




**U.S. Department  
of Transportation**  
Office of the Secretary  
of Transportation

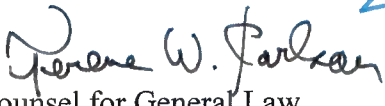
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SEP 25 2019

**MEMORANDUM FOR THE OFFICE OF FINANCIAL MANAGEMENT AND  
TRANSIT BENEFIT PROGRAMS**

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**Subject:** Interpretation of “Commute” for Purposes of Transit Benefit Eligibility  
under 5 U.S.C. § 7905

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You have asked for our legal opinion on the meaning of the term “commute” as used in 5 U.S.C. § 7905, the statute authorizing the Federal transit benefit programs. Specifically, you have asked whether the statute imposes a geographic (i.e., distance) limitation on the length of a commute for purposes of eligibility for Federal transit benefits. We understand that your request is prompted by a recent opinion of the Government Accountability Office (GAO) in which GAO opined that transit benefits are available to Federal employees only for the cost of home-to-work travel within the local travel area of the employee’s official duty station.<sup>1</sup>

**Summary**

We conclude that 5 U.S.C. § 7905 does not impose a definite distance limitation on what constitutes a commute eligible for Federal transit benefits, though travel time and distance are relevant practical factors for agency heads to consider in establishing the terms of a reasonable transit benefit program. In our view, “to commute” as used in section 7905 means to transit on a regular basis back and forth between the employee’s place of residence and the employee’s official duty station; it requires both that there be no intermediate overnight stay between home and work at a hotel or other residence away from the employee’s originating place of residence, and that the complete roundtrip between home and work is one that could reasonably be expected to occur on a regular daily basis, even if it does not, in fact, occur every workday (for example, because of a teleworking arrangement approved for the employee). In addition, under

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<sup>1</sup> GAO Opinion B-330935, “Unavailability of Appropriated Funds to Subsidize Employees’ Long-Distance Home-to-Work Travel” (May 20, 2019) (“*GAO Opinion re Long-Distance Home-to-Work Travel*”).

7905, a financial transit benefit is available to cover an employee's personal commuting expenses only when the commute occurs via a mass transit system, whether public or private, or a commercial van-pool or shuttle-bus service.

This interpretation preserves the flexibility Congress intended for agency heads to establish reasonable transit benefit programs that encourage employees to use means other than single-occupancy vehicles for their regular daily commutes. Agency heads have discretion to define appropriate limitations on eligibility for benefits and, in so doing, can and should take into account travel time, distance, and other geographic considerations suitable to the agency's workforce and the commuting realities of the agency's particular office locations. Furthermore, because financial transit benefits are available only for commutes by mass transit system or commercial van-pool or shuttle-bus service, eligible commutes are limited to the geographic reach of such systems and services. Unlike GAO, however, we do not believe that Congress's separate statutory authorization in 5 U.S.C. § 5702 for employees to receive per diem allowances and reimbursement of expenses for official, out-of-town business travel implies that section 7905 prohibits agency heads from authorizing Federal transit benefits for commutes that extend beyond the limits of the agency's designated local travel area.

### **Legal Framework**

Appropriated Federal funds may be used only for purposes authorized by Congress. *See* 31 U.S.C. § 1301(a). Home-to-work commuting expenses of Federal employees are generally considered personal expenses, and thus appropriated funds will not be available to cover such costs without specific statutory authority. In 5 U.S.C. § 7905, Congress has provided specific authority for agency heads to use appropriated funds to establish a transit pass program to defray the costs of employee commutes that do not make use of single-occupancy vehicles.

Section 7905 authorizes each agency head to "establish a program to encourage employees of such agency to use means other than single-occupancy motor vehicles to commute to or from work," and it states that "a program established under this section may involve . . . transit passes . . . including cash reimbursements therefor [or] direct distribution [of vouchers or passes] by the agency." *Id.* § 7905(b)(1) & (2). The statute incorporates the definition of "transit pass" used in the transportation-related fringe benefits provision of the Internal Revenue Code, which defines the term to mean a pass, farecard, etc., that provides for transportation by mass transit facilities or by a commercial van or shuttle-bus ride-share service.<sup>2</sup>

Section 7905 further provides that "The President shall designate 1 or more agencies which shall prescribe the guidelines for programs under this Section." 5 U.S.C. § 7905(d). In Executive

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<sup>2</sup> *See* 5 U.S.C. § 7905(a)(4) ("the term 'transit pass' means a transit pass as defined by section 132(f)(5) of the Internal Revenue Code of 1986"); 26 U.S.C. § 132(f)(5)(A) (Internal Revenue Code provision defining qualified transportation fringe benefits) (defining "transit pass" to mean "any pass, token, farecard, voucher, or similar item entitling a person to transportation (or transportation at a reduced price) if such transportation is—(i) on mass transit facilities (whether or not publicly owned), or (ii) provided by any person in the business of transporting persons for compensation or hire if such transportation is provided in a vehicle meeting the requirements of subparagraph (B)(i)"); *id.* § 132(f)(5)(B)(i) (specifying any highway vehicle "the seating capacity of which is at least 6 adults (not including the driver)").

Order 13150 of April 21, 2000, entitled Federal Workforce Transportation, the President designated DOT as one such agency and instructed Federal agencies to “develop plans to implement this order in consultation with . . . the Department of Transportation.”

DOT’s authority over the transit pass program has also been recognized by Congress in annual appropriations acts, including, most recently, the 2019 Consolidated Appropriations Act: “The Secretary of Transportation is authorized to carry out a program that establishes uniform standards for developing and supporting agency transit pass and transit benefits authorized under section 7905 of title 5, United States Code, including distribution of transit benefits by various paper and electronic media.” Pub. L. 116-6, Div. G, Title I, § 190. And the appropriations laws give DOT authority to pay for and to “accept subsequent reimbursements from all Federal agencies from available funds for transit benefit distribution services that are necessary to carry out the Federal transit pass transportation fringe benefit program under Executive Order No. 13150.” *Id.* § 103.

Under the authorities described above, DOT has provided government-wide oversight and guidance and coordinated the activities of the executive departments and agencies regarding transit benefit programs. In this role, DOT acts as the “Executive Agent” for the Federal transit benefit programs established within other executive departments and agencies pursuant to section 7905. DOT exercises these responsibilities through the Secretary’s Office of Financial Management and Transit Benefit Programs, also known as the Office of Transit Benefit Policy.

### Analysis

The statutes governing the Federal transit benefit programs do not define the term “commute” or expressly impose a distance limitation on commutes eligible for transit benefits. We interpret the phrase “to commute” in section 7905 according to its ordinary dictionary meaning and in light of the context and structure of the statute and the express purpose of the transit benefit authorization enacted by Congress, which is to enable agency heads to provide financial and other incentives to encourage their employees to choose commuting options that do not depend upon single-occupancy vehicles. *See Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Ed.*, 550 U.S. 81, 82-83 (2007); *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990).

Dictionaries define the verb “to commute” to mean to “travel some distance between one’s home and place of work on a regular basis.” Google Dictionary (“commute”) (searched Aug. 18, 2019); *see* Webster’s Third New International Dictionary (1986), p.461 (defining “commute” to mean “to travel by use of a commutation ticket esp. daily to and from a city and one’s suburban residence: travel back and forth regularly and frequently {*commuting* between London and New York}”); Merriam-Webster Online Dictionary (“commute”) (“to travel back and forth regularly (as between a suburb and a city)”), *available at* [www.merriam-webster.com/dictionary/commute](http://www.merriam-webster.com/dictionary/commute) (visited Aug. 19, 2019). Correspondingly, when used as a noun, “commute” means “a regular journey of some distance to and from your place of work.” Google Dictionary, *supra*; *see* Vocabulary.com (“commute”) (“A commute is a journey you take from home to work and back again.”) (visited Aug. 18, 2019). The word “commute” derives from “commutation,” which means an exchange, interchange, or trade, and, historically, it relates to the use of a “commutation ticket,” i.e., “a transportation ticket for a fixed number of trips back and forth over the same

route (as between a city and one of its suburbs) during a limited time (as a month) sold at a reduced rate because of the frequency and regularity of travel.” Webster’s Third New International Dictionary, *supra*, at 461.

These definitions make clear that, in general, the activity of commuting involves travel back and forth between home and work that occurs with regularity and some frequency, such on a daily basis. And they also strongly imply that a commute happens without any intermediate stay between one’s home and place of work, such as at a hotel or other residence. These are basic definitional limitations on what can reasonably be considered a “commute” that follow from the plain meaning of the term itself. Beyond the general notion that commuting entails regular, routine back-and-forth home-to-work transit, however, the dictionary definitions do not suggest any particular distance or other geographic limitation. The parenthetical reference in some of these definitions to commuting “between a city and one of its suburbs” is obviously illustrative only and not meant to be a necessary element of the definition, as indicated by use of the introductory terms “as” and “esp[ecially],” which signal that what follows is an example only. Certainly, it cannot be suggested that only commutes between a suburban residence and a city-center office are eligible for benefits under section 7905, since many Federal employees do not live in a suburb and many Federal agency offices are not located in a city center.<sup>3</sup>

Accordingly, while travel time and distance are practical factors to be considered with regard to the particular circumstances of an agency’s office locations, the plain meaning of the statutory text does not impose any definite distance limit on what may constitute a “commute” eligible for transit benefits under an approved section 7905 program. This conclusion is reinforced by the statute’s purpose and the wide discretion given to agency heads to establish a “program” of transit benefits. Congress granted agency heads broad authority to design programs of incentives, including financial benefits to defray the costs of commuting, so as “to encourage employees of such agency to use means other than single-occupancy motor vehicles to commute to or from work.” 5 U.S.C. § 7905(b)(1). Section 7905 was enacted on December 2, 1993, as the Federal Employees Clean Air Incentives Act, Pub. L. No. 103-172, and the law’s statement of purpose, in section 1(b), declared that “the purpose of this Act is to improve air quality and to reduce traffic congestion by providing for the establishment of programs to encourage Federal employees to commute by means other than single-occupancy motor vehicles.” Interpreting the law, notwithstanding its plain language, to incorporate a specific distance limit on commutes eligible for benefits would significantly constrain the ability of agency heads to encourage some of their employees (those who have the longest drives to work) to switch to alternative modes of commuting. That result would undercut the purpose of section 7905.<sup>4</sup>

This interpretation does not mean that all forms of employees’ home-to-work commutes that could reasonably occur on a daily basis are eligible to receive a financial transit benefit. The definition of “transit pass” incorporated into section 7905 from the qualified transportation-

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<sup>3</sup> Indeed, one dictionary quoted above actually gives as another example “commuting between London and New York.” Webster’s Third New International Dictionary, *supra*, at 461. As explained herein, however, a “commute” between London and New York (or any other commute by airplane) would not be eligible for Federal transit benefits under section 7905 because of the definition of an authorized “transit pass.”

<sup>4</sup> We have found no legislative history suggesting any understanding that there would be a definite distance limit on commutes eligible for financial support in a Federal transit benefit program under section 7905.

related fringe-benefit provision of the Internal Revenue Code must be satisfied. That definition limits the types of commutes that may receive financial support through a Federal transit benefit program to commutes that occur via (1) a mass transit system, whether public or private, or (2) a commercial van or shuttle-bus service.<sup>5</sup> Thus, the scope of employee commutes eligible for potential Federal transit benefits with regard to an agency office location will be limited by the reach of an available mass transit system in that geographic area, including commuter rail or bus lines, and by the availability of arrangements for commercial van-pool or shuttle-bus service.

We have reviewed the May 20, 2019 GAO opinion (entitled “Unavailability of Appropriated Funds to Subsidize Employees’ Long-Distance Home-to-Work Travel”), in which GAO concluded that Federal transit benefits are available only for commutes occurring within an agency’s designated “local travel area,” and we are not persuaded by GAO’s analysis.<sup>6</sup> In its May 20 opinion and three previous opinions cited therein, GAO reasoned that the availability of appropriated Federal funds to cover the personal commuting expenses of agency employees under section 7905 must be interpreted to be mutually exclusive in terms of geographic reach with the separate statutory authorization, found in 5 U.S.C. § 5702, to use Federal funds to pay the official business travel expenses of agency employees.<sup>7</sup> GAO opined:

“It is the official travel authorization, issued in accordance with the implementing regulations for section 5702, that provides authority to use appropriated funds to reimburse the costs an employee incurs while traveling outside of the local travel area defined by the agency. As such, absent other affirmative authority, section 5702 provides the only authority to use appropriations for an employee’s long-distance travel costs.

.... Because section 5702 provides the only affirmative authority to use appropriated funds to reimburse costs an employee incurs while traveling outside of the local travel area, it is the bounds of the agency’s local travel area that define the scope of section 7905.

.... [Accordingly,] [a]n agency may not use appropriated funds to provide transit subsidies for home-to-work travel costs an employee incurs beyond the local travel area. An agency may use appropriated funds, however, to provide transit subsidies for

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<sup>5</sup> See footnote 2, *supra*.

<sup>6</sup> GAO’s legal opinions are not binding on executive agencies but may provide persuasive authority. See *Comptroller Gen.’s Authority To Relieve Dispersing Certifying Officials from Liability*, 15 Op. O.L.C. 80, 82 (1991) (“[T]he Comptroller General, as the agent of Congress, cannot issue interpretations of the law that are binding on the executive branch”); *Use of Gen. Agency Appropriations to Purchase Employee Business Cards*, 21 Op. O.L.C. 150, 151 (1997) (GAO opinions are “useful sources on appropriations matters” but not “binding upon departments or agencies of the executive branch.”); see also *Bowser v. Synar*, 478 U.S. 714, 722 (1986); *Delta Data Sys. Corp. v Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984).

<sup>7</sup> See *GAO Opinion re Long-Distance Home-to-Work Travel* at 6-10 (citing & enclosing Memorandum from GAO Deputy General Counsel to GAO Controller re Transit Benefits and Long-Distance Travel (Aug. 28, 2017) (“*Aug. 2017 GAO Deputy GC Mem.*”); Memorandum from GAO Deputy General Counsel to Director, GAO Labor Management Relations Office, re Transit Benefits for Employees Residing at Long-Distance Locations (July 25, 2017); Memorandum from GAO Deputy General Counsel to Director, GAO Labor Management Relations Office, re Appropriations for Transit Benefits for Field Office Employees (Sept. 19, 2016)).

home-to-work travel costs an employee incurs once he or she enters the local travel area, because those costs are within the scope of section 7905.”

*GAO Opinion re Long-Distance Home-to-Work Travel* at 9.<sup>8</sup> GAO based this conclusion on the “conflict avoidance” canon of statutory construction applied by the Supreme Court: i.e., that when confronted with two arguably inconsistent Federal statutes, courts must interpret the statutes harmoniously, to the extent reasonable, so as to avoid the unnecessary application of conflicting legal requirements.<sup>9</sup>

In our view, GAO’s reliance on the conflict-avoidance canon of construction to interpret the scope of eligible transit benefits under section 7905 is misplaced. There is no conflict or even potential inconsistency between section 7905 and 5 U.S.C. § 5702 because these two statutes apply to entirely separate categories of travel-related expenses, personal vs. business expenses: Section 7905 authorizes subsidies for employees’ *personal* transportation expenses for home-to-work commuting, and section 5702 authorizes payment of per diem allowances and reimbursement of expenses incurred for employees’ official *business* travel.<sup>10</sup> Furthermore, whereas section 5702 contemplates the designation of local travel areas to determine what constitutes official business travel “away from” the employee’s “home and regular place of business,” 5 U.S.C. § 5702(a)(1), section 7905 includes no terms restricting the scope of authorized transit benefits to defined local areas; rather, beyond the limiting factors we have described above, section 7905 leaves the authorization of transit benefits for eligible commuting to the discretion of each agency head.

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<sup>8</sup> Consistent with 5 U.S.C. § 5707, GSA has delegated to Federal agencies the authority to define local travel areas for purposes of payment of employees’ TDY travel expenses for official business travel outside the local area. See 75 Fed. Reg. 24434 (May 5, 2010). For the DOT Headquarters building in Southeast Washington, D.C., for example, the local travel area is a surrounding circle with a 50-mile radius.

<sup>9</sup> See *Aug. 2017 GAO Deputy GC Mem.* at 2 (“In interpreting and applying the statutes at play here, GAO necessarily follows the statutory interpretation canons of the Supreme Court providing that one must read statutes harmoniously. Given that GAO’s appropriations are available for long-distance travel only for official TDY travel, it necessarily follows *as a matter of law* that GAO’s appropriations are only available for transit benefits for personal commutes that take place within the local travel area of their official duty station. Travel outside of that area is covered by 5 U.S.C. § 5702, and must be official TDY travel.”) (emphasis in original) (citing *Posadas v. Nat’l City Bank of N.Y.*, 296 U.S. 497, 503 (1936), for the general canon of construction).

<sup>10</sup> Unlike the transit benefit statute, which was enacted in 1993, section 5702 originated more than 90 years ago, in the Subsistence Expense Act of 1926, 44 Stat. 688, which established a maximum per diem allowance for official travel expenses. The current form of the statute applies to expenses incurred by an employee “when traveling on official business away from the employee’s designated post of duty or away from the employee’s home or regular place of business.” 5 U.S.C. § 5702(a)(1). The operative phrase is “on official business,” and the legislative history of section 5702 confirms that the purposes of the authorization are to ensure that the government pays the reasonable expenses of official government travel and to raise periodically the per diem allowance to employees for official business travel. See, e.g., House Report No. 94-104 (Mar. 20, 1975) (accompanying an amendment to section 5702) (“Recognizing that a Federal Government employee traveling on legitimate Government business should not have to subsidize the cost of his trip, Congress has historically provided for reimbursement for reasonable expenses incurred while on official business.”). There is nothing in the text, structure, or legislative history of section 5702 to suggest, even remotely, that it should be interpreted or applied to affect in any way the scope of available transit benefits for the personal home-to-work commuting costs of Federal employees.

### Conclusion

For the reasons discussed herein, we conclude that 5 U.S.C. § 7905 does not impose a prescribed distance limitation on commutes eligible for Federal transit benefits. In establishing and approving Federal transit benefit programs to encourage Federal employees to commute by means other than single-occupancy vehicles, agency heads may provide a subsidized transit pass that covers the cost of personal transportation back and forth between the employee's home and work, provided the transportation: (1) is directly between the employee's residence and official place of work, with no intervening stay elsewhere, (2) is the type of regular or frequent roundtrip travel between home and work that could reasonably be expected to occur on a daily basis, even if it does not actually occur every workday, and (3) occurs via a mass transit facility or a commercial van-pool or shuttle-bus service.

Please let us know if we can be of further assistance.