Early Draft

UNLOCKING OTHER TRANSACTIONS

Mark Thomas*

* J.D. Candidate, Harvard Law School.

I. Introduction: The Cost of Uncertainty

Other Transactions represent federal recognition that traditional procurement is defective. Congress has granted OT authority at least thirty-six times to enable agencies across the government to bypass the thirty statutes and 2,100 pages of Federal Acquisition Regulations that encumber typical contracting arrangements. Despite OT success stories like SpaceX's Falcon 9 and the Covid-19 vaccines, however, OTs account for only 2% of contract spending and most agencies with authority never use it.[1]

OTs are growing in prominence and popularity, propelled by the Trump administration's emphasis on using them as one of its tools for increased government discretion over spending.[2] There have been many recent high-profile announcements of contracts awarded through an OT. For example, Scale AI got a $100 million OT contract to deliver AI tools to DOD.[3] DOD also (through the Defense Intelligence Unit, DIU) signed OTs with six geothermal developers to construct geothermal systems at DOD installations.[4] U.S. Special Operations Command awarded Anduril Industries an indefinite delivery and indefinite quantity Other Transactions contract worth almost $1 billion for counter unmanned systems.[5]

Nevertheless, three constraints hinder broader adoption of OTs: bureaucratic sclerosis, legal complexity, and the specter of corruption. This paper demonstrates that each barrier can be overcome. Part II documents the gap between the statutory authority agencies have and how they use it in practice. Part III uses a hypothetical to map the contours and limits of OT authority. Part IV addresses corruption risk and the Intel equity controversy. The Appendix catalogs all known OT authorities.

---

[1] U.S. Gov't Accountability Off., *A Snapshot: Government-Wide Contracting for FY 2024* (2024), https://files.gao.gov/multimedia/Federal_Government_Contracting-FY2024/index.html.

[2] *See* Exec. Order No. 14265, 90 Fed. Reg. 15621 (Apr. 15, 2025) ("Modernizing Defense Acquisitions and Spurring Innovation in the Defense Industrial Base").

[3] *Scale GenAI Platform. Scale AI Wins $100M Pentagon Agreement*, GovCon Wire (Sep. 18, 2025), https://www.govconwire.com/articles/scale-ai-dod-ota-agreement-donovan-gen-ai.

[4] *See DoD Expands Geothermal Initiative to Support Mission Assurance*, Def. Innovation Unit (Aug. 12, 2025), https://www.diu.mil/latest/department-of-defense-expands-geothermal-initiative-to-support-mission.

[5] *See Special Operations Command Selects Anduril Industries as Systems Integration Partner*, Anduril Blog (Jan. 24, 2022), https://blog.anduril.com/special-operations-command-selects-anduril-industries-as-systems-integration-partner-e40da542f18d.

II. Other Transactions are Defined But Underutilized

A. The Statutory Architecture of OTs

OTs are, definitionally, any legally binding agreement between the federal government and a private party that is *not* a procurement contract, a grant, or a cooperative agreement.[6] That exempts them from almost all of the regulations governing normal contracting and grantmaking.[7] That has been agency interpretation since NASA and DARPA began using OTs.[8] Congress has ratified this interpretation by renewing and expanding OT authority, both to DARPA and NASA and to other agencies.[9] Indeed, Congress has repeatedly exhorted agencies, particularly the Department of Defense (DOD), to use their OT authority more aggressively.[10] The 2018 National Defense Reauthorization Act (NDAA) directed DOD to prefer OTs for science and technology and prototyping programs, and the accompanying Senate Report expressed frustration at their slow uptake, instructing contracting officers to tolerate more risk in using OTs.[11] Congress similarly put pressure on the Department of Energy (DOE) to exercise its OT authority, requiring it to promulgate regulations for OTs in short order and directing it to use OTs for new grant programs.[12]

Because OTs are not procurement contracts, grants, or cooperative agreements, they are exempt from laws and statutes that specifically apply to such agreements.[13] The most comprehensive analysis of which statutes apply to OTs was performed by an Ad Hoc Working Group of the American Bar Association in 1996, which analyzed 29 laws' application to DOD's particular OT statute. Their draft paper is routinely cited by later analysts commenting on OTs. The group used several factors

---

[6] Nathaniel E. Castellano, *"Other Transactions" are Government Contracts, and Why It Matters*, 48 Pub. Cont. L.J. 485, 490 (Spring 2019).

[7] Erin L. Toomey & Julia Di Vito, *Government Contracts: Other Transaction Authority*, Thomson Reuters Practical Law Practice Note (2024).

[8] A.B.A, Section of Public Contract Law, *Ad Hoc Working Group on Other Transactions, Department of Defense "Other Transactions": An Analysis of Applicable Laws* 26 (1998) [hereinafter "A.B.A. Working Group"].

[9] *Id.*

[10] Armani Vadiee & Todd M. Garland, *The Federal Government's "Other Transaction" Authority*, 18-5 Briefing Papers 7 (Apr. 2018).

[11] *Id.* at 12–13.

[12] *See* Santi Ruiz, *How to Fix a Department's Funding Tools*, Statecraft (Apr. 10, 2025), https://www.statecraft.pub/p/how-to-fund-new-energy-tech (interviewing Narayan Subramanian) ("Congress is impatient, and had gotten increasingly impatient" at DOE not utilizing its OT authority).

[13] A.B.A. Working Group, *supra* note 8, at 16, ("To the extent that a particular requirement is a funding or program requirement or is not tied to the type of instrument used, it would generally apply to an 'other transaction.') (quoting 1996 memorandum by Undersecretary of Defense for Acquisition and Technology Paul G. Kaminski).

in determining if a statute only applied to procurement contracts (the focus of their work was procurement contracts, rather than grants). They looked at the terms of the statute itself, its legislative history, and where the statute was placed in the US Code relative to laws usually designed for procurement.[14] Later analysts have relied on similar techniques.[15]

Fiscal laws governing appropriations apply to OTs, which exempt agreements from process rules but not from funding rules.[16] When an OT draws from appropriations for funding,[17] it must follow requirements like the Purpose Statute ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.")[18] and the Necessary Expense doctrine ("an expenditure [must] be reasonably necessary or reasonably related to or make a direct contribution to carrying out an authorized function").[19]

B. Dormant Powers: The Gap Between Authority and Practice

Far more agencies have OT authority than is generally recognized.[20] The Appendix lists thirty-four grants of OT authority found in the U.S. Code across a dozen major executive agencies, including the Departments of Defense, Energy, Commerce, Interior, State, and Agriculture. These authorities come in two basic types, with many sub-variations. The DOD model is to restrict OTs to Research & Development and prototyping, and often to require the contractors to put up some money or not be a frequent government contractor.[21] This has been copied across other agencies, like DOE and DHS.[22] The other model is typified by NASA, which was the first to use OT authority (conceptualized as such) in 1958.[23] NASA's authority

---

[14] A.B.A. Working Group, *supra* note 8, at 23, 27. There is a robust academic debate about the legitimacy of the latter technique for inferring congressional intent, since the Office of Law Revision Council makes independent judgments about where to place laws in the US Code. *See* Daniel B. Listwa & Adam Flaherty, *Interpreting Code*, 61 Harv. J. on Legis. Online 69 (2024).

[15] Richard L. Dunn, *Other Transaction Agreements: What Applies?*, 32 Nash & Cibinic Rep. NL ¶ 22, at 69 (May 2018).

[16] *See* U.S. Dep't of Energy, *Guide to Other Transactions* 3 (Aug. 2023) (listing laws that apply to OTs, including "Federal Fiscal Laws – Annual Appropriations").

[17] Note that OTs do not have to be funded. Some of the first OTs by NASA were for unfunded collaborative research projects. *See* A.B.A. Working Group, *supra* note 8, at 2–3.

[18] 31 U.S.C. 1301(a).

[19] *Ass'n of Civilian Technicians v. F.L.R.A.*, 370 F.3d 1214, 1218 (D.C. Cir. 2004)

[20] *See* Gov't Accountability Off., *Federal Acquisitions: Use of 'Other Transaction' Agreements Limited and Mostly for Research and Development Activities*, GAO-16-209 (2016), https://www.gao.gov/assets/gao-16-209.pdf. (claiming eleven agencies have OT authority).

[21] *See* 10 U.S.C. §§ 4021–22.

[22] *See* 42 U.S.C. § 7256(g) (DOE); 6 U.S.C. § 391 (DHS).

[23] *See* 51 U.S.C. § 20113(e). Note that other agencies had OT authority before NASA; Congress gave the National Science Foundation authority to "enter into contracts or other arrangements" in 1950. *See* National Science Foundation Act of 1950, Pub. L. 81-507, 64 Stat. 149 (codified at 42 U.S.C. §

is broad, with no additional requirements around the type, terms, or parties of an OT. Other agencies have similarly broad authority, like USAID and NOAA.[24]

Relatively little is known about which agencies use OTs and how extensively. The data underlying U.S. Government Accountability Office (GAO) dashboard on government contract spending compiles OT spending that agencies reported by Air Force, Army, Department of Homeland Security (DHS), Navy, "Other Civilian Agencies," and "Other Defense Agencies."[25] The three listed military branches counted for 82% of reported OT spending in 2024; civilian agencies accounted for only 1%.[26] Moreover, a National Science Foundation Office of Inspector General (OIG) report from 2023 surveying OIG reports from four other agencies on OTs found that in many cases OTs failed to be reported at all.[27]

1. Bureaucratic Sclerosis

There are many anecdotal reports of cultural resistance among agency personnel to using OTs. Civil servants and military officers responsible for contracting are deeply enmeshed in the usual requirements for federal transactions, like the Federal Acquisition Regulations (FAR) for procurement contracts.[28] They are reluctant to abandon the traditional oversight and compliance safeguards that have guided their professional careers.[29] This leads many to see OTs as inherently risky, and opting into a risky format defies most bureaucratic norms.[30] This could explain why, when OTs do gain in popularity, agencies tend to tamp down on the rise in unregulated procurement instead of encouraging it.[31] This creates a negative feedback loop; inexperience and untrained personnel awarding OTs are likely to make errors, and such errors discourages the agency from promoting OTs by writing guidance or training personnel on how to use them.[32] Besides being risk-averse, many contracting

---

1870(c), as amended by the National Science Foundation Authorization Act of 1968 (Pub. L. 90-407)).

[24] *See* 22 U.S.C. § 2395(b) (USAID); 15 U.S.C. § 8531(d) (NOAA).

[25] *See* GAO, *supra* note 1.

[26] *Id.*

[27] *See* Nat'l Sci. Found. Off. of Inspector Gen., *Summary of Federal OIG Findings and Recommendations Related to Other Transaction Agreements*, Report No. 23-6-001 at 2 (2023).

[28] *See* Roza Sheffield, *Other Transactions Authority: Business Necessity That Needs a Minor Tune-up? Or Too Fast and Furious with Insufficient Compliance and Transparency Requirements?*, 53 Pub. Cont. L.J. 95, 142 (2023)

[29] *See id.*

[30] *See* Scott Amey, *Other Transactions: Do the Rewards Outweigh the Risks?*, POGO (Mar. 15, 2019).

[31] *See* Nicholas K. Feldstern, *Tempering the 809 Panel's Recommended Expansion of Other Transaction Authority*, 50 Pub. Cont. L.J. 471, 472 (2021).

[32] *See* Off. of Inspector Gen., U.S. Dep't of Def., Audit of Other Transactions Awarded Through Consortiums, Report No. DODIG-2021-077 at 18 (2021), https://media.defense.gov/2021/Apr/23/2002626394/-1/-1/1/DODIG-2021-077.PDF (DOD personnel "did not always award OTs in accordance with applicable laws and regulations because the DoD lacks sufficient training.").

officers steeped in the Federal Acquisition Regulations (FAR) simply don't see the need for OTs; they think the existing system is adequate and that wholesale circumvention of standard regulation is not warranted.[33]

2. Legal Uncertainty

The scant legal documentation on OTs limits their use. Few agencies and contracting officers have experience using OTs; they may not even know the authority is available. If they do know it's available, they have to address basic questions before it can be exercised: Who can use OT authority? What kinds of transactions are permissible or impermissible as OTs? What ethics rules govern agreements? How do administrative and appropriations law principles constrain OT flexibility? Without clear answers, risk-averse agencies default to traditional procurement methods instead of using this powerful authority.

The next section reduces legal uncertainty by answering a series of practical questions that agencies face before exercising OT authority to clarify its scope. The Appendix documents the existence of OT authority across a wide range of agencies and sub-agencies, some of which may never have been exercised.

3. The Specter of Corruption

The most common objection to OTs is that they circumvent the FAR guardrails that prevent corruption.[34] Without the protracted ceremonies of planning, solicitation, and secret bidding, private contractors could suborn government employees to direct government funds their way. The objection is not without merit; some critics have documented OTs that seem to have little other justification besides enabling cronyism, like OTs for janitorial service, guard services, video surveillance, and other activities that are commonly and easily procured through normal, regulated procedures.[35] Graft is, of course, always a risk in government spending—indeed, most contracts implicated in corruption schemes were executed pursuant to the FAR.[36] But the undefined increase to corruption risk pales in comparison to the well-documented money and time wasted from following inflexible, rote-bound procurement regulations.

---

[33] *See* Richard L. Dunn, *OTAs: 30 Years of Progress on a Rocky Road*, Nat'l Def. Mag. (Nov. 27, 2019), https://www.nationaldefensemagazine.org/articles/2019/11/27/viewpoint-otas-30-years-of-progress-on-a-rocky-road.

[34] *See*, *e.g.*, Sheffield, *supra* note 28, at 134 ("temptations for abuse of the system and fraud").

[35] Amey, *supra* note 30.

[36] *See*, *e.g.*, *USAID Official and Three Corporate Executives Plead Guilty to Decade-Long Bribery Scheme Involving Over $550 Million in Contracts; Two Companies Admit Criminal Liability for Bribery Scheme and Securities Fraud*, U.S. D.O.J. (Jun. 12, 2025), https://www.justice.gov/opa/pr/usaid-official-and-three-corporate-executives-plead-guilty-decade-long-bribery-scheme (USAID contracting officer funneled at least 14 prime contracts to co-conspirators in exchange for bribes).

III. A Hypothetical Exploring the Limits of OTs

Legal uncertainty deters risk-averse agencies from using OT authority. The following hypothetical makes OTs' legal topography legible by analyzing their relationship to established appropriations and administrative law principles. Imagine an agency titled the Agency for Manufacturing Planning (AMP). AMP is headed by a Secretary and its organic statute states "the Secretary may make grants and enter into contracts, cooperative agreements, and other transactions as may be necessary."[37] The agency has several subcomponents created by law, including the Future Investment Team (FIT). AMP intends to begin using its OT authority, which has gone unused for decades, and has questions about the parameters of its use.

Question 1: What must subcomponent Future Investment Team (FIT) do to exercise AMP's OT authority? Are there limits on its delegation?

FIT can exercise AMP's OT authority if it is delegated by the Secretary of AMP, who can delegate her OT contracting authority to a member of FIT. Although OTs are not *procurement* contracts governed by the FAR, they are contracts in the ordinary legal sense: they have an offer, acceptance, consideration, authority, and legal purpose.[38] The authority element means they must be signed by someone who has the legal authority to bind the federal government.[39] The power to contract is vested in the head of the agency, who usually delegates it to a Head of Contracting Activity (HCA).[40] For example, the Secretary of Defense has delegated to the heads of the sub-agencies the authority to act as head of agency, including to act as HCA and to delegate HCA authority further down the chain.[41] Most agencies that actively use OTs have set up a system for delegating authority to "Agreement Officers" (AOs), as a parallel to Contract Officers who operate under the FAR, to enter binding OTs on behalf of the agency.[42] AMP can set up a similar system for the Secretary to delegate OT contracting

---

[37] This is a mashup of several current agency authorities.
[38] *See* Castellano, *supra* note 6, at 493.
[39] *Id.*
[40] *See* FAR 1.601 ("authority and responsibility to contract for authorized supplies and services are vested in the agency head [who may] delegate broad authority to manage the agency's contracting functions to heads of such contracting activities"; this goes for non-procurement contracts as well).
[41] *See* DFARS 202.1; *Head of Contracting Activity*, Defense Acquisition University Glossary, https://www.dau.edu/glossary/head-contracting-activity.
[42] *See* U.S. Dep't of Energy, *supra* note 16, at 5 ("a warranted official of DOE authorized to execute OT agreements on behalf of DOE"); U.S. Dep't of Def. Office of the Under Sec'y of Def. for Acquisition and Sustainment, *Other Transactions Guide* 5 (Nov. 2018) ("The Head of the Contracting Activity (HCA) may be delegated authority
to appoint AOs and will establish internal requirements for appointment").

authority, potentially through an agency-wide HCA and/or a FIT-specific HCA, to an Agreement Officer within FIT.

There are no legal limits on the combination of spending authorities that the Secretary could delegate to FIT. Indeed, almost every federal agency exercises some form of procurement contracting authority in addition to other specialized authority it may have (e.g. to give out loans). A canonical case is DARPA, which exercises the specialized OT authority in addition to its ordinary procurement contracting authority; 10 U.S.C. § 4021 empowers the Secretary of Defense to act through DARPA or "any other element" of the DOD they designate to exercise OT authority, and 10 U.S.C. § 4001 empowers the Secretary to engage in non-OT R&D projects through any delegated sub-agencies.[43]

Other agencies have even more unusual combinations of spending or budget authorities, demonstrating that there is no limiting principle on their coexistence. One example is the Department of Agriculture's (USDA's) Rural Housing Service (RHS). Congress granted the Secretary of Agriculture a variety of loan authorities[44] that she in turn has delegated to RHS.[45] The Secretary also has revolving fund authority[46] under 7 U.S.C. § 1929 to administer insurance programs that support agriculture. RHS has been delegated revolving fund authority pursuant to § 1929 with respect only to "assets and programs relating to community facilities."[47] Other sub-agencies of USDA have been granted revolving fund authority under the same statute for a variety of other programs.[48] These examples demonstrate that a single sub-agency can hold a heterogeneous assortment of delegated spending authorities, and that the Secretary has discretion to delegate her authorities however she sees fit.

Question 2: Can AMP enter an OT to procure a technology that won't be delivered for five years?

Yes, but with a variety of constraints. The first constraint is that AMP must have enough appropriated funds from Congress to cover the cost of the OT. The Anti-Deficiency Act (ADA) prohibits agencies from incurring obligations in advance

---

[43] *See also* Santi Ruiz, *How to Buy Stuff Like DARPA Does*, Statecraft (Feb. 14, 2024), https://www.statecraft.pub/p/how-to-buy-stuff-like-darpa-does (interviewing Richard L. Dunn, who describes DARPA's acquisition of OT authority to augment its ordinary procurement authority).

[44] *See*, *e.g.*, 42 U.S.C. § 1472 (to low-income individuals and families to acquire, build, rehabilitate, or improve homes in rural areas).

[45] *See* 7 C.F.R. § 2.49(a)(2) (delegating authority over §1472, *inter alia*, to RHS Director).

[46] *See* U.S. Gov't Accountability Off., Principles of Federal Appropriations Law, GAO-04-261SP 12-85 (3d ed. 2008) [hereinafter "Red Book,"] ("A revolving fund authorizes an agency to retain receipts and deposit them into the fund to finance the fund's operations.")

[47] 7 C.F.R. § 2.49(a)(1)(ii).

[48] *See*, *e.g.*, 7 C.F.R. § 2.48(a)(2)(iii) (to the Rural Business-Cooperative Service Administrator "relating to assets and programs related to rural development"); 7 C.F.R. § 2.47(a)(4)(vii) (to the Rural Utilities Service Administrator "relating to assets and programs related to watershed facilities, resource and conservation facilities, and water and waste facilities").

of or in excess of the funds Congress has appropriated.[49] That includes a prohibition on entering "a contract or obligation for the payment of money before an appropriation is made unless authorized by law."[50] Thus while the executive branch, and its constituent agencies, have a general constitutional power to enter contracts,[51] the ADA limits that power to entering contracts for which Congress has already appropriated funds unless that agency has statutory contracting authority that overrides the ADA.

OT agreements are subject to the ADA and cannot obligate federal funds beyond what is available from valid appropriations.[52] OTs do not count as a "contract authority," which in appropriations law refers to the authority to make contracts without regard to the ADA's usual limitations.[53] A statute only grants such contract authority "if the law specifically states … that such a contract may be made."[54] For instance, the Federal Water Pollution Control Act Amendments of 1972 authorized the Environmental Protection Agency (EPA) Administrator the power to make grants to municipalities for water treatment projects , and that Administrator approval of a project "shall be deemed a contractual obligation of the United States for the payment of its proportional contribution to such project."[55] The Supreme Court held that this explicit language qualified as a contract authority and overcame ADA restrictions.[56] The standard language for OTs contains no similar terms, and usually is a simple grant of authority "to enter into and perform such contracts, leases, cooperative agreements, or *other transactions* as may be necessary to carry out the functions of the Administrator and the Administration."[57]

The second constraint is the time limitation of appropriations. OTs are not exempt from the requirement, derived from the ADA, that an appropriation can only be obligated during the fiscal year(s) for which it is authorized.[58] When Congress appropriates a sum of money to an agency, those funds are presumed to expire at the end of the fiscal year covered by the law that appropriated them, unless it "expressly provides that it is available after."[59] They must be obligated within that year or they are

[49] *See* 31 U.S.C. § 1341.
[50] § 1341(a)(1)(B).
[51] *See Van Brocklin v. Tennessee*, 117 U.S. 151, 154 (1886) ("The United States, for instance, as incident to the general right of sovereignty have the capacity, within the sphere of their constitutional powers, and through the instrumentality of the proper department, to enter into contracts and take bonds, not prohibited by law … although not expressly directed or authorized to do so by any legislative act").
[52] *See* A.B.A. Working Group, *supra* note 8, at 86–87.
[53] *See* Red Book, *supra* note 46, at 2-6.
[54] 31 U.S.C. § 1301.
[55] Pub. L. 92-500, 86 Stat. 816, 833, (1972).
[56] *See Train v. City of New* York, 420 U.S. 35, 39 n.2 (1975).
[57] 49 U.S.C. § 106(l) (Federal Aviation Administration OT authority) (emphasis added).
[58] *See* Castellano, *supra* note 6, at 505.
[59] 31 U.S.C. § 1301(c)(2).

no longer available.[60] Note that *obligating* the funds means to set them aside for the specific use, making them unavailable for other uses; *spending* the funds is the process of actually withdrawing from the Treasury and sending them to the recipient. Thus an appropriation for Fiscal Year (FY) 2000 could be spent in FY 2002 so long as it had been obligated in FY 2000.[61] The lag between obligation and expenditure, however, cannot exceed five years; after five fiscal years, any obligated funds that have not been spent get canceled and returned to the Treasury.[62] This is usually not a binding limitation, because the contract can provide for the agency to deliver payment before the contractor completes performance.

To use annual appropriations on contracts with performance after the fiscal year, agencies must comply with the "bona fide needs" rule. This rule is a proposition inferred from the ADA and the Purpose Statute, based on century long executive branch practice, and formalized through dozens of Comptroller General decisions.[63] A simple statement of the principle is that an annual appropriation may be obligated only to meet a bona fide need arising in the fiscal year for which the appropriation was made.[64] Thus if AMP has a need for the technology in the current fiscal year, then it can spend this year's funds on the technology that won't be delivered until five years later. For instance, a contract to construct a ship needed this year but that will take three years to build satisfies the bona fide needs rule.[65]

A bona fide need can extend to future years it is "entire" and not "severable."[66] For example, if the ship contract were terminated after one year, the government would not have benefitted; one third of a ship is not especially useful. But if the contract were instead for one ship each year for three years, then terminating the contract after only one year would still provide the government with a ship. That is severable.[67] In general, services are severable if they are continuing and recurring in nature, while services that represent a single undertaking are considered entire.[68] Similar to services, goods can be delivered later if the additional time is needed for fabrication or some other process.[69] But if the agency does not actually need the goods

---

[60] *See* 31 U.S.C. § 1502(a) (appropriation is available "only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title.").
[61] *See* Red Book, *supra* note 46, at 5-3–5-4 ("the general rule is that the availability relates to the authority to obligate the appropriation, and does not necessarily prohibit payments after the expiration date for obligations previously incurred, unless the payment is otherwise expressly prohibited by statute").
[62] 31 U.S.C. § 1552.
[63] *See* Red Book, *supra* note 46, at 5-11; *see also* Bona Fide Need, Def. Acquisition Univ. ABUS 013, https://www.dau.edu/acquipedia-article/bona-fide-need.
[64] *Id.* (paraphrased).
[65] *See id.* at 5-37.
[66] *Id.* at 5-23.
[67] *See id.* at 5-28.
[68] *Id.* at 5-24.
[69] *Id.* at 5-22–23.

until a future year then it cannot order them this year.[70] The purpose of the bona fide needs rule is to prevent agencies from obligating funds from expiring appropriations to future years just to preserve the money, which would enable them to transfer money from one year to another in defiance of congressional appropriations.[71]

Agencies can also enter contracts with performance after the fiscal year using appropriations that last past the fiscal year. Congress must explicitly designate such funds' time horizons, and they are termed either multi-year funds (if they expire past the current fiscal year) or no-year funds (if they have no expiration date). The bona fide needs rule applies to a multi-year appropriation at any point in its span of years.[72] For example, if AMP needs a technology in year two of a five-year appropriation, then it meets the bona fide needs rule for using that appropriation. But if AMP needs a technology in year four and the appropriation only lasts for three years, then such a contract would violate the bona fide needs rule if it paid from that appropriation. The bona fide needs rule does not apply to no-year funds, so AMP can disregard this constraint if it intends to use a no-year appropriation that lasts indefinitely.[73]

There are some separate authorities that authorize an agency to enter a contract without following the bona fide needs rule. These are usually termed "multi-year contracts" and mean that the needs they fulfill extend past the current year.[74] If AMP had multi-year contract authority, then it could use an annual appropriation to enter a contract to construct one ship a year for the next three years.[75] OT authority is not multi-year contract authority. Moreover, multi-year contract authorities are almost always for *procurement* contracts. For example, 41 U.S.C. § 3903 permits multi-year contracts for purchasing property and services no more than five years out.[76] Its language indicates that it is specifically about "acquisition," meaning procurement.[77] The original law was specifically about "public contracts," amends Title 41, and begins with a section outlining federal procurement policy.[78] OTs cannot avail themselves of this kind of authority because they are not procurement contracts. This is the other edge of the OT sword; OTs are not bound by the requirements of procurement contracts, but they also can't utilize exemptions or powers afforded specifically to procurement contracts.

---

[70] *Id.* at 5-22.
[71] *Id.*
[72] *Id.* at 3d ed. 5-14–15.
[73] *Id.* at 5-15.
[74] *See id.* at 5-37.
[75] *Id.*
[76] *See* U.S. Gov't Accountability Off., B-322455, *Department of Health and Human Services—Multiyear Contracting and the Bona Fide Needs Rule* (Aug. 16, 2013) (holding that 41 U.S.C. § 3903 provides an exception to the bona fide needs rule).
[77] *See* § 3903(b).
[78] *See* Act of Jan. 4, 2011, Pub. L. No. 111–350, 124 Stat. 3677.

Question 3: Can AMP use OT authority to create an advance market commitment?

Advance market commitments (AMCs) are binding contracts that guarantee a future purchaser for an undeveloped product.[79] They originate in the global health domain, where they were set up to incentivize pharmaceutical companies to develop vaccines targeting neglected diseases.[80] AMCs are designed to encourage innovation by de-risking investment while maintaining competition.[81] AMCs are a classic use case for OTs, but still have to abide by appropriations principles like full availability of funds at the time of obligation. Two prominent examples of OT-enabled AMCs are NASA's Commercial Orbital Transportation Services (COTS) program and Operation Warp Speed (OWS).

COTS was designed as a milestone-based competition between multiple participants.[82] In Phase 1, NASA provided funding over four years for private firms, who were expected to secure additional outside funding.[83] Out of six semifinalists, two were selected to participate in Phase 1.[84] The participants, SpaceX and Rocketplane Kistler (RpK) signed OT agreements (known in NASA as Space Act Agreements) designating a series of milestones they had to hit to get additional funding.[85] RpK only got $32 million of its potential $207 million award because it failed to hit milestones.[86] SpaceX completed all the milestones and got its full $278 million award, developing the Falcon 9 rocket and Dragon capsule in the process.[87]

OWS was a partnership between the Department of Defense (DOD) and Department of Health and Human Services (HHS) to accelerate development of a Covid-19 vaccine.[88] An essential part of OWS was a series of OTs structured as AMCs with different pharmaceutical companies where the government committed to purchase a certain number of doses of Covid vaccines if the pharma developer created

---

[79] *See* Alan Ho and Jake Taylor, *Using Advance Market Commitments for Public Purpose Technology Development*, Harvard Belfer Center (Jun. 2021), https://www.belfercenter.org/publication/using-advance-market-commitments-public-purpose-technology-development.
[80] *See* Anthony E. Chavez, *Turning Carbon Into Gold*, 32 Duke Env. L. & Pol'y Forum 1, 43 n.374 (2021).
[81] *Id.*
[82] *See* U.S. Gov't Accountability Off., B-298804, *Matter of: Exploration Partners, LLC* at 2 (Dec. 19, 2006).
[83] *Id.*
[84] Eli Dourado, *A 2006 NASA program shows how government can move at the speed of startup*s, Ctr. for Growth and Opportunity (Mar. 15, 2021), https://www.thecgo.org/benchmark/a-2006-nasa-program-shows-how-government-can-move-at-the-speed-of-startups.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] U.S. Gov't Accountability Off., GAO-21-319, *Operation Warp Speed: Accelerated COVID19 Vaccine Development Status and Efforts to Address Manufacturing Challenges* (Feb. 11, 2021).

them and the FDA approved them.[89] Pfizer, for instance, was promised $2 billion for 100 million doses of an approved vaccine.[90] These OT agreements amounted to over $29 billion in commitments to purchase vaccines from various sources.[91]

Both of these programs complied with the appropriations law requirements mentioned earlier. Space transportation and vaccines were both needed in the year in which the agreement was signed and the funds were obligated, even if they were only completed later. Neither was severable, as a partial vaccine or an incomplete rocket would not satisfy the ultimate need. Both also stated their "need" as promoting research and private market capacity, which is similarly nonseverable.[92] Finally, note that they both fit within the five-year time window for spending obligated payments; COTS was structured as a four-year program, so the funds it obligated to RpK and SpaceX would still be available if and when they met their milestones.

Question 4: Can AMP use OT authority to create an inducement prize?

Unlike an AMP, an inducement prize is not a binding contract between particular parties. It is rather an open offer to any comers that forms a contract once a party has demonstrated the requisite performance to win the prize. Such a prize can be structured as an OT, offering to pay a certain sum to the first entity to accomplish a specific task.[93] An OMB memo from 2010 suggests that agencies should use OT authorities for prizes.[94] Most agencies that do so operate in partnership with a nongovernmental organization, like the X Prize foundation.[95] Of course, the prize will face the usual limitations on the availability of appropriations that apply to OTs,

---

[89] Sarosh Nagar, Anil Cacodcar, and Aaron S. Kesselheim, *Advance Market Commitments and Their Role in Public Innovation*, 53 J. of L., Med. & Ethics 478, 479 (2025).
[90] *Id.*
[91] *Id.*
[92] *See* Trump Admin., U.S. Dep't of Health & Hum. Servs., *Trump Administration Announces Framework and Leadership for 'Operation Warp Speed*, (May 15, 2020), https://www.war.gov/News/Releases/Release/Article/2310750/trump-administration-announces-framework-and-leadership-for-operation-warp-speed (OWS intended to "accelerate the development, manufacturing, and distribution of COVID-19 vaccines"); Space Act Agreement Between Nat'l Aeronautics and Space Admin. and Space Expl. Techs. Corp. for Com. Orbital Transp. Servs. Demonstration, art. 2.A (May 30, 2006), https://www.nasa.gov/wp-content/uploads/2015/04/189228main_setc_nnj06ta26a.pdf?emrc=12cb23 (COTS intended to "stimulate commercial enterprises in space").
[93] Or, alternatively, to give a prize to the highest accomplishment as defined within a particular time period.
[94] OMB Memorandum M-10-11, *Guidance on the Use of Challenges and Prizes To Promote Open Government* 9 (Mar. 8, 2010).
[95] The Department of Energy gave grants to the Foundation for a contest on vehicle fuel efficiency. *Id.* at 7. NASA ran a prize for students using an OT agreement with the American Society of Mechanical Engineers Foundation. *See Future Engineers 3D Space Design*, Challenge.gov Case Study, https://www.challenge.gov/toolkit/case-studies/future-engineers-3d-space-design/.

including the five-year limitation on spending obligated funds. If AMP obligated $10 million for the winner of the prize, someone would have to win and claim it within five years or the money would return to the Treasury.

Most prizes, however, are conducted under the authority of the America COMPETES Act rather than as an OT.[96] That Act authorizes the head of every agency to conduct prizes to "stimulate innovation that has the potential to advance the mission of [their] agency."[97] This authority specifically exempts appropriations obligated for prizes from the five-year limitation on obligated funds, functionally converting the money into a no-year appropriation by virtue of its association with the prize.[98] The disadvantage of this specific prize authority is that it comes with various requirements that an OT does not have: it can only be granted to US entities,[99] has strict rules around judging,[100] and may impede federal use of intellectual property developed during the prize.[101] AMP would have to decide whether these requirements would impede the mission and it should use its OT authority instead, with its five-year limitation.

Question 5: Can AMP use an OT to give out a loan? If so, can it reinvest the returns?

AMP's statute empowers it to "enter into contracts, cooperative agreements, and other transactions." The original interpretation of OTs is that this language covers any type of legal contract that is legally cognizable, with any terms.[102] Loans are a legal contract and are therefore permissible by the standard grant of OT authority. AMP's statute text gives no indication that loans are somehow exceptional. But lending raises several other more complex questions. Note that while the following focuses on a direct loan, the analysis is the same for a loan guarantee.

---

[96] America Competes Reauthorization Act of 2010, Pub. L. No. 111–358, 124 Stat. 3989 (codified at 15 U.S.C. § 3719).

[97] 15 U.S.C. § 3719(b).

[98] *See* § 3719(m)(1) (funds for the prize "may consist of Federal appropriated funds"); (m)(2) ("Notwithstanding any other provision of law, funds appropriated for cash prize purses or non-cash prize awards under this section shall remain available until expended."). *See also* Dept. of Interior, *Guidance for Prize Challenges to Stimulate Innovation*, Attachment at 1 (Mar. 2015) (interpreting 3719(m)(1) to apply to all federally appropriated funds, including annual appropriations and general purpose funds).

[99] § 3719(g)(3).

[100] § 3719(k)

[101] § 3719(j)(1) states that a participant must give their "written consent" for the government to acquire their IP, and (j)(2) states that the government would have to negotiate with a registered participant to license their IP. It is unclear if the statute permits the government to require registrants to agree to IP licensure or acquisition by the terms of participating in the prize.

[102] *See* Ruiz, *supra* note 43 ("Contracts can be almost anything that two or more parties agree to.") (quoting Richard L. Dunn in interview) (quoting Paul Dembling, author of the Space Act and originator of OTs).

Can an OT loan take advantage of the Federal Credit Reform Act's (FCRA) subsidy cost accounting?[103] Under FCRA, federal loans are counted against the agency's budget and the federal budget only to their calculated net present value.[104] So if an agency lends $10 million, but expects to get $5 million back (after accounting for any interest and the discounted value of future revenue), then they only have to spend $5 million out of their budget for the $10 million loan. The other $5 million comes out of a "financing account" that is separate from the official budget.[105] The language of FCRA seems to apply to any loan given by the federal government; it defines the loans it covers in general terms, with specific exclusions for price support loans from the Commodity Credit Corporation.[106] But the statute is targeted at specific agencies who have been "authorized to make direct loan obligations."[107] It is unclear if most courts would interpret the statute to only cover those agencies with express direct loan authority or to apply more broadly to include OTs.

The more immediate barrier is administrative. The Treasury and the Office of Management and Budget (OMB) have to set up specific financing accounts for each loan program under FCRA.[108] They have not set up such an account for AMP, which doesn't have formal loan authority but is just making a one-off loan as an OT. Getting Treasury and OMB to set up a credit account for a single loan to which FCRA's applicability is uncertain might also pose political problems. In practice, then, it's not feasible to use FCRA subsidy cost accounting for an OT loan and AMP will have to have the full amount of the loan available when it makes it.

Another important consideration is that AMP will not receive any loan repayments back to its own budget. The Miscellaneous Receipts Statute requires that when any government agent receives money "from any source" they deposit it in the Treasury, unless AMP has legal authorization to keep it.[109] When the recipient starts paying their loan back, AMP will have to deposit it directly in the public fisc and it will not be credited on their account. This has the unfortunate consequence of AMP facing the same costs for giving money away as for loaning it out and getting repayment.

Some agencies with OT authority can keep money that is repaid to them. DOD's OT authority includes a provision enabling OTs to "include a clause that requires a person or other entity to make payments to the Department of Defense or any other department or agency of the Federal Government as a condition for

---

[103] *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101–508, § 13201(a), 104 Stat. 1388, 1388-609.
[104] *See* 2 U.S.C. § 661a(5).
[105] § 661a(7).
[106] § 661a(2) ("The term "direct loan" means a disbursement of funds by the Government to a non-Federal borrower under a contract that requires the repayment of such funds with or without interest.").
[107] § 661d(a).
[108] *See generally* Off. of Mgmt. & Budget, Exec. Off. of the President, Circular No. A-11, Section 185 (Aug. 2025).
[109] 31 U.S.C. § 3302(b).

receiving support under the agreement or other transaction."[110] That money gets credited to the budget of the military department that spent the funds, and are "available for the same purposes and the same period" as other funds in that account.[111] The Department of Energy (DOE) has the same power, because its OT authority defined by reference DOD's authority, with the "same terms and conditions."[112] The Department of Commerce also has repayment authority.[113] Without such express authority, however, loan repayments to other agencies go back to the Treasury.

DOD has used its repayment authority extensively. The very first non-NASA OT was between DARPA and Gazelle Microcircuits in 1990, and included a provision for DARPA to get a "fair return" on its $4 million investment.[114] The payback from Gazelle could be in royalties in sales or in the increase in the company's value after some period of time.[115] The goal was to make money out of the deal, although it ultimately resulted in political fallout due to the deal's novelty.[116] For the duration of the OT, however, DARPA sent a representative to sit on the company's board and functioned much like a typical equity investor.[117]

Question 6: Can AMP use an OT to take out a loan?

No. The ADA prevents agencies committing to pay money before an appropriation is made for that payment.[118]

Question 7: Can AMP use an OT to take an ownership stake in a private or public company?

OTs can include contracts to purchase all kinds of assets. There is no statutory exception for company stock. Of course, the usual restrictions would have to apply—AMP could only spend an appropriation available for that purpose during that timeframe, and it would have to establish a bona fide need for the stock unless it was using no-year funds. As with a loan, if AMP acquired stock in a company and later sold it (assuming the sale was legally authorized, see Question 8 below), the proceeds from that sale would go to the Treasury and not to AMP.

---

110 10 U.S.C. § 4021(d)(1).
111 § 4021 (d)(2).
112 42 U.S.C. § 7256(g)(1).
113 15 U.S.C. § 4659(b).
114 Richard L. Dunn, *Origins and Evolution of Other Transactions – Part 3*, Strategic Institute (Sep. 12, 2018), https://strategicinstitute.org/other-transactions/origins-evolution-transactions-part-3/.
115 *See* Ruiz, *supra* note 43 (quoting Richard L. Dunn in interview).
116 *Id.*
117 *Id.*
118 31 U.S.C. § 1341(a)(1)(B).

Question 8: Can AMP transfer other assets in an OT?

Through previous OTs, AMP has acquired a number of assets, including transferable intellectual property licenses and stock in public companies. OT authority does not enable AMP to transfer these assets to any other party. When Congress appropriated money to AMP, the agency gained the power to withdraw those amounts from the Treasury for the specified purposes.[119] But AMP has received no equivalent authorization from Congress that it can dispose of other government property.

Just as the Spending Clause vests in Congress the power to control money spent from the Treasury, the Constitution's Property Clause vests the power to dispose of US government property in Congress.[120] The Supreme Court has held the Property Clause implies that the executive branch, including agencies like AMP, lack the power to dispose of property without authorization from Congress.[121] Such property includes both real property, like land and buildings, and personal property, like intellectual property and company stock.[122] AMP would need a separate authority to authorize it to transfer or dispose of such property, separate from its OT authority.[123]

IV. Applied Analysis: Contemporary Controversies

The flexibility that makes OTs attractive for innovation also creates vulnerability for abuse. Without FAR's competitive bidding requirements and procedural safeguards, critics worry that OTs could enable government officials to illegitimately funnel awards to favored contractors. This concern is not hypothetical—a variety of recent OT awards have been criticized for crossing ethical lines. But the specter of corruption need not prevent OT adoption. Existing legal frameworks already constrain corrupt behavior through criminal fraud statutes, ethics regulations, and debarment procedures. Where these mechanisms leave gaps, transparency can provide oversight without reimposing the procedural burdens that OTs were created to address. The recent Intel equity transaction demonstrates how appropriations law principles set meaningful boundaries on OT authority even in deals that push legal

---

[119] U.S. Const. art. I, §9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

[120] U.S. Const. art. IV, §3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

[121] See *Royal Indemnity Co. v. U.S.*, 313 U.S. 289, 294 (1941).

[122] *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 331 (1936) (Constitution's property clause covers "all other personal and real property rightfully belonging to the United States") (quoting Joseph Story).

[123] There are several statutes permitting executive agencies to license intellectual property, but they refer to inventions originated by the U.S. government or its labs and do not address IP acquired from private parties. *See*, *e.g.*, 15 U.S.C. § 3710.

limits. Understanding these constraints enables agencies to use OTs ambitiously while staying within lawful bounds.

A. Mitigating Corruption Risk

The specter of corrupt contracting is the third barrier preventing wider OT adoption. Critics worry that bypassing FAR safeguards could enable self-dealing. This is a real concern that needs to be mitigated. To demonstrate the risk, consider a new hypothetical Secretary of AMP who is unethical. He wants to enrich himself, his friends, and his family through OTs. He proposes non-competitive OTs (1) to purchase half of a social media company he founded at an inflated price and (2) to acquire supplies from a firm in which his daughter is a part owner. Assume arguendo that AMP has appropriations with amounts and purposes that can plausibly cover these transactions.

These transactions certainly violate ethics principles outlined in regulation, meaning the Secretary could be fired if there was sufficient evidence and political will.[124] The primary statute governing such conflicts of interest is 18 U.S.C. § 208, which governs "acts affecting a personal financial interest." Assuming the Secretary's daughter is not a minor, then her financial interest does not create a conflict with his participation in the transaction under the statute.[125] If he still has a financial interest in the social media company, however, then participating in, approving, recommending, or giving advice on that transaction would be illegal.[126] If he no longer has a financial stake in the company, then this law is not a bar to the transaction.[127]

If the price inflation is indefensible or the Secretary and his cronies discuss the transactions in egregious ways, they could incur civil or criminal liability. A price so high as to be fraudulent (or other misrepresentations about the supplies or the company) could violate the False Claims Act (FCA).[128] A defendant must make "knowing" misrepresentations, which could include "reckless disregard" for truth or falsity, to violate the FCA.[129] A private party can bring an FCA case *qui tam* on behalf of the federal government, meaning Department of Justice (DOJ) cooperation isn't required for enforcement.[130] If the Secretary or conspirators have demonstrated intent to defraud the government then they could be prosecuted (by DOJ) for conspiracy or wire fraud, with criminal liability.[131]

---

[124] *See*, *e.g.*, 5 C.F.R. § 2635.101(b)(8) ("Employees shall act impartially and not give preferential treatment to any private organization or individual.").
[125] § 208(a).
[126] *Id.*
[127] If he accepted a bribe then he could be liable under other statutes like 18 U.S.C. § 666.
[128] *See* 31 U.S.C. § 3729(a)(1);
[129] § 3729(b)(1).
[130] *See* 31 U.S. Code § 3730(b).
[131] 18 U.S.C. § 371 (conspiracy to defraud the United States); § 1346 (use of wire to defraud of money or honest services).

If the Secretary, his spouse, and minor children have no financial stake in the companies, and if they are careful to set defensible prices and not say anything incriminating, then it would be very difficult to hold them accountable for partiality. It might also require substantial political capital to prosecute perpetrators like this; the President who appointed the Secretary might not want to publicize the Secretary's corruption, and succeeding presidents of the same party may harbor similar reservations. The *qui tam* case under the FCA resolves this issue but would only obtain in rare circumstances.

Some believe this hypothetical is close to reality. Several government agencies recently announced agreements with four portfolio companies of the venture capital firm 1789, where Donald Trump, Jr. is a partner.[132] Trump Jr. sits on the board and owns substantial shares of at least one of those companies.[133] One of the agreements is an OT, a $42 million Indefinite Delivery Vehicle (IDV) award from DARPA to Cerebras Systems, Inc. for a battlefield simulator.[134] The other contracts either appear to be loans[135] or FAR-based procurement contracts.[136] There is no evidence of corruption, which is notoriously difficult to prove. This case does demonstrate that if a government employee has corrupt intent, there are many ways of pursuing graft besides OTs. The other four agreements either bypassed FAR guardrails through non-OT authorities or abided by the FAR and were still awarded.

Procurement practitioners and theorists have developed many tools to mitigate corruption risk, including transparency, systematic oversight, competitive bidding, ethics codes, debarment, contractor compliance, and whistleblower incentives.[137] Some of these already apply to OTs, like whistleblower incentives under FCA *qui tam* suits and ethics rules that apply to all federal employees. The government also

---

132 Alex Rogers and Joe Miller, *Donald Trump Jr-backed start-up scores $600mn US federal government deal*, Fin. Times (Dec. 3, 2025), https://www.ft.com/content/952f37ba-78b4-42a4-8d1b-2258de65f2c0.

133 *See*, *e.g.*, Barratt Dewey, *Trump Jr.-Linked Unusual Machines Wins Army Contract* (Oct. 27, 2025), https://www.tectonicdefense.com/trump-jr-linked-unusual-machines-wins-army-contract/ (third-largest shareholder in Unusual Machines worth ~$4M).

134 *See Other Transaction IDV HR00112490459*, GovTribe (Jul. 26, 2024), https://govtribe.com/award/federal-idv-award/other-transaction-idv-hr00112490459.

135 *Vulcan Elements' $1.4 B U.S. Government-backed Magnet Strategy: Deep Dive into What It Means for the Critical Minerals Chain*, Rare Earth Exchanges (Nov. 18, 2025), https://rareearthexchanges.com/news/14447/. Note, however, that the government is taking an ownership stake in Vulcan Minerals through Department of Commerce authorities, which almost certainly means as an OT.

136 *See PsiQuantum Announces $10.8M Contract with Air Force Research Laboratory to Deliver Novel Quantum Chip Capabilities to the U.S. Air Force*, BusinessWire (Apr. 15, 2025), https://www.businesswire.com/news/home/20250415826098/en/PsiQuantum-Announces-%2410.8M-Contract-with-Air-Force-Research-Laboratory-to-Deliver-Novel-Quantum-Chip-Capabilities-to-the-U.S.-Air-Force; Dewey, *supra* note 133; Firehawk Aerospace, *Firehawk Aerospace Secures $4M to Push the Boundaries of 3D Printed Propellant for Extended Range Rockets*, Firehawk Aerospace (Sep. 22, 2025), https://firehawkaerospace.com/news/firehawk-aerospace-secures-4m-to-push-the-boundaries-of-3d-printed-propellant-for-extended-range-rockets/.

137 *See* Sheffield, *supra* note 28, at 116.

maintains government-wide debarment proceedings defined in 2 C.F.R. Part 180 that bar or suspend a party that has violated particular rules from entering any non-procurement agreement with the government, including OTs.

The best solution to retaining OTs' flexibility while mitigating corruption risk is transparency. Without requiring competitive bidding or the onerous procedures of the FAR, transparency is the strongest tool that can be deployed against corruption.[138] Unlike FAR's ex ante controls—competitive bidding requirements, elaborate procedures, multiple approval layers—transparency creates ex post accountability. It enables oversight without constraining the flexibility that makes OTs valuable for innovation procurement. Sunlight works where process requirements would defeat OTs' purpose. Public disclosure of award details (parties, amounts, purposes, key terms) already exists for FAR contracts through USAspending.gov, and could be set up for OTs as well. [139]

Similar disclosure for OTs would enable public and government scrutiny of OT awards through several mechanisms. Congressional committees can scrutinize awards in their jurisdictions. Media outlets can investigate suspicious patterns. Competitors can challenge awards that appear to violate legal constraints. Watchdog organizations and academics can analyze OT usage patterns and outcomes. Industry players who favor OTs' flexibility have called for greater transparency, recognizing it's necessary for legitimacy. Such public scrutiny has a deterrent effect by increasing the risk for a corrupt actor that they will be found out, raising the cost of corrupt behavior.

There is increasing recognition of the need for transparency. Even industry players, which generally favor OTs' flexibility, have called for greater transparency into OTs.[140] New transparency requirements may be forthcoming; the 2026 National Defense Authorization Act currently carries an amendment that would require all OT spending to be publicly listed on a government website.[141] Such requirements have the additional benefit of enabling further study of OTs, to understand their efficacy and develop solutions to whatever problems do exist.

B. Equity Stakes: The Intel Deal as a Legal Boundary Case

The recent Intel equity controversy illustrates that OTs face meaningful legal constraints like those imposed by appropriations statutes. There has been speculation that the government acquisition of a 9.9% stake in Intel was performed as an OT

---

138 *See* Amey, *supra* note 30.

139 *See* 41 U.S.C. § 1712(d) (requiring agencies to submit procurement contract information to the Federal Procurement Data System (FPDS).

140 Am. Council for Tech. & Indus. Advisory Council, *Other Transaction Authority: Best Practices for Industry and Government* 12 (2020), https://www.actiac.org/system/files/OTA_1.pdf.

141 *See Ernst Stops Secret Pentagon Spending*, Joni Ernst (Jul. 16, 2025), https://www.ernst.senate.gov/news/press-releases/ernst-stops-secret-pentagon-spending.

pursuant to Commerce Department authority in the CHIPS Act.[142] This seems very likely; the stake was taken as part of ongoing transactions with the CHIPS office, the CHIPS program has OT authority,[143] and OTs can be used to take equity stakes.[144] It does, however, stretch some legal limits—just not those related to OTs.

The CHIPS program office is limited to its statutory mission. Congress directed Commerce to establish the CHIPS program for the purpose of providing federal financial assistance.[145] 2 C.F.R. 200.1 defines "federal financial assistance" as including six categories (e.g., grants), the last of which is "other financial assistance." It is somewhat paradoxical for the CHIPS mission to be defined by reference to 2 C.F.R. Part 200, which defines and governs federal financial assistance, but also to have OT authority enabling transactions exempt from the very regulations ostensibly defining its mission. Nevertheless, Part 200 is the most canonical source defining federal financial assistance and is likely authoritative here.

Furthermore, the relevant appropriations in the CHIPS Act are designated for use by the CHIPS program for its designated purpose.[146] The CHIPS program is thus limited to federal financial assistance both by its statutory mission and by the funds that it has been allocated. Using those appropriations for something other than federal financial assistance would violate the Purpose Statute.[147]

OTs can qualify as federal financial assistance. One commenter argued that it would be an "expansive" but not "implausible" reading for the CHIPS office to claim that the Intel deal counts as "other financial assistance."[148] In fact, this reading is relatively well-established. The Department of Transportation's official guidance on federal financial assistance has for many years stated that "[t]he term "Other financial assistance" … is considered as an "Other Transaction" for Department program purposes."[149] This interpretation finds support in practice—the very first OT performed by DARPA involved a payback scheme that functioned much like an equity investment.[150] Thus CHIPS could structure an OT with an equity stake while staying within its statutory remit to provide federal financial assistance.

---

142 Peter E. Harrell, *The Legal Bases for Government Stakes in Private Firms*, Lawfare (Aug. 28, 2025), https://www.lawfaremedia.org/article/the-legal-bases-for-government-stakes-in-private-firms.
143 15 U.S.C. § 4659(a).
144 *See supra* Question 7.
145 15 U.S.C. § 4652(a)(1).
146 *See* CHIPS Act of 2022, Pub. L. No. 117–167, § 102(a)(2)(A), 136 Stat. 1372 (appropriating money for "section 9902 of Public Law 116–283" (codified at 15 U.S.C. § 4652 ("Financial assistance program")).
147 *See* 31 U.S.C. 1301(a).
148 Harrell, *supra* note 142.
149 *See* U.S. Dept. of Transp., *Guide to Financial Assistance* at 34 (Oct. 2019), https://www.transportation.gov/sites/dot.gov/files/2023-10/DOT_Guide_to_Financial_Assistance_effective_January_1_2020.pdf.
150 *See supra* notes 115–117 and accompanying text.

Even though OTs with equity stakes *can* be consistent with the office's mission, this OT was not. The problem with the deal is not that it was an OT; the problem was its terms are not financial assistance. The usual definitions of financial assistance require its purpose to be transferring value to the beneficiary, not benefiting the government; indeed, this is the canonical distinction between a procurement contract and a grant.[151] But here, the deal is patently one-sided with the purpose of benifitting the government, not Intel.

The Intel deal was not financial assistance from the government to a private company; it was financial assistance from Intel to the US Government. Although the parties described the deal as a government "investment," the government didn't actually commit any new funds to the company. The CHIPS program had already committed to awarding Intel $8.9 billion in grants. For the purpose of the deal, they renamed grants "payments" in order to cover the "cost" of the equity stake the government got.[152] So the government just re-committed to giving Intel grants that it had already committed to.

The deal's only real "assistance" to Intel was a waiver on rights to future profit sharing and clawbacks from $2.2 billion in grants, while getting back 10% of a $112 billion company from Intel.[153] The value to Intel was, at most, $2.2 billion, while the government got a guaranteed $11.2 billion. Even if one accepts at face value the government's claim that its $8.9 billion in already-committed grants counted as payment for the stock, the government purchased newly Intel issued shares for about $20 when Intel was trading at $23.[154] A government purchase of Intel shares at a 13% discount can hardly qualify as "financial assistance."

Even if Commerce could argue that its OT authority is not limited to financial assistance, the only appropriation it could be using for an $8.9 billion transaction is. The least implausible case for the deal's legality is that (1) it exercised CHIPS OT authority at the *agency* level and the financial assistance restriction only applies to the CHIPS *office*, and (2) it wasn't spending any appropriations contrary to their purpose because the $8.9 billion had already been allocated before the deal. Neither point is persuasive. The CHIPS OT authority is for Commerce to "carry out … responsibilities" pursuant to Chapter 72A of the U.S. Code, titled "Creating Helpful Incentives to Produce Semiconductors for America."[155] The only relevant

---

[151] *See* 31 U.S.C. § 6304.

[152] *Intel and Trump Administration Reach Historic Agreement to Accelerate American Technology and Manufacturing Leadership*, Intel (Aug. 22, 2025), https://www.intc.com/news-events/press-releases/detail/1748/intel-and-trump-administration-reach-historic-agreement-to.

[153] *See Intel Market Cap 2011-2025 | INTC*, MacroTrends, https://www.macrotrends.net/stocks/charts/INTC/intel/market-cap.

[154] *See Intel Secures $8.9B U.S. Government Investment in Common Stock*, HPC Wire (Aug. 22, 2025) https://www.hpcwire.com/off-the-wire/intel-secures-8-9b-u-s-government-investment-in-common-stock/ (purchase at $20.47 per share); *INTC*, Yahoo! Finance, https://finance.yahoo.com/quote/INTC/history/ (opening at $23.65 on August 22).

[155] 15 U.S.C. § 4659.

responsibility for this transaction in Chapter 72A is the CHIPS program. And it did leverage at least the clawback provisions over $2.2 billion in CHIPS appropriations for the agreement, and those appropriations are restricted by the Purpose Statute to their congressionally-intended purpose just like the $8.9 billion.

It is unlikely anyone has standing to litigate the deal's legal violations, but Commerce still doesn't have a totally free hand in this or other deals.[156] The equity it has acquired must stay with whatever agency originally acquired it. As Question 8 explained, Congress must authorize every transfer of government property.[157] The executive branch could entirely circumvent congressional appropriations, with their attendant time limits and purpose requirements, if it could simply purchase assets with an appropriation and then transfer them between accounts. Moreover, if and when that agency liquidates its holdings, all proceeds will return to the general Treasury fund pursuant to the Miscellaneous Receipts Statute.

V. Conclusion

Legal uncertainty has been the primary impediment to broader OT adoption. This paper reduces that uncertainty by mapping OT authority across the federal government, analyzing its interaction with appropriations and administrative law constraints, and demonstrating that existing legal frameworks provide meaningful boundaries without requiring FAR compliance. The thirty-six documented authorities represent latent capacity that agencies already possess but rarely exercise.

The path forward requires three concurrent developments. First, agencies must train, encourage, and empower their personnel to use OTs without anxiety about defying norms. Second, transparency mechanisms must mature to enable oversight without reimposing procedural burdens that would defeat OTs' purpose. Third, agencies must develop institutional competence through practice, accepting that initial errors are the cost of building expertise in a dormant authority.

OTs will not replace traditional procurement entirely. But for innovation priorities where speed and flexibility matter—emerging technologies, novel partnerships, frontier research—OTs offer procurement mechanisms that Congress has repeatedly authorized and that the FAR's ossified processes cannot accommodate. The choice is not between OTs and perfect oversight, but between OTs with appropriate transparency and continued procurement failures under the FAR.

---

156 Other equity deals also purport to use Commerce's CHIPS authority. *See*, *e.g.*, *U.S. takes stake in RTP-based maker of rare-earth magnets as part of $1.4B deal*, WRAL News (Nov. 3, 2025), https://www.wral.com/story/u-s-takes-stake-in-rtp-based-maker-of-rare-earth-magnets-as-part-of-1-4b-deal/22228830/.

157 *See supra* notes 119–123 and accompanying text.

Appendix: OT Authorities by Agency

Thirty-six grants of OT authority are listed here, to various agencies and sub-agencies. This list is almost certainly not be exhaustive.

The table is broken into two sections. The first lists OT authorities that are modeled after DOD's authority, which is focused on prototype contracts with non-traditional defense contractors like Silicon Valley startups. These OTs can often only be used if the agreement complies with strict requirements around cost sharing or participation of a non-defense contractor. Many of them have "follow-on production" authority that allows the government to develop a prototype using an OT and then directly follow that up with a FAR-compliant procurement contract for the product that was developed, without issuing an RFP or holding a full competition.

The second section lists OT authorities that are broad and generally unconstrained, like the original NASA OT authority. It also includes provisions that haven't historically been recognized as authorizing OTs, like USAID's authority under the Foreign Assistance Act of 1961.

Section 1: DOD Authorities and DOD-Derivative Authorities

Agency	Purpose	Citation	Year Granted	Original Statute	Requirements (Cost Share / Non-Trad)	Follow-on Production?
DOD (General)	Research Projects	10 U.S.C. § 4021	1989	NDAA for FY 1990/1991 (Pub. L. 101-189)	**Cost Share:** Standard 50/50 split generally required.	**NO**
DOD (General)	Prototype Projects	10 U.S.C. § 4022	1993	NDAA for FY 1994 (Pub. L. 103-160)	**Strict:** Significant participation by **Non-Traditional Contractor** OR **1/3 Cost Share** (paid by industry).	**YES**
DOD (ManTech)	Manufacturing Tech	10 U.S.C. § 4841	1991	NDAA for FY 1992 (Pub. L. 102-190)	**Specific:** Must use competitive procedures. Specifically to improve the "manufacturing quality, productivity, and practices" of the industrial base.	**NO.** Focused on process improvement, not acquiring hardware.

Agency	Purpose	Citation	Year Granted	Original Statute	Requirements (Cost Share / Non-Trad)	Follow-on Production?
DOT (ARPA-I)	Infrastructure Prototype	49 U.S.C. § 119(g)(5)	2021	Infrastructure Investment and Jobs Act (IIJA)	**Prototype:** Explicitly modeled on ARPA-E.	**YES.**
DHS (HQ & Components)	Prototypes	6 U.S.C. § 391	2002	Homeland Security Act of 2002 (Pub. L. 107-296)	**Strict:** Adopts DOD rules by direct reference	**YES**
DHS (CWMD)	Detection Systems	6 U.S.C. § 596	2006	SAFE Port Act (Pub. L. 109-347)	**None mentioned**	**NO**
USCG (Coast Guard)	Adv. Technology	14 U.S.C. § 1158	2022	NDAA for FY 2023 (Pub. L. 117-263)	**None mentioned**	**NO**
DOE (Research)	R&D / Demo	42 U.S.C. § 7256(g)	2005	Energy Policy Act of 2005 (Pub. L. 109-58)	**Cost Share:** Statute explicitly references DOD *Research* rules (50/50 split).	**NO**
DOE (ARPA-E)	Energy Research	42 U.S.C. § 16538(f)	2007	America COMPETES Act (Pub. L. 110-69)	**Discretionary:** "To maximum extent practicable" requires cost share, but can be waived.	**NO**
HHS (BARDA)	Countermeasures	42 U.S.C. § 247d–7e	2006	Pandemic & All-Hazards Prep. Act (Pub. L. 109-417)	**Flexible:** Broad statute; typically mirrors DOD "Non-Traditional" preference in policy.	**NO**
HHS (ARPA-H)	Health Research	42 U.S.C. § 290c(g)	2022	Consolidated Appropriations Act, 2022 (Pub. L. 117-103)	**Formal:** Need director signoff, submit reports, must use competitive procedures if possible.	**NO**

Agency	Purpose	Citation	Year Granted	Original Statute	Requirements (Cost Share / Non-Trad)	Follow-on Production?
HHS (NIH)	Precision Med	42 U.S.C. § 282(n)	2016	21st Century Cures Act (Pub. L. 114-255)	**Formal:** Need director signoff, submit reports.	**NO**
USDA (AGARDA)	Adv. Ag Research	7 U.S.C. § 3319k	2018	Farm Bill of 2018 (Pub. L. 115-334)	**Strict:** "Same manner" as DOD implies inheriting cost-share/non-traditional rules.	**Likely NO**
ODNI (Intel)	Intel Innovation	50 U.S.C. § 3024(n)	2014	Intel. Auth. Act for FY 2014 (Pub. L. 113-126)	**Cost Share:** Adopts DOD *Research* rules (50/50 split).	**NO**
Army Corps (Civil Works)	Prototypes	33 U.S.C. § 2313(d)	2022	WRDA of 2022 (Pub. L. 117-263)	**Strict:** Specifically authorizes *prototype* projects; follows DOD policy guidance.	**NO**

Section 2: Broad Authorities

Agency	Purpose	Citation	Year Granted	Original Statute	Requirements
NASA	Space Act Agreements	51 U.S.C. § 20113(e)	1958	National Aeronautics and Space Act of 1958	**Broad Discretion**
State Dept	Refugee Assistance	22 U.S.C. § 2602(a)	1962	Migration and Refugee Assistance Act of 1962	**Extra Discretion:** Authority granted to the President. Can disregard other laws regulating contracting and appropriations.
USAID	Foreign Assistance	22 U.S.C. § 2395(b)	1961	Foreign Assistance Act of 1961	**Broad Discretion**
HHS (NIH - NHLBI)	Heart, Lung, Blood	42 U.S.C. § 285b–3(b)(3)	1972	National Heart, Blood Vessel, Lung, and Blood Act of 1972 (Pub. L. 92-423)	**Broad Discretion**
NTSB	Safety Investigations	49 U.S.C. § 1113(b)(1)(B)	1974	Independent Safety Board Act of 1974 (Pub. L. 93-633)	**Broad Discretion**
DOT (FAA)	General Functions	49 U.S.C. § 106(l)(6)	1996	FAA Reauthorization Act of 1996	**Broad Discretion**
DOT (TSA)	Security Functions	49 U.S.C. § 114(m)	2001	Aviation and Transportation Security Act	**Broad Discretion**

Agency	Purpose	Citation	Year Granted	Original Statute	Requirements
DOT (FTA)	Public Transit	49 U.S.C. § 5312(b)	2012	MAP-21 (Pub. L. 112-141)	**R&D:** Used for research, development, deployment and demonstration projects.
DOC	CHIPS Program	15 U.S.C. § 4659(a)	2021	NDAA for FY 2021 (Pub. L. 116-283)	**Program Specific**
DOC (NOAA)	Satellite Data	15 U.S.C. § 8531(d)	2018	NIDIS Reauthorizatio n Act of 2018	**R&D:** limited to research and development activities, with limited scope, and only available when ordinary procurement and grants cannot be used.
NSF (TIP)	Innovation Incentives	42 U.S.C. § 19116	2022	CHIPS and Science Act (Pub. L. 117-167)	**Broad Discretion**
NSF	General Authority	42 U.S.C. § 1870(c)	1950	National Science Foundation Act of 195 (Pub. L. 81-507)	**Broad Discretion**
Interior (FWS)	Lacey Act	16 U.S.C. § 3376(b)	1981	Lacey Act Amendments of 1981	**Specific Mission:** Limited to carrying out the enforcement functions of the Lacey Act (wildlife protection)
DOE (General)	Admin / Legacy	42 U.S.C. § 7256(a)	1977	Dept. of Energy Org. Act (Pub. L. 95-91)	**Broad:** This is the original DOE authority.

Agency	Purpose	Citation	Year Granted	Original Statute	Requirements
DOT (FRA)	Railroad Safety	49 U.S.C. § 103(i)	1994	Swift Rail Development Act of 1994 (Pub. L. 103-440)	**Broad**
CDC	Health Research	42 U.S.C. § 242c(e)	2023	PREVENT Pandemics Act (Pub. L. 117-328)	**Broad:** For research, biosurveillance, modeling, preparedness and response.
NIH	Cures Acceleration	42 U.S.C. § 287a	2010	Patient Protection and Affordable Care Act of 2010	**Specific**: to fund projects for cures acceleration; limited to 20% of funds appropriated for the purpose.
NIH	High-Impact Cutting-Edge Research	42 U.S.C. § 282(n)	2016	21st Century Cures Act (Pub. L. 114-255)	**Broad**
ONCD (Cyber Director)	Administrative	6 U.S.C. § 1500(e)(1)(F)	2021	NDAA for FY 2021 (Pub. L. 116-283)	**Broad**
CSB	Chemical Safety	42 U.S.C. § 7412(r)(6)(N)	1990	Clean Air Act Amendments of 1990	**Broad**
Presidio Trust	Presidio Mgmt	16 U.S.C. § 460bb note	2023	Consolidated Appropriations. Act, 2023 (Pub. L. 117–328)	**Real Estate / Corporate:** The Trust manages the Presidio in SF. It has authority to enter into " agreements, leases, contracts and other arrangements."