



Decision

Matter of: U.S. Commodity Futures Trading Commission—Obligation of Amounts for Whistleblower Awards

File: B-329712

Date: October 15, 2020

DIGEST

The U.S. Commodity Futures Trading Commission (CFTC) has a nondiscretionary duty to pay awards to qualifying whistleblowers from the Customer Protection Fund (CPF), and thus, an award that exceeds the available balance of the fund would not trigger an Antideficiency Act violation. By contrast, in the event that the CPF has insufficient funds, CFTC may not fund the operation of the Whistleblower Office or the Office of Customer Education and Outreach without violating the Antideficiency Act. Neither CFTC's annual lump-sum appropriation, nor previously deposited miscellaneous receipts, would be available to fund their operation.

DECISION

The U.S. Commodity Futures Trading Commission (CFTC) requests a decision from the Comptroller General under 31 U.S.C. § 3529 regarding how the Customer Protection Fund (CPF) is to operate when the balance of the CPF is insufficient to pay a whistleblower award or insufficient to continue the operation of the Whistleblower Office and Office of Customer Education and Outreach. Letter to Comptroller General, GAO, from Chief Financial Officer, CFTC (Dec. 20, 2017) (Request Letter), at 3.

As discussed below, CFTC has a nondiscretionary duty to pay awards to qualifying whistleblowers, 7 U.S.C. § 26(b)(1), and the amount of the award must be recorded consistent with the recording statute, 31 U.S.C. § 1501. In response to questions asked by CFTC we conclude: (1) if the balance of the CPF is insufficient to pay a whistleblower award its recording will not trigger an Antideficiency Act violation, as there can be no violation where an agency has a statutory requirement to obligate funds in excess of available appropriations; (2) by contrast, there is no statutory requirement to obligate funds for the operation of the Whistleblower Office or the Office of Customer Education and Outreach regardless of available appropriations, and thus the Antideficiency Act prohibits CFTC from incurring obligations in excess

of amounts available in the CPF for the operations of these offices; and (3) CFTC may not use funds from an alternate appropriation nor may it withdraw funds previously deposited lawfully as miscellaneous receipts without an express appropriation from Congress.

Our practice when rendering decisions is to obtain the legal views of the relevant agency and to establish a factual record on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP. CFTC provided the relevant facts and the agency's legal views in its request letter.

BACKGROUND

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), amending the Commodity Exchange Act, requires CFTC to implement whistleblower incentive and customer education programs. Pub. L. No. 111-203, title VII, subtitle A, pt. II § 748, 124 Stat. 1376, 1742-43 (July 21, 2010), *codified at* 7 U.S.C. § 26(g). Specifically, Dodd-Frank establishes the CPF, which is available to CFTC for (1) “the payment of awards to whistleblowers” and (2) “the funding of customer education initiatives designed to help customers protect themselves against fraud or other violations of [the Act].” 7 U.S.C. § 26(g)(2). In general, Dodd-Frank authorizes CFTC to credit the CPF with deposits to include any monetary sanctions it collects in covered judicial or administrative actions that are not otherwise distributed to victims. *Id.* § 26(g)(3)(A).

The CPF is available to make payments to whistleblowers “without further appropriation or fiscal year limitation.” 7 U.S.C. § 26(g)(2). Awards are made to whistleblowers who provide original information that leads to the successful resolution of a covered judicial or administrative action, or related action. *Id.* § 26(b)(1). The amount of the award must be between 10 and 30 percent of the monetary sanctions collected in a covered judicial or administrative action. *Id.* Within this range, CFTC has discretion to determine the amount of the award but “shall not take into consideration the balance of the [CPF].” *Id.* § 26(c)(1)(B)(ii).

Additionally, consistent with our previous decisions, CFTC obligates the CPF for expenses of the Whistleblower Office and the Office of Customer Education and Outreach, which are responsible for carrying out the whistleblower incentive program and the customer education initiatives, respectively. See B-321788, Aug. 8, 2011; B-324469, Nov. 8, 2013 (concluding that, although CFTC receives an annual lump-sum appropriation that is available for CFTC’s personnel and administrative costs generally, the CPF is the more specific, and therefore the appropriate, appropriation for the operation of the Whistleblower Office and customer education initiatives).

In its request to GAO, CFTC asks three questions related to a situation in which the balance of the CPF is insufficient to either make an award or support the operation

of the Whistleblower Office and Office of Customer Education and Outreach.¹ First, CFTC asks whether a whistleblower award that exceeds the available balance of the CPF must be recorded consistent with the recording statute, 31 U.S.C. § 1501, and if so, whether its recording would trigger an Antideficiency Act violation. Request Letter, at 3. CFTC also asks whether it would violate the Antideficiency Act by obligating amounts in excess of the available balance of the CPF for the operation of the Whistleblower Office and the Office of Customer Education and Outreach. *Id.* Lastly, CFTC asks whether either CFTC's annual lump-sum appropriation, or previously deposited miscellaneous receipt funds, would be available to make a whistleblower award or to fund the continued operation of the Whistleblower Office and Office of Customer Education and Outreach, in the event that the CPF had an insufficient balance. *Id.*

DISCUSSION

Recording Whistleblower Awards

CFTC asks when a whistleblower award must be recorded consistent with the recording statute, 31 U.S.C. § 1501. Section 1501(a) establishes the criteria for recording obligations against the government. As relevant here, agencies must record an obligation when it is supported by evidence of a binding agreement, in writing, for an authorized purpose of law. The writing need not be a finalized contract of any form but it must demonstrate offer and acceptance of the parties. See B-226782, Oct. 20, 1987; B-189697, Feb. 1, 1978; 39 Comp. Gen. 829 (1960). Additionally, where no other specific provision applies, but where there is documentary evidence of a legal liability of the government against an appropriation or fund, section 1501(a)(9) requires the recording of that obligation.

An award to a whistleblower does not require a formal contract between the awardee and CFTC, unless otherwise required by CFTC, rule, or regulation. 7 U.S.C. § 26(e). However, whether CFTC makes its award through a written contract between the agency and awardee, or issues an award without a contract, the award creates a specific legal liability sufficient to trigger either 31 U.S.C.

¹ CFTC's Office of the General Counsel (GC) describes several scenarios through which the CPF could become over-obligated as the result of a whistleblower award. Memorandum to the CFTC Chief Financial Officer from the CFTC General Counsel, *Review of the Financial Management Branch's Questions Concerning Operation of the Customer Protection Fund*, (Oct. 26, 2017), at 3, n. 2. Under the first scenario described, sanctions are credited to the CPF after distribution to victims, pursuant to 7 U.S.C. § 26(g)(3), but the whistleblower award is based on the total monetary sanctions collected before distribution to victims. Under this scenario the amount collected could prove insufficient for the award. CFTC GC also describes a scenario in which, because the CPF exceeds \$100 million at the time of sanctions, no credit is made to the CPF, pursuant to 7 U.S.C. § 26(g)(3)(A). Under this scenario an exceptionally large award could exceed the balance of the CPF.

§ 1501(a)(1) or (a)(9). See 42 Comp. Gen. 733, 734 (1963) (“If such analysis discloses a legal duty on the part of the United States which constitutes a legal liability . . . an obligation of funds may generally be stated to exist.”). Where an agency incurs a legal liability, the recording statute requires it to record the obligation, even if the obligation exceeds available appropriations. See 65 Comp. Gen. 4 (1985). CFTC is therefore required to record the amount of the award consistent with the recording statute even when the award exceeds the current value of the CPF.

Obligations that exceed available CPF funds

CFTC asks whether it would violate the Antideficiency Act if it over-obligates the CPF by recording a whistleblower award that exceeds the CPF’s available balance. The Antideficiency Act prohibits agencies from obligating or expending in excess or in advance of an available appropriation. 31 U.S.C. § 1341; B-331093, Oct. 22, 2019. Moreover, the text of the Antideficiency Act itself states that an agency may make an obligation before an appropriation is made where such an obligation is “authorized by law.” 31 U.S.C. § 1341(a)(1)(B); B-331093. Therefore, though the Antideficiency Act generally forbids agencies from recording obligations in excess of available appropriations, specific provisions in other statutes can overcome this general prohibition and, thus, permit agencies to incur obligations in excess of available appropriations under particular circumstances.

An agency need not have express authority to exceed its appropriation: “Congress may expressly state that an agency . . . may obligate funds in excess of the amount appropriated . . . or it may implicitly authorize an agency do so by virtue of a law that necessarily requires such obligations.” B-262069, Aug. 1, 1995, at 2. However, when interpreting and applying statutes to determine whether they permit an agency to incur obligations in excess of available appropriations, we are cognizant that the Antideficiency Act’s prohibition against such obligations is a key mechanism through which Congress furthers its constitutional power of the purse. Accordingly, we will find authority for an agency to incur obligations in excess of available appropriations only in the presence of clear statutory authority to do so.

Mere authority or even a requirement for an agency to undertake particular activities does not confer authority to do so without regard to available appropriations. For example, a court’s mandate that the District of Columbia comprehensively reform the District’s child welfare system did not permit the District to incur obligations in excess of its available appropriations. B-262069. Instead, for a statute to confer authority for an agency to incur obligations in excess of appropriations, the statute must require the agency to incur the obligation regardless of the availability of sufficient appropriations. For example, where a statute entitled the beneficiary of a loan guarantee to payment upon default of the borrower, the obligation arose at the time of default, even if there were insufficient appropriations to satisfy the guarantee. 65 Comp. Gen. 4, 7 (1985). The prohibitions of the Antideficiency Act pertain to discretionary obligations entered into by administrative officers. *Id.* at 9. Where

Congress requires the incurrence of obligations without the exercise of discretion by agency officials, the lack of a sufficient balance in the appropriation does not cause the obligation to violate the Antideficiency Act.

Here, CFTC “*shall* pay an award” to qualifying whistleblowers “not less than 10 percent” of the collected monetary sanctions. 7 U.S.C. § 26(b)(1) (emphasis added). Moreover, although CFTC has some discretion in the amount of the award, it “shall not take into consideration the balance of the [CPF].” *Id.* § 26(c)(1)(B)(ii). Congress has created a nondiscretionary duty for CFTC to award qualifying whistleblowers and has explicitly stated that it may not consider the balance of the CPF when determining how much to grant the awardee. Therefore, a whistleblower award that over obligates the CPF would not result in an Antideficiency Act violation.² While CFTC must record against the CPF obligations for whistleblower awards even if this exceeds its available balance, CFTC may make payments to liquidate these obligations only to the extent that the CPF has available amounts. Such a circumstance could require CFTC to await enactment of further appropriations sufficient to permit the CPF to satisfy its outstanding but unliquidated obligations.

We have previously established that costs associated with the Whistleblower Office and Office of Customer Education and Outreach are necessary and incident to achieving the purposes for which Congress established the CPF and, therefore, that CFTC should obligate amounts for these offices’ operations against the CPF. See B-321788. Unlike the award payments to qualifying whistleblowers, there is no statutory requirement to obligate funds for the operation of these offices notwithstanding the availability of sufficient appropriations. If the CPF lacks sufficient funds to sustain the operation of these offices, CFTC will need to take necessary steps to prevent itself from incurring these discretionary obligations, as they would violate the Antideficiency Act unless an exception applies. Such steps could include the suspension of the operations of these offices, or alternatively, CFTC could petition Congress for additional appropriations sufficient to continue operations. See 61 Comp. Gen. 661.

Alternative Funds Available for Operating the Whistleblower Office and Office of Customer Education and Outreach

Lastly, CFTC asks whether it may use its general appropriation or, alternatively, retrieve previously deposited miscellaneous receipts, in order to operate the Whistleblower Office and Office of Customer Education and Outreach if there is an insufficient balance in the CPF. CFTC must deposit any applicable judgments into

² In addition to recording the whistleblower award itself, CFTC could permissibly incur additional obligations directly incident to the recording of the whistleblower award, such as obligations for salaries of the staff necessary to record the obligation. See B-330775.1, Oct. 1, 2020 (agency did not violate Antideficiency Act when, during a lapse in appropriations, it incurred obligations for salaries for officials necessary to perform functions that were excepted under the Antideficiency Act).

the general fund as miscellaneous receipts if, at the time the monetary judgment is collected, the balance of the CPF exceeds \$100,000,000. See 7 U.S.C. § 26(g)(3)(A); 31 U.S.C. § 3302(b).

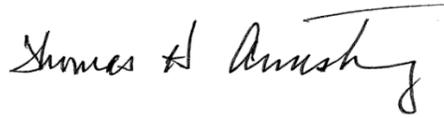
The CPF “is the more specific appropriation for expenses incidental to customer education initiatives and the whistleblower incentive awards.” B-324469, Nov. 8, 2013; B-321788, Aug. 8, 2011. If a specific appropriation exists for a particular item, then that appropriation must be used and it is improper to obligate any other appropriation for that item. See B-330776, Sept. 5, 2019, at 10. Congress can allow an agency to use two appropriations for the same activity, but that allowance must be made explicitly by Congress in statute or in the appropriation itself. Here, there is currently no such allowance, and therefore even if the CPF is depleted, the Antideficiency Act would bar the CFTC from using its general appropriation to fund the operations of the Whistleblower Office and Office of Customer Education and Outreach. See B-330720, Feb. 6, 2019.

Similarly, previously recovered funds deposited into the general fund of the Treasury as miscellaneous receipts are also unavailable to continue the operation of the Whistleblower Office and Office of Customer Education and Outreach. Erroneous deposits into the general fund may be adjusted without a violation of law. See *e.g.* B-286661, Jan. 19, 2001 (allowing an agency to correct an improper deposit into miscellaneous receipts by retrieving the funds from the account); 72 Comp. Gen. 343 (1993). However, if an agency has properly deposited money into the general fund, such as here, those amounts may not be retrieved without a specific appropriation from Congress. If a deposit has been made to the general fund of the Treasury in accordance with the law, then no error has been made that would allow CFTC to retrieve funds previously deposited in order to continue the operation of the Whistleblower Office and Office of Customer Education and Outreach.

CONCLUSION

CFTC’s duty to award qualifying whistleblowers under 7 U.S.C. § 26(b) is nondiscretionary, and therefore, although any award must be recorded consistent with the recording statute, an award that causes an over obligation of the CPF would not result in an Antideficiency Act violation. By contrast, there is no statutory requirement for CFTC to continue to operate the Whistleblower Office or Office of Customer Education and Outreach notwithstanding the availability of sufficient appropriations. Any over obligation of the CPF for the purpose of operating these offices would result in an Antideficiency Act violation, and neither CFTC’s annual

lump-sum appropriation nor previously deposited miscellaneous receipts are available to CFTC to obligate for the operation of the two offices.

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the "A" and a long, sweeping tail on the "g".

Thomas H. Armstrong
General Counsel