



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Office of Management and Budget—Reconsideration—Application of the Impoundment Control Act to 2019 Apportionment Letters and a Congressional Notification for State Department Foreign Military Financing

File: B-331564.2

Date: March 17, 2022

DIGEST

Our decision in B-331564.1 characterized fiscal year (FY) 2019 appropriations for foreign military financing (FMF) as lump sum amounts, even though a general provision incorporated by reference into law line-item amounts, within the FY 2019 FMF appropriation, for specific countries. We are issuing this reconsideration to assess whether this omission was material to the outcome of the decision. Because the Arms Export Control Act confers substantial discretion to the President to carry out the FMF program, we reaffirm our conclusion in our prior decision. The Office of Management and Budget did not violate the Impoundment Control Act when it conducted interagency discussions that may have delayed the transmission of a congressional notification regarding the agencies intent to obligate FY 2019 FMF funds.

DECISION

This is a reconsideration of our decision in B-331564.1, February 10, 2022, in which we concluded that the Office of Management and Budget (OMB) did not violate the Impoundment Control Act of 1974 (ICA)¹ when it conducted interagency discussions regarding the plan to obligate fiscal year (FY) 2018 and 2019 foreign military financing (FMF) funds for Ukraine. We are issuing this reconsideration because our prior decision characterized FY 2019 appropriations for FMF as lump sum amounts, without addressing section 7019 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019 (Section 7019), which incorporated

¹ Pub. L. No. 93-344, title X, §§ 1001–1017, 88 Stat. 297, 332–339 (July 12, 1974), 2 U.S.C. §§ 681–688.

by reference into law line-item amounts, within the FY 2019 FMF appropriation, for specific countries, including Ukraine.² We will modify or reverse a prior decision if it contains a material error of fact or law.³ As such, we consider whether this omission was material to the outcome of the decision. Because the Arms Export Control Act (AECA)⁴ confers substantial discretion to the President in carrying out FMF, we conclude that conducting interagency discussions regarding a congressional notification for FMF funds for Ukraine constituted a programmatic delay. Therefore, the omission was not material, and we reaffirm our original conclusion that OMB did not violate the ICA.

In accordance with our regular practice, we contacted OMB and the Department of State (State) to confirm factual information and their legal views on this matter.⁵ We received and considered responses from both agencies.⁶

² Pub. L. No. 116-6, div. F, title VII, § 7019, 133 Stat. 267, 307–308 (Feb. 15, 2019); H.R. Conf. Rep. No. 116-9, at 869 (2019). Section 7019 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2018, incorporated by reference into law line-item amounts, within the FY 2018 FMF appropriation, for specific countries, including \$95 million for Ukraine. Pub. L. No. 115-141, div. K, title VII, § 7019, 132 Stat. 833, 873–874 (Mar. 23, 2018); 2 House Appropriations Committee Print on H.R. 1625, at 1805 (2018). OMB and State complied with this direction on September 28, 2018, when OMB apportioned \$95 million of FY 2018 FMF amounts for Ukraine. Email from GAO Liaison, State, to Assistant General Counsel or Appropriations Law, GAO (Dec. 12, 2019); Email from GAO Liaison, State, to Senior Staff Attorney, GAO (Jan. 19, 2021), Attachment, at 8; Letter from General Counsel, OMB, to General Counsel, GAO (Dec. 11, 2019), at 3. The FY 2018 FMF funds included in the September 11, 2019 congressional notification were amounts appropriated for FMF in the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2018, designated for Overseas Contingency Operations/Global War on Terrorism. Department of State, *Congressional Notification*, CN 19-286 (Sept. 11, 2019) (CN 19-286); Pub. L. No. 115-141, 132 Stat. at 970.

³ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), at 9–10, available at <https://www.gao.gov/products/gao-06-1064sp>.

⁴ Pub. L. No. 90-628, 82 Stat. 1320 (Oct. 22, 1968), 22 U.S.C. §§ 2751–2778, 2779–2799aa-2.

⁵ Email from Managing Associate General Counsel, GAO, to General Counsel, OMB (Feb. 16, 2022); Email from Managing Associate General Counsel, GAO, to Acting Legal Adviser, State (Feb. 16, 2022).

⁶ Email from Deputy General Counsel, OMB, to Managing Associate General Counsel, GAO (Mar. 5, 2022); Email from Director, GAO Liaison, State, to Managing Associate General Counsel, GAO (Mar. 5, 2022).

BACKGROUND

In B-331564.1, we addressed, in part, whether OMB violated the ICA when it conducted interagency discussions regarding the obligation of FY 2018 and 2019 FMF funds for Ukraine where these discussions may have delayed the transmission of a congressional notification for such funds, a necessary prerequisite to obligating the FMF funds.⁷ The decision concluded that OMB did not violate the ICA with respect to the interagency discussions because of “the statutory discretion vested in the President and the inherent flexibility of a lump sum appropriation.”⁸

After we issued B-331564.1, we determined that we should also address the import of Section 7019, which incorporated by reference into law line-item amounts, within the FY 2019 FMF appropriation, for specific countries. Section 7019(a) provides, among other things, that funds appropriated under title IV of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019, shall be made available in the amounts specifically designated in the tables included in the joint explanatory statement accompanying the Act. The FMF appropriation falls under title IV of the Act.⁹ The joint explanatory statement includes tables for several countries, specifying certain amounts from the FMF and other accounts for assistance for those countries, including Ukraine.¹⁰

Section 7019(b) authorizes State to deviate from amounts in the joint explanatory statement’s tables by up to 10 percent. If the Secretary of State wishes to deviate by more than 10 percent, the Secretary may do so under certain conditions, “subject to prior consultation with, and the regular notification procedures of, the Committees on Appropriations.”¹¹ In short, Section 7019 directs the agencies to spend the specified FMF amount for certain countries, including Ukraine, with flexibility to deviate as set forth in Section 7019.

⁷ State is required to notify Congress of planned FMF obligations for specific countries 15 days in advance of making such obligations. 22 U.S.C. § 2394-1; Pub. L. No. 115-141, § 7015(c), 132 Stat. at 870; Pub. L. No. 116-6, § 7015(c), 133 Stat. at 303. Therefore, funds could not be obligated for FMF for Ukraine until 15 days after September 11, 2019, the date State transmitted the congressional notification for these funds. CN 19-286.

⁸ B-331564.1, at 13.

⁹ Pub. L. No. 116-6, 133 Stat. at 288–289.

¹⁰ H.R. Conf. Rep. No. 116-9, at 869 (table for Ukraine making specific amounts from various accounts, including \$115 million in FMF amounts, available for Ukraine).

¹¹ Pub. L. No. 116-6, § 7019(b), 133 Stat. at 308.

DISCUSSION

At issue here is whether we made a material error of fact or law in B-331564.1 when we did not address that Section 7019 incorporated by reference into law line-item amounts for Ukraine, within the FY 2019 FMF appropriation, in concluding that no violation of the ICA had occurred. For the reasons explained below, this omission is not material. We reaffirm the conclusion in our prior decision.

Our conclusion in B-331564.1 that OMB did not violate the ICA when it conducted interagency discussions that may have delayed transmission of a congressional notification relied, in part, on the discretion inherent in obligating lump sum appropriations.¹² We explained that such discretion meant it was reasonable and necessary for State, OMB, and other interagency partners to communicate regarding the best use of the funds within the scope of the appropriation.¹³ However, we must consider whether the line-item appropriations within the FY 2019 FMF appropriation for specific countries further limited the President's discretion in administering the FMF program.

When amounts are appropriated for a narrow purpose, the executive branch has less discretion in executing the funds than might be the case with a lump sum appropriation.¹⁴ But to determine how much or little discretion the executive branch has in executing a line-item appropriation, we must consider the purpose of the appropriation.¹⁵ Here, Congress appropriated a lump sum appropriation "[f]or necessary expenses for grants to enable the President to carry out the provisions of section 23 of the Arms Export Control Act,"¹⁶ and then, within that larger sum, incorporated line-item amounts for Ukraine. Therefore, we must consider the discretion afforded to the President by section 23 of AECA.

In general, AECA authorizes and provides general rules for the sale of defense articles and services to foreign countries, known as foreign military sales.¹⁷ There

¹² B-331564.1, at 12–13.

¹³ *Id.*

¹⁴ B-332393, May 5, 2021, at 3 (a lump sum appropriation "allows the agency flexibility to execute its appropriation in a manner that accommodates shifting circumstances and needs . . . [and] [c]onversely, where Congress intends to limit agency discretion, it may insert a line item").

¹⁵ See B-331888, June 11, 2020.

¹⁶ Pub. L. No. 116-6, 133 Stat. at 288.

¹⁷ See 22 U.S.C. §§ 2751–2778, 2779–2799aa-2.; see also Defense Security Cooperation Agency (DSCA), *Electronic Security Assistance Management Manual (ESAMM)*, Glossary, available at <https://samm.dsca.mil/listing/esamm-glossary> (last visited Mar. 15, 2022) (describing AECA and defining Foreign Military Sales).

are various funding sources that a country may use to pay the U.S. government for a sale.¹⁸ For example, a country may use its national funds.¹⁹ Alternatively, section 23 of AECA provides that the President may finance a country's procurement of defense articles and services using FMF funds.²⁰ Under the foreign military sales process, an eligible foreign country submits a request for defense articles or services which, after acceptance by the U.S. government, may result in a sales agreement.²¹

As discussed in our prior decision, AECA provides the President with substantial discretion to carry out FMF and foreign military sales. Under AECA, the Secretary of State, under the President's direction, is responsible for continuous supervision and general direction of sales and financing "to the end that the foreign policy of the United States would be best served thereby."²² In addition, section 23 of AECA specifically provides that the President may finance the procurement of defense articles and services "on such terms and conditions as [the President] may determine. . . ."²³

The discretion provided to the President under AECA continues to support a conclusion that it was reasonable and necessary for OMB, State, and other interagency partners to hold discussions regarding FMF before amounts were obligated. Obligation of FMF to an eligible country is part of the foreign military sales process, and interagency discussions are part of implementing AECA and the FMF line-item appropriation. Further, there is no evidence that the President or OMB delayed funds because of a disagreement with the policy underlying AECA or the appropriation.²⁴ Indeed, the line-item amount for Ukraine within the FY 2019 FMF

¹⁸ ESAMM, ch. C9, § C9.7, available at <https://samm.dsca.mil/listing/chapters> (last visited Mar. 15, 2022).

¹⁹ ESAMM, ch. C9, § C9.7.1.

²⁰ See 22 U.S.C. § 2763(a); ESAMM, ch. C9, § C9.7.2.

²¹ See ESAMM, ch. C4, §§ C4.4, C4.5 (articles and services that may, and may not, be purchased under the foreign military sales program) and ch. C5 (describing the request and acceptance process for foreign military sales).

²² 22 U.S.C. § 2752(b).

²³ 22 U.S.C. § 2763(a). The President has delegated to the Secretary of Defense the authority to issue grants and loans to eligible recipients in accordance with AECA. ESAMM, ch. C9, § C9.7.2.9.2.1.3. The Secretary of Defense has further delegated this authority to the Director of DSCA, to be exercised in consultation with State and the Department of Treasury. *Id.*

²⁴ In responses to our office, OMB and State noted that there was no deviation under Section 7019 in FMF amounts designated for Ukraine for FY 2018 or 2019. Email from Deputy General Counsel, OMB, to Managing Associate General Counsel, GAO

appropriation was obligated on September 30, 2019.²⁵ The discretion afforded to the executive branch in Section 7019 is certainly more constrained than a lump sum appropriation. Nevertheless, the discretion afforded by AECA over FMF may reasonably necessitate interagency discussions, and any delays incident to such discussions were programmatic delays. As such, we find no basis to change our previous decision.

We reaffirm the conclusion reached in B-331564.1 that OMB did not violate the ICA when it conducted interagency discussions that may have delayed the transmission of a congressional notification for FY 2019 FMF funds.

CONCLUSION

Our decision in B-331564.1 did not address Section 7019 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019, which incorporated by reference into law line-item amounts, within the FY 2019 FMF appropriation, for specific countries. However, AECA provides the President substantial discretion in carrying out FMF, and OMB's actions were a reasonable exercise of programmatic discretion. Upon reconsideration, we have no basis to modify the conclusions reached in our prior decision that OMB did not violate the ICA when it conducted interagency discussions about a congressional notification.



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General Counsel

(Mar. 5, 2022); Email from Director, GAO Liaison, State, to Managing Associate General Counsel, GAO (Mar. 5, 2022), Attachment.

²⁵ Letter from General Counsel, OMB, to General Counsel, GAO (Dec. 11, 2019), Attachment (apportionment schedule for Foreign Military Financing Program appropriated by Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019). FMF amounts are obligated upon apportionment. Pub. L. No. 116-6, 133 Stat. at 288. OMB apportions the amounts as available for either a specific country or as “unallocated.” See Letter from General Counsel, OMB, to General Counsel, GAO (Jan. 19, 2021), Attachment A, at 3. Amounts that are apportioned for a specific country are considered obligated for that country once the apportionment action is taken. See *id.*