Dan Broidy, *The Iron Triangle: Inside the Secret World of the Carlyle Group* (New York: John Wiley, 2003).

¹⁰ U.S. General Accounting Office, *Government Corporations: Profiles of Recent Proposals*, GAO/GGD-95-57FS (Washington: GAO, 1995).

¹¹ For a discussion of how the Patuxent River Naval Air Station contracts out its services to state governments and private organizations, including use of their Defense Department aircraft, see Steve Vogel, “Pentagon Recruits New Business: Military Turns to Private Enterprise to Help Pay Bills,” *Washington Post*, Aug. 8, 1998, p. B1.

¹² The term “New Public Management” has gained currency in part through its use by the Organization for Economic Cooperation and Development (OECD) to refer to the literature, propositions, and practices that promote the conceptual convergence of governmental and private sector management. OECD, *Governance in Transition: Public Management Reforms in OECD Countries* (Paris: OECD, 1995); Donald F. Kettl, *The Transformation of Governance: Public Administration for 21st Century America* (Baltimore: The Johns Hopkins University Press, 2002); Robert D. Behn, *Rethinking Democratic Accountability: Performance and the New Public Management* (Washington: The Brookings Institution, 2001).

governmental institutions. For example, the 109th Congress is considering bills that would create a Louisiana Reconstruction Corporation (H.R. 4100 and S. 2172). This federal entity would engage in commercial-type transactions, such as purchasing and selling property, in areas of Louisiana affected by Hurricane Katrina.

A government corporation is not a panacea for contemporary public management problems. There are times when it may be an appropriate choice and times when it may not. Understanding the unique character of government management, based as it is upon tenets of public law, provides guidance in weighing these choices.¹³

Evolution of the Federal Government Corporation

Historically, the federal government has been involved in few commercial enterprises. There were some early instances of the federal government participating in otherwise private corporate enterprises on a shared ownership basis, most notably the first and second Banks of the United States. This practice came into question, however, as a consequence of a Supreme Court ruling in 1819.¹⁴ From that time to this, the federal government, with few exceptions, has consciously avoided shared ownership involvement with private, nongovernmental entities.

The first time the federal government acquired a corporation outright occurred in 1903, when the Panama Railroad Company was purchased from the French Panama Canal Company.¹⁵ Since then, a number of corporate bodies have been established as part of the federal government, with growth in that number tending to come in spurts and generally in response to emergencies. The first large-scale use of the corporate option accompanied the mobilization for World War I.¹⁶ Later, the Depression of the 1930s fostered numerous corporations (e.g., the Reconstruction Finance Corporation, and Tennessee Valley Authority).¹⁷ Finally, World War II prompted additional federal corporations. After the passing of each of these

¹³ See, for example, Ronald C. Moe, “The Importance of Public Law: New and Old Paradigms of Government Management,” in Phillip J. Cooper and Chester A. Newland, eds. *Handbook of Public Law and Administration* (San Francisco: Jossey-Bass Publishers, 1997), pp. 41-57.

¹⁴ *McCulloch v. Maryland* (17 U.S. (4 Wheat.) 315 (1819)). The Supreme Court’s ruling implied that partial federal ownership of a corporation, in this instance the Bank of the United States, assigned the corporation certain attributes normally reserved to the sovereign authority (e.g., non-taxable status). The Court also declared that the Necessary and Proper Clause of the Constitution (Art. I, sec. 8, cl. 18) permitted Congress to establish corporations. See also *Osborn v. Bank of the United States*, 17 U.S. (4 Wheat.) 738 (1824).

¹⁵ Marshall Dimock, *Government-Operated Enterprises in the Panama Canal Zone* (Chicago: University of Chicago Press, 1934).

¹⁶ Harold A. Van Dorn, *Government Owned Corporations* (New York: Alfred A. Knopf, 1926).

¹⁷ John Thurston, *Government Proprietary Corporations in English-Speaking Countries* (Cambridge: Harvard University Press, 1937).

emergencies, many of the corporations that dealt with them were abolished or absorbed into the permanent executive branch agencies.

In 1945, partly in response to the proliferation of corporate bodies created for the war effort, Congress passed the Government Corporation Control Act. Provisions of the act standardized budget, auditing, debt management, and depository practices for corporations. Notwithstanding unusual provisions that may be present in their enabling statute, government corporations remain “agencies” of the United States, and are therefore subject to all laws governing agencies, except where exempted from coverage by provisions of general management laws,¹⁸ or by provisions in the enabling act of the corporation.¹⁹

The GCCA is not a general incorporation act such as is in effect in the states. The charter for each federal government corporation is the separate enabling legislation passed by Congress. The GCCA also does not offer a general definition of what constitutes a government corporation. It simply enumerates organizations covered by the act.

In addition to the enumeration of corporations in the GCCA, there have been several other listings of corporations available, each different and based upon the definition employed by the compiler.²⁰ The corporations cover the spectrum from such large, well-known corporations as the United States Postal Service and the Federal Deposit Insurance Corporation to such small, low-visibility corporate bodies as the Federal Financing Bank and Federal Prison Industries.

In the absence of a general incorporation act with organizational definitions, how is one to know when a government corporation is the most suitable option, and what criteria should be met before a government corporation is established?

¹⁸ CRS Report RL30795, *General Management Laws: A Compendium*, Clinton C. Brass, Coordinator.

¹⁹ The Supreme Court opinion in the 1946 case of *Cherry Cotton Mills v. United States* (327 U.S. 536) held that government corporations are agencies of the United States. “That the Congress chose to call it [Reconstruction Finance Corporation] a corporation does not alter its character so as to make it something other than what it actually is, an agency selected by the Government to accomplish purely governmental purposes.”

²⁰ In a 1988 report the GAO profiled some 44 government corporations. U.S. General Accounting Office, *Profiles in Existing Government Corporations*, GAO/AFMD-89-43FS (Washington: GAO, 1988). In 1995, using a more precise and narrow definition, the GAO concluded that there were actually 22 government corporations. U.S. General Accounting Office, *Government Corporations: Profiles of Existing Corporations*, GAO/GGD-96-14 (Washington: GAO, 1995). Some years earlier, in 1981, the National Academy of Public Administration issued a substantial report on government corporations and listed 39 corporations. *Report on Government Corporations*, 2v. (Washington: National Academy of Public Administration, 1981). Finally, in a major study of government corporations, A. Michael Froomkin, using a somewhat eclectic definition, simply concluded that there were “more than forty” government corporations. “Reinventing the Government Corporation,” *University of Illinois Law Review*, 1995, p. 549.

In an effort to provide criteria to determine when the corporate option was appropriate, President Harry Truman, in his 1948 budget message, stated:

Experience indicates that the corporate form of organization is peculiarly adapted to the administration of government programs which are predominately of a commercial character — those which are revenue producing, are at least potentially self-sustaining and involve a large number of business-type transactions with the public. In their business operations such programs require greater flexibility than the customary type of appropriations budget ordinarily permits. As a rule, the usefulness of a corporation rests on its ability to deal with the public in a manner employed by private enterprise for similar work.²¹

Congress, generally at the President's behest, has created agencies titled "corporations" that do not meet these criteria. The Corporation for Public Broadcasting and the Legal Services Corporation are examples of "corporations" that do not perform commercial functions, although they receive incidental income from advertising rates and legal fees.²² A principal intention behind assigning this status and title was to provide considerable insulation from oversight by the central management agencies and the application of the general management laws.

Characteristics of a Government Corporation

No two federal government corporations are completely alike. There are sufficient commonalities among the several corporations, however, that it is possible to make some generalizations about their authorities, organization, mission, and behavior.²³

Legal Status

Government corporations, no matter what function they perform or how "private" they may appear to the public or to themselves, are agents of the state subject to constitutional limitations.²⁴ As the Supreme Court concluded in the 1995 *Lebron* case, a government corporation has certain inherent legal characteristics that

²¹ U.S. Congress, House, *Document No. 19*, 80th Congress, 2nd session (Washington: GPO, 1948), pp. M57-M62.

²² Neither CPB or LSC are government corporations; the U.S. Code explicitly denies that either is an agency or instrumentality of the federal government and neither are support themselves through commercial transactions. Both CPB and LSC are not-for-profit corporations chartered under the laws of the District of Columbia (47 U.S.C. 396 and 42 U.S.C. 2996). Of course, as the *Lebron* decision indicated, the Supreme Court, not Congress, is the ultimate arbiter of what is and is not a government corporation.

²³ For further information on the legal status and laws on budgeting and finances of government corporations, see General Accounting Office, *Principles of Federal Appropriations Laws*, Vol IV, pp. 17-119 - 17-216.

²⁴ Ronald C. Moe and Robert S. Gilmour, "Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law," *Public Administration Review*, vol. 55, Mar./Apr. 1995, pp. 135-46.

cannot be shed simply by legislative language or by corporate fiat.²⁵ The nature of the function performed (e.g., managing a railroad) has no effect upon its governmental character. The governmental and private sectors are fundamentally separate and distinct, with the distinctions based largely in legal theory, not economic theory.²⁶ This understanding is essential to recognizing both the potentialities and limitations of the government corporate concept. The government corporation remains governmental in character until Congress determines it shall be fully private, thereby coming under private law.

As a general proposition, the attorney general is vested with central control over the litigation to which the U.S. government is a party.²⁷ Various statutes recognize that the attorney general is the chief legal officer for all departments and agencies. However, in an uneven pattern over the years, exceptions have been permitted to this central authority. The independent regulatory commissions, for instance, have some independence (although the degree of independence varies considerably from commission to commission) in their litigation authority.²⁸ While the Justice

²⁵ The Supreme Court in a 1995 case faced the issue of distinguishing between a governmental and private corporation. The National Railroad Passenger Corporation (AMTRAK) established by Congress (45 U.S.C. 451), and enumerated as a “mixed-ownership corporation” under 31 U.S.C. 9101, was sued by Michael Lebron for rejecting, on political grounds, an advertising sign he had contracted with them to display. Lebron claimed that his First Amendment rights had been abridged by AMTRAK because it is a government corporation, and therefore an agency of the United States. AMTRAK argued, on the other hand, that its legislation provides that it “will not be an agency or establishment of the United States Government” and thus is not subject to constitutional provisions governing freedom of speech. The Court decided that, although Congress can determine AMTRAK’s governmental status for purposes within Congress’s control (e.g., whether it is subject to statutes such as the Administrative Procedure Act), Congress cannot make the final determination of AMTRAK’s status as a government entity for purposes of determining constitutional rights of citizens affected by its actions. To do so, in the Court’s view, would mean that the government could evade its most solemn constitutional obligations by simply resorting to the corporate form of organization. *Michael A. Lebron v. National Railroad Passenger Corporation*; 513 U.S. 374 (1995).

AMTRAK continues to seek distance from the application of the general management laws. In the AMTRAK Reform and Accountability Act of 1997 (P.L. 105-134; 111 Stat. 2570), AMTRAK was removed from the list of mixed-ownership government corporations in Title 31. And in any year when AMTRAK receives no government subsidy, it will be exempt from coverage under the Inspector General Act of 1978.

²⁶ Robert S. Gilmour and Laura S. Jensen, “Reinventing Government Accountability: Public Function, Privatization and the Meaning of ‘State Action,’” *Public Administration Review*, vol. 58, May/June 1998, pp. 247-58; Harold J. Sullivan, “Privatization of Public Services: A Growing Threat to Constitutional Rights,” *Public Administration Review*, vol. 47, Nov./Dec. 1987, pp. 461-68; Ronald C. Moe, “Exploring the Limits of Privatization,” *Public Administration Review*, vol. 47, November/December 1987, pp. 453-60.

²⁷ 28 U.S.C. 519: “Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this Title in the discharge of their respect duties.”

²⁸ For a discussion of litigation authority being delegated to agencies, see U.S. Congress, (continued...)

Department has consistently favored central coordination of litigation, this view has been difficult to maintain in practice. With the relatively small staff of the department and its understandable reluctance to become responsible for routine litigation, there has been a trend toward awarding greater authority and flexibility to the departments and agencies in their legal affairs.

With respect to government corporations, in their enabling legislation they are typically assigned a legal personality distinct from that of the United States. Most are subject to, and may initiate, civil suits. Government corporations, being agencies of the United States, have their employees come under the limited waiver of immunity provided in the Federal Tort Claims Act (FTCA).²⁹

Distinguished public administrator Harold Seidman notes: “As a body corporate, a government corporation has a separate legal personality distinct from that of the United States. A corporation, therefore, does not enjoy the traditional immunity of the United States from being sued without its consent.” Further, a corporation is generally provided authority “to determine the character and the necessity for its expenditures, and the manner in which they shall be incurred, allowed and paid.” Corporations can generally borrow funds through the Federal Financing Bank of the Treasury Department, one advantage of this practice being “that such unguaranteed corporate obligations are not included under the public debt ceiling.”³⁰

In practical terms, the purpose of permitting corporations to sue and be sued in their own name is to enable a private business to contract with a government corporation under the assurance that if something goes amiss, it can go to court to settle the matter. With a regular government agency, however, a contractual dispute must normally go through a laborious process in the Court of Claims; if the contractor wins, he must wait for an appropriation; the Departments of Justice and Treasury, the Office of Management and Budget, the President, and both houses of Congress may become involved in the claim. With the government corporation, however, this process is simplified, and when a contractor prevails, he can usually obtain a prompt settlement.

Budget and Finance

The budget process is a useful management tool for planning as well as for maintaining accountability. Presidents and central management agencies find the discipline of the budget an essential element in their management arsenal. Regular

²⁸ (...continued)

Senate, Committee on Governmental Affairs, *Study on Federal Regulations*, 5v. (Washington: GPO, 1974), vol. 5 (Regulatory Organization), pp. 54-67; U.S. Administrative Conference of the United States, “Multi-Member Independent Regulatory Agencies: A Preliminary Survey of Their Organization” (revised edition), May 21, 1990.

²⁹ The Federal Tort Claims Act defines federal agencies to include “the executive departments, ... independent establishments of the United States, and corporations (other than contractors) primarily acting as instrumentalities or agencies of the United States.” 28 U.S.C.A. 2671.

³⁰ Seidman, *Politics, Position, and Power*, 5th ed., p. 190.

agencies of the executive branch, with few exceptions, are subject to uniform rules and regulations with respect to the budgets. Government corporations, on the other hand, are exempt either individually or collectively from many executive branch budgetary regulations. These exemptions are predicated, for the most part, on the idea that with the corporate structure, users, rather than the general taxpayer, are the principal source of revenue, and that fluctuations in income and expenditures do not impact in any material way the budget of the federal government.

The GCCA, as amended in 1982 (96 Stat. 1042), provides that each wholly owned government corporation shall prepare and submit to the President a “business-type budget”

in a way and before a date the President prescribes by regulation for the budget program. This budget program shall contain estimates of the financial condition and operation of the corporation for the current and following fiscal years and the condition and results of operations of the last fiscal year. Further, it shall contain statements of financial condition, income and expense, and sources and uses of money, an analysis of surplus and deficit, and additional statements and information to make known the financial condition and operations of the corporation, including estimates of operations by major activities, administrative expenses, borrowings, the amount of U.S. Government capital that will be returned to the Treasury during the fiscal year, and appropriations needed to restore capital impairment.” (31 U.S.C. 9104)

The objective of the budget program is to permit the corporation sufficient financial flexibility to carry out its activities. The President, after review and revision, submits these budget programs to Congress at the same time as the executive branch budget is submitted. Under the Chief Financial Officers Act of 1990 (CFOA),³¹ government corporations must submit to Congress annual management reports, which are to include statements of financial position, operations, and cash flows, a reconciliation to the budget report of the government corporation (if applicable), and a statement on internal accounting and administrative control systems.³²

Many Members of Congress feel somewhat uneasy with broad, “business type budgets,” also referred to as “budget programs.” To be sure, Congress can alter these budget programs and can limit the use of corporate funds for any purpose, but this option is seldom employed. Faced with complex projections and agencies with little direct budgetary impact, Members understandably give corporate bodies marginal attention, and when they do, it is directed to the “administrative expenses” line account. It is not clear what the term “administrative expenses” entails, but corporations see it as including “entertainment expenses” and thus keep the latter to the minimum. As a general assessment, the corporations come under comparatively little congressional scrutiny, except when there is some political or financial threat evident. As Seidman notes: “In essence, the business-type budget provides for a qualitative rather than a quantitative review of proposed corporate expenses.”³³

³¹ P.L. 101-576.

³² 31 U.S.C. Sec. 9106(a)(2).

³³ *Ibid.*, p. 192.

Traditional agencies of the United States receive the preponderance of their financial support from funds appropriated by Congress. Government corporations, on the other hand, generally receive most, if not all, their funds from users of their services. Thus, the latter relationship has a business character in which it is the obligation of the corporate body to provide services as long as the buyers are willing to pay. This being the case, revenues, expenditures, and even personnel will tend to fluctuate according to consumer demand.

Until 1975, GAO was responsible under the GCCA for performing annual financial audits of government corporations. At the request of GAO, the GCCA was amended to provide for audits of the financial transactions of wholly owned corporations at least once every three years, rather than annual audits. In 1990, as part of the CFOA,³⁴ GAO's recommendation that government corporations be subject once again to annual audits was accepted. Henceforth, however, the audit is to be conducted by the corporation's inspector general "or by an independent external auditor, as determined by the inspector general or, if there is no inspector general, the head of the corporation," according to accepted government auditing standards.³⁵ The Comptroller General, however, continues to be authorized to review any corporate financial statement.

Location and Governance

The location, structure, and governance of government corporations varies greatly. Corporate status does not limit where in the executive structure a corporation may be located. Corporations may be located in executive departments (e.g., the St. Lawrence Seaway Development Corporation in the Department of Transportation), or be assigned independent status (e.g., the Export-Import Bank). A government corporation may be so structured that it is but a financial entity whose employees are actually employees of the parent agency (e.g., the Federal Financing Bank in the Department of the Treasury, and Commodity Credit Corporation in the Department of Agriculture).

There is no one form of governance necessarily associated with government corporations. Whether a government corporation is best managed by a full-time board (e.g., TVA, formerly),³⁶ a chief executive officer selected by a part-time board and responsible to it (e.g., Corporation for National and Community Service), a part-time board consisting of Cabinet-level officials of other agencies (e.g., Pension Benefit Guaranty Corporation),³⁷ a mixed board of governmental and private

³⁴ P.L. 101-576, Sec.305-306.

³⁵ 31 U.S.C. 9105.

³⁶ In 2004, P.L. 108-447, Div. C, Sec. 601 changed TVA's three-member, full-time board to a nine-member, part-time board.

³⁷ Cabinet secretaries placed on corporate boards, or any boards for that matter, rarely attend such meetings, sending subordinates instead to protect departmental interests. For approval of this process, see U.S. Department of Justice, 6 Op. Off. Legal Counsel 257, *Delegation of Cabinet Members' Functions as Ex-Officio Members of the Board of Directors of the* (continued...)

appointees (e.g., Overseas Private Investment Corporation), or a single administrator responsible to a department secretary, and ultimately to the President (e.g., Government National Mortgage Association, “Ginnie Mae”), is an open question. There are positives and negatives to the various options for corporate governance.

A board of directors is the trademark of a government corporation, according to many lawmakers and attorneys. Marshall Dimock, an academic writing in 1949, argued that a board of directors was considered an essential element for an “authentic” government corporation. “Being a separate and distinct entity, headed by its own board of directors, the corporation is inherently better able to succeed than the ordinary department of government.”³⁸

A few years later, Harold Seidman challenged the view that a board of directors was an essential and necessarily desirable element for a government corporation. Dimock’s view, he asserted, was based on an inappropriate borrowing of state practice by the federal government. State incorporation laws require boards of directors for private corporations to insure representation where ownership is held by more than one party. In government corporations, under this reasoning, because ownership resides in the government alone, there is no inherent need for a board of directors.³⁹ Government corporations, Seidman pointed out, have existed and operated without boards of directors. A board of directors may well be found advisable and useful under some circumstances, but, Seidman said, it is not the *sine qua non* of a government corporation.⁴⁰

Whether or not a board of directors is essential or desirable for a government corporation, the fact is that all but two federal government corporations presently

³⁷ (...continued)

Solar Energy and Energy Conservation Bank (1982).

The Pension Benefit Guaranty Corporation (PBGC), an agency within the Department of Labor, provides evidence of the problems that some analysts contend are associated with boards of directors that include officials of other departments. The board of directors of the PBGC has three members: the Secretary of the Treasury, the Secretary of Commerce, and as chairman, the Secretary of Labor. “Such arrangements,” according to the National Academy of Public Administration Report, “inherently cause confusion as to the corporation’s status and the role of the Secretary of Labor. To have Cabinet officers serve as directors of a subordinate unit of an executive department other than their own, places him and the head of that department in an anomalous position. Can the Secretaries of the Treasury and Commerce give orders to the Secretary of Labor? On the other hand, are the Secretaries of Treasury and Commerce, when acting as PBGC directors, in any way required in formulating policies to conform to the policies of the Secretary of Labor?” Perhaps because of such anomalies, although the bylaws call for “regular meetings,” the board never met between March 1982 and April 1991. National Academy of Public Administration, *Study of the Pension Benefit Guaranty Corporation’s Corporate Status* (Washington: NAPA, 1991), pp. 5-6.

³⁸ Marshall E. Dimock, “Government Corporations: A Focus on Policy and Administration,” *American Political Science Review*, vol. 43, Oct. 1949, pp. 914.

³⁹ Harold Seidman, “The Theory of the Autonomous Government Corporation,” *Public Administration Review*, vol. 12, spring 1952, pp. 93-111.

⁴⁰ *Ibid.*

have boards of directors. The two exceptions are the Government National Mortgage Association (“Ginnie Mae”), and the St. Lawrence Seaway Development Corporation. In a study published in 1981, the National Academy of Public Administration was critical of boards of directors in general:

We believe that this arrangement, borrowed from the private corporation model, has more drawbacks than advantages and that in most cases the governing board would be better replaced by an advisory board and the corporation managed by an administrator with full executive powers. A governing board may cut or confuse the normal lines of authority from the President or departmental secretary to the corporation’s chief executive officer. With an advisory board, the secretary’s authority to give that officer policy instruction is clear, as is the officer’s right to report directly to the secretary and to work out any exemptions from or qualifications of administration or departmental policies and practices which the corporation requires.⁴¹

There is little doubt that a board of directors, particularly a part-time, “outsiders” board, is a “buffer” between the corporation’s top executive and political officials, including the President. Whether such a buffer is a desirable feature in the overall administrative system, however, is a question subject to debate. Notably, it is also argued that corporation board appointments are patronage plums for the White House since the jobs are not generally demanding.

The effectiveness and utility of boards is dependent upon a number of factors: the coherency of the enabling legislation, the conceptual integrity and soundness of the program itself, and the number and quality of membership. Large boards (comprising more than 12 members), for instance, may experience difficulty in making decisions. The play of internal factors, such as the size of the board, the primary loyalties of board members (whether to the corporation or to an outside constituency group), and the relationship of the board to the corporate management all also have their place in the managerial equation.

Central Management Agency Oversight

There is, at present, little central management agency oversight or supervision of government corporations as a category of agency in the executive branch. Nor is there any central unit charged with designing government corporations from the perspective of presidential or central management interests.⁴² Government corporations today are largely perceived as discrete entities, each with its own political and administrative requirements, and each with its own route and degree of political accountability. Individual corporations come under scrutiny from time to time by OMB and Congress, or more precisely, a congressional committee

⁴¹ National Academy of Public Administration, *NAPA Report on Government Corporations*, 2 vols. (Washington: NAPA, 1981), I, pp. 31-32.

⁴² See, for example, Alan Dean, Dwight Ink, and Harold Seidman, “OMB’s ‘M’ Fading Away,” *Government Executive*, vol. 26, June 1994, pp. 62-64; Ronald C. Moe, “At Risk: The President’s Role as Chief Manager,” in *The Managerial Presidency*, 2nd ed., ed. James Pfiffner (Lawrence, KS: University Press of Kansas, 1999), pp. 265-84.

responsible for oversight. More often than not, the immediate impetus for the oversight follows from indications that a corporation is operating at financial risk or there is an appearance of wrongdoing.

The current absence of systematic oversight of corporations as a class runs counter to the intentions of the sponsors of the GCCA. The Bureau of the Budget (predecessor organization to the Office of Management and Budget) was instrumental in the passage of the GCCA, and created a separate office to oversee the formation, and monitor the operation, of government corporations on behalf of the President. During the 1960s, this specialized staff function atrophied until at some point in the 1970s it is fair to conclude that there was little remaining central executive staff capacity to provide information, expert advice, or oversight of government corporations or to develop and implement consistent policies governing their formation, authorities, and operations.⁴³

Government corporations are not considered by OMB to be a category of organization to be supervised collectively. OMB, in support of its position, contends:

The responsibility for oversight of government corporations was not changed by the OMB 2000 reorganization. That is, government corporations will continue to be reviewed by the Resource Management Office (RMO) which has responsibility for the functional area most closely associated with the corporation's mission.... OMB does not review government corporations separately from other government organizations that perform similar functions.⁴⁴

The executive branch treatment of management responsibilities respecting government corporations as a class of organization tends to place additional burdens on Congress and its committees to determine if the corporations are respecting the provisions of the general management laws (e.g., the National Environmental Protection Act and the Competition in Contracting Act).

One corollary of limited central management oversight of government corporations is the lack of answers to fundamental issues regarding when and how government corporations ought to be created and utilized. There are at least two schools of thought respecting the proper use of the government corporation option relating to its structure, authority, and financial systems. One school holds that government corporations, including agencies called corporations but which do not perform commercial activities, should be encouraged, provided maximum policy and

⁴³ The Office of Management and Budget (OMB) and its predecessor organization, the Bureau of the Budget (BOB), ceased to monitor government corporations and enterprises during the 1960s. Charles Bingman, speaking to a 1978 conference on public enterprises, noted that he had been the last person in the BOB to undertake this monitoring role. He stated that he ceased the monitoring when it became apparent that the leadership of the agency was no longer interested in this role. In his view, both the executive branch and Congress had effectively abandoned the intent of the GCCA. *Proceedings, Research Conference in Public Enterprises*, June 1, 1978 (Charlottesville, VA: Federal Executive Institute, 1978), p. 18.

⁴⁴ Letter dated May 24, 1994, from OMB Director Leon Panetta to Senators David Pryor and Carl Levin of the Senate Governmental Affairs Committee, p. 4.

financial autonomy, and be subject to such oversight as is appropriate for other agencies and instrumentalities in the same policy field. The legal responsibilities of the corporation should be located in its enabling statute.

The position of the second school is that government corporations should be established only when appropriate criteria and standards, developed by a central management agency, are met. Such standards should be reflected in a national incorporation law and apply to all proposed and functioning corporate bodies properly defined. Government corporations should be considered to be part of the executive branch, but with recognition of their distinctive needs and oversight requirements as a category of institutions.

Government Corporations as Transition Organizations

The government corporation concept may be considered a useful alternative to privatization of some agency, or it may be employed as a transition step toward eventual full privatization.⁴⁵ Our interest here is limited to the corporation as a transition option. The principal utility of the transitional government corporation is that it can demonstrate marketability and asset value, critical elements in any successful privatization venture.

An early successful example of the government corporation concept as a transition vehicle involved Conrail. Conrail was created by Congress as a government corporation in 1976 from the remnants of seven private, bankrupt railroads. It took some 10 years and an investment of \$8 billion by the federal government to bring Conrail up to industry standards before entertaining a reasonable expectation that the railroad would be attractive to private investors.⁴⁶ The federal government received approximately \$2 billion from the sale, but the real payoff was that the northeastern region of the country was once again provided a viable freight rail system. The transition period as a government corporation was necessary to

⁴⁵ The term “privatization” is defined and interpreted in different ways. E. S. Savas, for instance, defines it expansively to include virtually any decision (e.g., contracting with third parties) that moves an activity toward private sector practices. “Privatization can be defined broadly as relying more on the private institutions of society and less on government to satisfy people’s needs.” *Privatization and Public-Private Partnerships* (New York: Seven Bridges Press, 2000), p. 3. Others define the term narrowly to include only instances where a function or entity is fully shifted (divested) from the governmental to the private sector. Ronald C. Moe, “Managing Privatization: A New Challenge to Public Administration,” in *Agenda for Excellence 2: Administering the State*, eds. B. Guy Peters and Bert A. Rockman (Chatham, NJ: Chatham House Publishers, 1996), pp. 135-148. In this report, privatization is defined narrowly to embrace only those actions resulting in ultimate full divestiture.

⁴⁶ National Academy of Public Administration, *Conrail and the Uranium Enrichment Corporation: A Comparison*, by Alan Dean (Washington: NAPA, 1989), p. 5.

develop a record as a potentially profit-making venture prior to a successful privatization (divestiture) effort.⁴⁷

More recently, the U.S. Enrichment Corporation (USEC) has completed its transitional process toward full privatization, with mixed results. USEC, until 1993 a regular agency in the Department of Energy (DOE), operated uranium enrichment plants in Kentucky and Ohio. In the 1950s, the plants produced highly enriched uranium (HEU) for defense purposes. Times changed and the United States was successfully challenged by new international entrants into the market. Today, the United States produces little more than one-third of the world's enriched uranium, much of it destined for private operations.

The Energy Policy Act of 1992 (P.L. 102-486; 106 Stat. 2776) established the U.S. Enrichment Corporation as a wholly owned government corporation. The general intent of the legislation was to "privatize" the two plants and let them compete in the world market. A privatization plan was delivered by USEC to the President and Congress in 1995. The plan suggested that there were two primary methods of corporate divestiture: an initial public offering (IPO) and a merger or acquisition with another corporation or group of corporations.⁴⁸ After considerable discussion, the IPO option was selected, as it had been with Conrail.

The IPO of stock was completed on July 28, 1998, and raised an estimated \$1.9 billion for the federal government. The USEC transition process highlighted, however, one of the perennial problems in privatization efforts. Congress may intend a corporation to be private, but it also may want the corporation to continue to be involved in public policy implementation. In this instance, Congress wanted the corporation to participate in implementing a foreign policy objective, which was to purchase at above market rates a substantial amount of Russian enriched uranium otherwise destined for Russian weapons. Under the HEU agreement, USEC receives enriched uranium from Russian nuclear weapons and, in addition to its payment for the material, returns an equivalent amount of natural (unenriched) uranium to Russia to sell on the world market. This arrangement, from the corporation's perspective, has not proven viable and in October 1999, the USEC solicited Congress for "relief."⁴⁹

Another characteristic of a private corporation, legally organized and defined as such, is the right to cancel a program or withdraw from an activity if it is not

⁴⁷ It should not be forgotten that before Conrail could be privatized, it first had to be nationalized. Seven private railroad corporations went bankrupt and it required the federal government to resolve bankruptcy issues, establish a long-term, comprehensive commercial rail plan, develop corporate management capacity, invest capital funds, renegotiate contracts, and get the whole project functioning in a short period of time. The federal government was successful and only then was the private sector interested in "buying" the railroad.

⁴⁸ Peter Passell, "The Sticky Side of Privatization: Sale of U.S. Nuclear Fuel Plants Raises Host of Conflicts," *New York Times*, Aug. 31, 1997, p. 29.

⁴⁹ Martha M. Hamilton, "Uranium Company Seeks Federal Aid: Privatized USEC Warns of Losses," *Washington Post*, Oct. 30, 1999, p. E8.

deemed in the fiduciary interests of the shareholders. To the consternation of DOE officials, such a decision was reached recently by the USEC board of directors. One of the assets transferred from the DOE to USEC in the divestiture was the right to commercialize a new enrichment technology called “atomic vapor laser and isotope separation” (AVLIS), a technology in which DOE had invested over \$2 billion. On June 9, 1999, the board of directors of USEC determined that AVLIS was not commercially viable and canceled the program. The board’s decision made manifest the fiduciary distinctions between a government and private corporation.⁵⁰

The federal government may, for whatever reason, choose to directly divest itself of a commercial activity or asset and not follow the transition corporation option to establish its value in the market. Although a transition corporation had been recommended by an outside study,⁵¹ the Department of Energy determined to directly divest itself of the California fields of the Elk Hills National Petroleum Reserves. The sale of the reserve in 1999 was to Occidental Petroleum for \$3.65 billion.⁵²

Conclusion

The government corporation form of federal agency is a useful option to consider when establishing or reorganizing an agency with revenue potential. It is helpful to bear in mind, however, that there is no general provision in law that defines what, precisely, government corporations are. When writing the GCCA, Congress and the executive branch simply viewed the various corporate bodies, and defined them by enumeration, rather than by required characteristics. This relatively unstructured approach has meant that some corporate bodies (e.g., U.S. Postal Service) are not included in the GCCA enumeration, whereas other bodies, arguably non-corporate in function and authority (e.g., Corporation for National and Community Service) are listed.

There is little managerial oversight at present of government corporations as an institutional category by either the President or Congress. What oversight there is tends to be corporation-specific. In the case of Congress, corporations are assigned to committees of subject-matter jurisdiction. A GAO report recommended that

⁵⁰ Daniel Guttman, “The United States Enrichment Corporation: A Failing Privatization,” *Asian Journal of Public Administration*, vol. 23, December 2001, pp. 247-72.

⁵¹ National Academy of Public Administration, *Restructuring the Naval Petroleum and Oil Shale Reserves* (Washington: NAPA, 1994).

⁵² The problems associated with estimating the value, both to the federal government and to the would-be buyer, are discussed in Elizabeth Davis, “Once a Teapot in a Tempest, Now Just a Lonely Outpost: Navy Oversees Unwanted Oil Field,” *Washington Post*, Aug. 14, 1998, p. A23. The attractiveness of the “unwanted” Naval Petroleum Reserve increased with the rise in the world price of oil, and the Reserve was sold outright by the Department of Energy in February 1999 to Occidental Petroleum for \$3.65 billion. Susan Klann, “U.S. Oil Reserve Sale Sets Record,” *Denver Post*, Mar. 2, 1999, p. C2. Thomas H. Stanton, “Lessons Learned: Obtaining Value from Federal Asset Sales,” *Public Budgeting and Finance*, vol. 43, Spring 1993, pp. 22-44.

corporations properly require both subject matter and management oversight, and that the GCCA should be reconstituted to establish in law the characteristics of various types of corporate bodies.⁵³

Government corporations may be viewed as permanent agencies to perform a continuing governmental function (e.g., Federal Deposit Insurance Corporation); a temporary agency (e.g., Pennsylvania Avenue Development Corporation, Panama Canal Commission); or a transition agency to facilitate the process whereby a governmental agency or program is divested and transferred to the private sector (e.g., U.S. Enrichment Corporation). These options indicate the flexibility of the government corporation concept and may provide models for extending the corporate organization to other appropriations-funded agencies (e.g., U.S. Patent and Trademark Office and the U.S. Mint). Both the latter agencies and their programs meet the basic criteria for a government corporation and suggestions to this effect have been made.

The future of government corporations as a category of federal organization appears generally bright although they are not widely understood in executive management circles. The need for the executive branch and Congress to develop new organizational structures that take into account both the public law requirements of governmental status, and the flexibility that properly accompanies corporate bodies dependent upon revenues for services will foreseeably increase rather than diminish.⁵⁴ The managerial quality of the law establishing a corporation, may be a critical variable in determining the success or failure of that enterprise. If the conceptual basis of the law establishing a corporation or economic assumptions therein are faulty, as was allegedly the case with the Synthetic Fuels Corporation in the late 1970s, a government corporation may become a liability to the executive branch and face a short tenure.⁵⁵ On the other hand, if a federal government corporation is designed to conform with public law, governmental management principles, and sound economics, as discussed earlier, a corporate agency may provide a creative instrument to promote the public policy objectives of elected officials.

Although it has been the purpose of this report to emphasize the distinctive characteristics of federal government corporations, it is important to conclude with a statement of their shared characteristics with other federal agencies. The mission of both regular, appropriations-financed agencies and of government corporations is the same, to implement the laws passed by Congress.

⁵³ U.S. General Accounting Office, *Congress Should Consider Revising Basic Corporate Controls Laws*, GAO/PAD-83-3 (Washington: GAO, 1983).

⁵⁴ Most recently, the corporate option was considered, although not adopted, for what became the Transportation Security Administration in the Department of Homeland Security.

⁵⁵ Ronald C. Moe, "Government Corporations and the Erosion of Accountability: The Case of the Proposed Energy Security Corporation," *Public Administration Review*, vol. 39, Nov./Dec. 1979), pp. 566-572. Doug Bandow, "Synfuels, NoWinFuels," *New York Times*, Sept. 1, 1983, p. 25.

Appendix 1. Federal Government Corporations

1. Commodity Credit Corporation	(15 U.S.C. 714)
2. Community Development Financial Institutions Fund	(12 U.S.C. 4703)
3. Export-Import Bank	(12 U.S.C. 635)
4. Federal Crop Insurance Corporation	(7 U.S.C. 1501)
5. Federal Deposit Insurance Corporation	(12 U.S.C. 1811)
6. Federal Financing Bank	(12 U.S.C. 2281)
7. Federal Prison Industries (UNICOR)	(18 U.S.C. 4121)
8. Financing Corporation	(12 U.S.C. 1441)
9. Government National Mortgage Corporation	(12 U.S.C. 1717)
10. National Railroad Passenger Corporation (AMTRAK)	(49 U.S.C. 241)
11. Overseas Private Investment Corporation	(22 U.S.C. 2191)
12. Pension Benefit Guaranty Corporation	(29 U.S.C. 1301)
13. Presidio Trust of San Francisco	(16 U.S.C. 460bb)
14. Rural Telephone Bank	(7 U.S.C. 942)
15. St. Lawrence Seaway Development Corporation	(33 U.S.C. 981)
16. Tennessee Valley Authority	(16 U.S.C. 831)
17. U.S. Postal Service	(39 U.S.C. 101)
18. Valles Caldera Trust	(16 U.S.C. 698-v4)

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