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**Comptroller General  
of the United States**

**United States General Accounting Office  
Washington, DC 20548**

# Decision

**Matter of:** Commodity Futures Trading Commission

**File:** B-288581

**Date:** November 19, 2001

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## DIGEST

Pursuant to 7 U.S.C. § 2(a)(2)(A), in the event a successor is not appointed and qualified, Commodity Futures Trading Commission (CFTC) Commissioner Spears may continue to serve until the expiration of this current session of Congress. The Commissioner may not serve beyond the adjournment sine die of the current session of Congress irrespective of any reserved right to reconvene, or, in the absence of an adjournment sine die, when by operation of law the next session of Congress begins.

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## DECISION

The Commodity Futures Trading Commission (CFTC) has requested an opinion concerning when its appropriations will no longer be available to pay the compensation of Commissioner David D. Spears, due to the expiration of his holdover term. In the event a successor is not appointed and qualified, the applicable statutory holdover provision provides that the Commissioner may continue to serve until the expiration of the current session of Congress. 7 U.S.C. § 2(a)(2)(A). For the reasons discussed below, the Commissioner's holdover term will expire upon the adjournment sine die of the current session of Congress pursuant to a concurrent resolution, irrespective of any reserved right to reconvene, or, in the absence of a resolution providing for an adjournment sine die, when by operation of law the next session of Congress begins.

## BACKGROUND

Commissioner Spears's fixed 5-year term of office ended April 15, 2000, during the second session of the 106<sup>th</sup> Congress. The Commissioner has continued to serve since that time pursuant to a holdover provision which provides that:

“Each Commissioner shall hold office for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to

serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office . . . .”

7 U.S.C. § 2(a)(2)(A).

The CFTC indicates that Commissioner Spears’s successor will not be nominated by the President and, with the advice and consent of the Senate, appointed prior to the end of the current session of Congress. Therefore, the Commissioner’s holdover term must end upon the expiration of the current session of Congress. See 57 Comp. Gen. 213 (1978) (CFTC may continue to compensate Commissioner whose fixed term expired during first session of 95<sup>th</sup> Congress until expiration of the second session of the 95<sup>th</sup> Congress, or appointment and qualification of successor, whichever occurs first). Although we considered this statutory holdover provision, formerly codified at 7 U.S.C. § 4a(a), in 57 Comp. Gen. 213, we did not address when a session of Congress expires within the meaning of the statute.

## ANALYSIS

It is well established that a session of Congress is brought to a close through either (1) a concurrent resolution of both houses adjourning the session sine die<sup>1</sup> or (2) operation of law, immediately prior to the beginning of the next session of Congress. Ashley v. Keith Oil Corp. et al., 7 F.R.D. 589, 590 (1947) (effective date of amendments to federal rules which were not to take effect until after the close of the session of Congress). See also Deschler’s Precedents, H.R. Doc. No. 94-661, Ch 1, § 2, at 8 (1976) (the final adjournment of a session is usually accomplished by a sine die adjournment resolution but can also be accomplished by the commencement of the next session of Congress, referring to January 3, 1941, as the end of the third session of the 76<sup>th</sup> Congress as well as the beginning of the first session of the 77<sup>th</sup> Congress).

For example, the second session of the 100<sup>th</sup> Congress expired on October 22, 1988, pursuant to the concurrent resolution adjourning the Congress sine die: “Resolved by the House of Representatives (the Senate concurring), That when the House and Senate adjourn on Saturday, October 22, 1988, they stand adjourned sine die.” H.R. Con. Res. 398, 100<sup>th</sup> Cong., 102 Stat. 4934 (1988). In accordance with 7 U.S.C.

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<sup>1</sup> Adjournment sine die literally means adjournment without day, a reference to the fact that the Houses are adjourning until the next session of Congress and not to a specified date within the current session of Congress. See Black’s Law Dictionary 1390 (7<sup>th</sup> ed. 1999) and Congressional Research Service, “Lame Duck Sessions, 74<sup>th</sup>-106<sup>th</sup> Congress,” 98-872 GOV, at 1 (2001).

§ 2(a)(2)(A), a holdover term expiring at the end of the second session of the 100<sup>th</sup> Congress pursuant to 7 U.S.C. § 2(a)(2)(A) would have expired on October 22, 1998.<sup>2</sup>

Compare this to the first session of the 104<sup>th</sup> Congress which expired prior to noon, January 3, 1996, pursuant to operation of law. According to section two of the Twentieth Amendment to the United States Constitution, a new session of Congress begins at noon on January 3<sup>rd</sup> of each year.<sup>3</sup> As a result, a previous session of Congress cannot continue beyond that time. Since there was no concurrent resolution providing for an adjournment sine die of the first session of the 104<sup>th</sup> Congress,<sup>4</sup> that session ended prior to noon, January 3, 1996, by operation of law. 110 Stat. 1 (1996). In accordance with 7 U.S.C. § 2(a)(2)(A), a holdover term expiring at the end of the first session of the 104<sup>th</sup> Congress would have expired prior to noon on January 3, 1996.

With regard to the expiration of a session of Congress by operation of law, the Twentieth Amendment permits Congress to provide for a new session to begin on a date later than January 3<sup>rd</sup>. If Congress has done so (but has not adjourned the current session sine die), then the current session will expire immediately prior to the date set by Congress for commencement of the next session. Ashley, above, at 591 (joint resolution provided that the second session of the 80<sup>th</sup> Congress would

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<sup>2</sup> The CFTC holdover language at issue here is similar to the language which establishes the length of recess appointments in the Constitution and which provides for the expiration of such appointments “at the End of [the Senate’s] next Session”. See U.S. Const. art. II, § 2, cl. 3. In this context, a recess appointment expires upon an adjournment sine die pursuant to a concurrent resolution. See United States v. Woodley, 751 F.2d 1008 (9<sup>th</sup> Cir. 1985) (district court judge continued to sit pursuant to his recess appointment until December 16, 1981, when the 97<sup>th</sup> Congress ended its first session), cert. denied 475 U.S. 1048 (1986). See S. Con. Res. 57, 97<sup>th</sup> Cong., 95 Stat. 1781 (1981). See also 28 Comp. Gen. 121 (1948) (concurrent resolution providing for recess, not adjournment sine die, does not terminate that session of Congress for purposes of the recess appointments clause); B-122867, July 13, 1955 (recess appointment of military officer expired on August 3, 1953, when Congress adjourned sine die pursuant to S. Con. Res. 53, 67 Stat. B134 (1953)); 41 Op. Att’y Gen. 463, 469-71 (1960) (concurrent resolution providing for recess, not adjournment sine die, does not terminate session of Congress for purposes of the recess appointments clause, citing 28 Comp. Gen. 121).

<sup>3</sup> “The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3<sup>rd</sup> day of January, unless they shall by law appoint a different day.” U.S. Const. amend. XX, § 2.

<sup>4</sup> S. Con. Res. 32, 104<sup>th</sup> Cong., 109 Stat. 1035 (1995), merely provided for adjournment times for the House and Senate, but not an adjournment sine die.

begin at noon on January 6, 1948, which, in the absence of an adjournment sine die, would cause the first session to terminate as of 11:59 a.m. on January 6, 1948).

The issue for CFTC arises in the event that the current session of Congress adjourns sine die pursuant to a concurrent resolution which authorizes congressional leaders to call Congress back into session before the next session of Congress convenes. In recent years, Congress has almost routinely included this recall authority in the concurrent resolutions providing for the final adjournment. See, e.g., H.R. Con. Res. 230, 104<sup>th</sup> Cong., 110 Stat. 4495 (1996). The recall language used in H.R. Con. Res. 230 is typical of the language Congress frequently uses:

“Resolved by the House of Representatives (the Senate concurring), That when the House adjourns on the legislative day of [October 2, 3<sup>rd</sup> or 4<sup>th</sup>, 1996], on a motion offered pursuant to this concurrent resolution by the Majority Leader, or his designee, it stand adjourned sine die, or until noon on the second day after Members are notified to reassemble pursuant to section 2 of this concurrent resolution, and that when the Senate adjourns on [October 2, 3<sup>rd</sup> or 4<sup>th</sup>, 1996], on a motion offered pursuant to this concurrent resolution by the Majority Leader, or his designee, it stand adjourned sine die, or until noon on the second day after Members are notified to reassemble pursuant to section 2 of this concurrent resolution.

“Sec. 2 The Speaker of the House with the Majority Leader of the Senate, acting jointly after consultation with the Minority Leader of the House and the Minority Leader of the Senate, shall notify the Members of the House and Senate, respectively, to reassemble whenever, in their opinion, the public interest shall warrant it.”

The CFTC questions what impact an adjournment resolution that includes recall authority would have on the expiration of Commissioner Spears’s holdover term. To our knowledge, this is an issue of first impression. In our view, there are only two logical resolutions. One is to conclude that the holdover term expires upon the date the Congress adjourns sine die, despite the inclusion of recall authority in the concurrent resolution. The other is to conclude that the holdover term expires on January 3, 2002.

We find no suggestion in the holdover provision itself or in its legislative history that the retention of recall authority in a concurrent resolution adjourning the Congress sine die transforms the “expiration of the next session of Congress” from the date of adjournment sine die to January 3<sup>rd</sup>. While section two of the Twentieth Amendment can operate to establish the ending date for a session of Congress, it will only do so when that Congress has not agreed by resolution to adjourn sine die. See Ashley, above, at 591. See also Dreschler’s Precedents, supra, Ch 1, § 2, at 8. Also, to read the statutory language to mean, in effect, January 3<sup>rd</sup> would be to ignore Congress’s prerogative to schedule its adjournment and thus to identify the expiration date of its

sessions. Without some affirmative expression of congressional intent otherwise, we are unwilling to overlook Congress's prerogatives in our interpretation of the holdover provision. As one court has explained, the purpose, generally, behind a holdover provision like the CFTC's is to limit the duration of the holdover period so that the President and the Senate are forced to move quickly on replacements. See Swan v. Clinton, 100 F.3d 973, 984, fn 7 (D.C. Cir. 1996). We conclude, therefore, that the better interpretation of the phrase, "expiration of the next session of Congress," when viewed in the context of an adjournment sine die with recall authority, is the date of adjournment sine die that Congress specified in the concurrent resolution.

Utilizing recall authority is an extraordinary measure to address crises or emergency situations, or, in the words of the 1996 concurrent resolution, "whenever . . . the public interest shall warrant it." See Congressional Research Service, "Lame Duck Sessions, 74<sup>th</sup>-106<sup>th</sup> Congress," 98-872 GOV, at 2 (2001). Despite the repeated inclusion of the recall authority in sine die adjournment resolutions over the years, Congress has apparently utilized it only once in recent memory, namely, to permit the House to perform duties incident to the impeachment of President Clinton.<sup>5</sup> If Congress adjourns sine die with recall authority and the leadership, in fact, recalls Members, the resulting meeting is viewed as a continuation of the then-current session of Congress, not a new session. As a result, the current session of Congress would expire some time after the initial sine die adjournment date. However, to focus our analysis on an unlikely contingency would permit the exception to drive the application of the statute. In that event, the risk for CFTC is that it might subject itself, in those typical years when the recall authority is not utilized, to charges that any action taken by the Commission after the sine die date is invalid.

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<sup>5</sup> Both houses of the second session of the 105<sup>th</sup> Congress adjourned sine die on October 21, 1998, pursuant to H.R. Con. Res. 353, 105<sup>th</sup> Cong., 112 Stat. 3699-3700 (1998). Pursuant to recall authority provided the House leadership (an additional recall authority was also provided for reassembly of both houses), the House reassembled on December 17<sup>th</sup> to address matters relating to the impeachment of President Clinton. Having completed its business, the House again adjourned sine die on December 19, 1998. See 112 Stat. 1 (1998).

## CONCLUSION

In our opinion, the inclusion of recall authority in an adjournment sine die resolution does nothing to fundamentally change the consequence of the resolution, at the time of its adoption, to end a session of Congress. While the recall authority certainly permits a reassembly of a session of Congress, presumably such an event is an uncertainty. Accordingly, the Commissioner's holdover term will expire upon the adjournment sine die of the first session of the 107<sup>th</sup> Congress as established by concurrent resolution (irrespective of any reserved right to reconvene), or, in the absence of a concurrent resolution setting an adjournment sine die date, immediately prior to the beginning of the second session of the 107<sup>th</sup> Congress (January 3, 2002, or as otherwise provided).

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