



B-327212

April 8, 2016

The Honorable Robert Aderholt
Chairman
Subcommittee on Agriculture, Rural Development, Food and Drug Administration,
and Related Agencies
Committee on Appropriations
House of Representatives

Subject: *U.S. Agency for International Development—Nonemergency Food Assistance*

Dear Mr. Chairman:

Section 412(e) of the Food for Peace Act, as amended, required the U.S. Agency for International Development (USAID) to make at least \$350 million of the Food for Peace Title II Grants appropriation available for nonemergency food assistance in fiscal year (FY) 2014. Pub. L. No. 113-79, title III, § 3012, 128 Stat. 649, 777 (Feb. 7, 2014), *classified at* 7 U.S.C. § 1736f(e)(2). USAID obligated only \$261.6 million of the appropriation for nonemergency food assistance. Accordingly, you asked whether USAID violated the minimum funding level of \$350 million for FY 2014. You also asked whether USAID improperly obligated amounts from the Development Assistance appropriation in an effort to meet the minimum funding level required to be obligated from the Food for Peace Title II Grants appropriation.

As explained below, we conclude that USAID did not violate the minimum funding level for FY 2014. Another provision, section 202(a) of the Food for Peace Act, permits the USAID Administrator to obligate less than the minimum funding level for nonemergency food assistance when the Administrator chooses to prioritize emergency food assistance. Pub. L. No. 101-624, title XV, subtitle A, § 1512, 104 Stat. 3359, 3636–38 (Nov. 5, 1990), *classified at* 7 U.S.C. § 1722(a) (“*Notwithstanding any other provision of law, the Administrator may provide agricultural commodities to meet emergency food needs under this title . . . in such manner and on such terms and conditions as the Administrator determines appropriate to respond to the emergency*”) (emphasis added). We also do not object to USAID’s obligation of the “Development Assistance” appropriation for nonemergency food assistance activities where such activities are undertaken pursuant to section 103 of the Foreign Assistance Act.

BACKGROUND

USAID carries out a number of programs and activities related to agriculture and food security. USAID, *Agriculture and Food Security*, available at www.usaid.gov/what-we-do/agriculture-and-food-security (last visited Apr. 7, 2016). Relevant to this opinion are USAID's programs and activities authorized under title II of the Food for Peace Act as well as section 103 of the Foreign Assistance Act of 1961, as amended.¹

Food for Peace

USAID's Office of Food for Peace administers food aid programs under title II of the Food for Peace Act, as amended.² See USAID, *Office of Food for Peace*, available at www.usaid.gov/who-we-are/organization/bureaus/bureau-democracy-conflict-and-humanitarian-assistance/office-food (last visited Apr. 7, 2016) (FFP Website). Title II authorizes the provision of agricultural commodities to meet emergency and nonemergency food needs around the world. 7 U.S.C. § 1722. The nonemergency food assistance programs work as follows: (1) private voluntary organizations and international organizations submit proposals based on Food for Peace guidance; (2) after a project is approved, these partners order commodities for delivery; (3) the U.S. Department of Agriculture (USDA) procures the requested commodities while partners arrange for the commodities to be shipped to the recipient country; (4) during project implementation, the partners distribute the commodities according to plans in project documentation. USAID, *How Title II Food Aid Works*, available at www.usaid.gov/what-we-do/agriculture-and-food-security/food-assistance/quick-facts/how-title-ii-food-aid-works (last visited Apr. 7, 2016). The partner either directly

¹ USAID provided us with facts and its legal views on this matter. 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. Letter from Assistant General Counsel for the Bureau for Democracy, Conflict, and Humanitarian Assistance and Bureau for Food Security, USAID, to Assistant General Counsel for Appropriations Law, GAO, *Re: GAO Request B-327212, USAID appropriations for nonemergency food assistance* (Sept. 25, 2015) (USAID Letter). See also Email from Assistant General Counsel, Bureau for Democracy, Conflict, and Humanitarian Assistance and Bureau for Food Security, USAID, to Assistant General Counsel for Appropriations Law and Senior Attorney, GAO, *Subject: Examples of CDF and Title II Non-Emergency Awards* (Nov. 10, 2015) (USAID Email).

² The Food for Peace Act was previously referred to as the Agricultural Trade Development and Assistance Act of 1954. The Food, Conservation, and Energy Act of 2008 amended and renamed the law. Pub. L. No. 110-246, title III, subtitle A, §§ 3001–3024, 122 Stat. 1651, 1820–31 (June 18, 2008).

distributes food aid or sells commodities in-country, the proceeds of which are used to fund development purposes, a process known as “monetization.” GAO, *International Food Assistance: U.S. Nonemergency Food Aid Programs Have Similar Objectives but Some Planning Helps Limit Overlap*, GAO-13-141R (Washington, D.C.: Dec. 12, 2012); GAO, *International Food Assistance: Funding Development Projects through the Purchase, Shipment, and Sale of U.S. Commodities Is Inefficient and Can Cause Adverse Market Impacts*, GAO-11-636 (Washington, D.C., June 23, 2011).

In FY 2014, the Office of Food for Peace administered 30 nonemergency food assistance projects in 14 countries.³ USAID, *Fiscal Year 2014 Food for Peace Fact Sheet*, available at www.usaid.gov/what-we-do/agriculture-and-food-security/food-assistance/quick-facts/fiscal-year-2014-food-peace (last visited Apr. 7, 2016) (USAID FY 2014 Fact Sheet). USAID allocates funds to the Office of Food for Peace from the “Food for Peace Title II Grants” appropriation in the annual Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act. See, e.g., Pub. L. No. 113-76, div. A, title V, 128 Stat. 5, 29 (Jan. 17, 2014) (“For expenses during the current fiscal year, not otherwise recoverable, and unrecovered prior years’ costs, including interest thereon, under the Food for Peace Act (Public Law 83–480, as amended), for commodities supplied in connection with dispositions abroad under Title II of said Act, \$1,466,000,000, to remain available until expended . . .”).

Feed the Future

Another USAID component, the Bureau for Food Security, manages a different food assistance program. The Bureau for Food Security administers Feed the Future, described by USAID as the federal government’s “initiative on global hunger and food security,” under section 103 of the Foreign Assistance Act of 1961, as amended. USAID Letter, at 3. See also USAID, *Bureau for Food Security*, available at www.usaid.gov/who-we-are/organization/bureaus/bureau-food-security (last visited Apr. 7, 2016); GAO, *Global Food Security: USAID is Improving Coordination but Needs to Require Systematic Assessments of Country-Level Risks*, GAO-13-809 (Washington, D.C.: Sept. 17, 2013). Section 103 of the Foreign Assistance Act authorizes the President to furnish assistance to developing countries with regard to agriculture, rural development, and nutrition. Pub. L. No. 93-189, 87 Stat. 714, 715 (Dec. 17, 1973), *classified at* 22 U.S.C. § 2151a. USAID allocates funds to the Bureau for Food Security from the “Development Assistance” appropriation in the annual Department of State, Foreign Operations, and Related Programs

³ USAID refers to nonemergency food assistance as “development food assistance.” FFP Website; GAO-13-141R, at 1 n.2.

Appropriations Act.⁴ See, e.g., Pub. L. No. 113-76, 128 Stat. at 477 (“For necessary expenses to carry out the provisions of sections 103, 105, 106, 214, and sections 251 through 255, and chapter 10 of part I of the Foreign Assistance Act of 1961, \$2,507,001,000, to remain available until September 30, 2015 . . .”).

Some of these Development Assistance funds are obligated⁵ by the Office of Food for Peace on behalf of the Bureau for Food Security.⁶ USAID Letter, at 3. For instance, the Office of Food for Peace might modify an existing award and add Development Assistance funds pursuant to the Foreign Assistance Act. USAID Email. In FY 2014, the Office of Food for Peace obligated Development Assistance funds for nonemergency food assistance projects in five countries. USAID FY 2014 Fact Sheet. The Office of Food for Peace “utilizes [Development Assistance] monies to support community-level development activities, providing an alternative to the monetization and/or use of nonemergency food assistance in those cases where the process of monetization does not contribute to a country’s development goals, local or regional procurement of food is more appropriate and efficient, and/or in-kind food assistance is not a necessary component of the program.” USAID Letter, at 3. USAID’s goal is to “ensure that where [the Bureau for Food Security] and Feed the Future [are] working to boost local agriculture production, monetization under Title II [is not] undermining that effort.” USAID Email. USAID explains that it is following “[c]ongressional direction embodied in section 103(f) of the [Foreign Assistance Act] to link programming of Title II [Food for Peace Act] and [Development Assistance] grants to assist developing countries enhance their national food security and achieve the broader development goals of the Foreign Assistance Act.” USAID Letter, at 3; 22 U.S.C. § 2151a(f).

⁴ USAID refers to Development Assistance amounts provided under section 103 of the Foreign Assistance Act as “Community Development Funds.” USAID Letter, at 3.

⁵ An obligation is a “definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States.” GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 70. See also B-325526, July 16, 2014, at 3; B-300480.2, June 6, 2003, at 3–4; B-300480, Apr. 9, 2003, at 3–4.

⁶ Development Assistance funds are “reserved for use in [the 19] Feed the Future countries.” USAID Email; Feed the Future, *Feed the Future Countries*, available at www.feedthefuture.gov/countries (last visited Apr. 7, 2016).

DISCUSSION

With this background in mind, we consider whether USAID violated the minimum funding level by failing to obligate \$350 million of Food for Peace Title II Grants appropriation for FY 2014. We also address whether USAID improperly obligated both the Food for Peace Title II Grants appropriation and the Development Assistance appropriation in an effort to meet the minimum funding level for FY 2014.

Minimum Funding Level and the Legal Effect of a “Notwithstanding” Clause

USAID concedes that in FY 2014 it obligated only \$261.4 million of the Food for Peace Title II Grants appropriation for nonemergency food assistance, which is about \$90 million less than the \$350 million minimum funding level in section 412(e) of the Food for Peace Act. See 7 U.S.C. § 1736f(e)(2) (“The amount made available to carry out nonemergency food assistance programs . . . shall not be less than \$350,000,000 for any fiscal year.”). USAID explains that a “notwithstanding clause” in section 202(a) of the Food for Peace Act allowed it to obligate less than the minimum funding level. USAID Letter, at 2; 7 U.S.C. § 1722(a) (“*Notwithstanding any other provision of law*, the Administrator may provide agricultural commodities to meet emergency food needs under this title . . . in such manner and on such terms and conditions as the Administrator determines appropriate to respond to the emergency”) (emphasis added).

When Congress wishes to confer discretion unrestrained by other laws, its practice has been to include the words “notwithstanding any other provision of law” or similar language. 14 Comp. Gen. 578 (1935). The Supreme Court stated, “[T]he use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.” *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993).⁷ Similarly, the Court of Appeals for the Federal Circuit explained that an introductory “notwithstanding” clause “connotes a legislative intent to displace any other provision of law that is contrary to [that] Act.” *Shoshone Indian Tribe of the Wind River*

⁷ In *Cisneros*, the Supreme Court had to reconcile two provisions in a housing subsidy contract: one that guaranteed a landlord automatic annual payment adjustments and another that stated that “notwithstanding any other provisions of this Contract,” annual adjustments shall not result in material differences between subsidized and market rates. 508 U.S. at 13–14. The Court held that the two provisions clearly conflicted if annual adjustments exceeded market rates, and in such a case, the “notwithstanding” provision took precedence over the annual adjustment provisions. *Id.* at 18–19.

Reservation v. United States, 364 F.3d 1339, 1346 (Fed. Cir. 2004).⁸ The U.S. District Court for the Southern District of New York stated that a “notwithstanding” clause “supersedes any other law that could hinder its objectives.”⁹ *Ku v. U.S. Department of Housing and Urban Development*, No. 11 CV 6858, slip op. at 10 (S.D.N.Y. May 14, 2012), *aff’d*, 508 F. App’x 14 (2^d Cir. 2013).

Here, title II of the Food for Peace Act directs USAID to provide agricultural commodities to foreign countries to meet both emergency and nonemergency food needs. 7 U.S.C. § 1722. Congress has appropriated amounts for this purpose in the Food for Peace Title II Grants appropriation. Section 412(e) provides that USAID must make at least \$350 million of that appropriation available for nonemergency food assistance programs. *Id.* § 1736f(e)(2). However, section 202(a) provides that USAID may make *any* amount available for emergency food assistance programs in certain circumstances, “[n]otwithstanding any other provision of law.” *Id.* § 1722(a) (“Notwithstanding any other provision of law, the Administrator may provide agricultural commodities to meet emergency food needs under this title . . . in such manner and on such terms and conditions as the Administrator determines appropriate to respond to the emergency”). These sections are in direct conflict.

The “notwithstanding” clause in section 202(a) takes precedence over a competing provision. See *Cisneros*, 508 U.S. at 18. The “notwithstanding” language affords the Administrator with the discretion to prioritize emergency food assistance, thus diverting money from nonemergency food assistance, if the Administrator

⁸ In *Shoshone*, the Court of Appeals for the Federal Circuit considered the effect of an appropriations provision that stated “notwithstanding any other provision of law,” the statute of limitations on tribal trust fund claims shall not commence to run until the tribe is furnished with an accounting. 364 F.3d at 1344. The court found that a clear conflict existed between this provision and the existing statute of limitations for certain trust claims. Accordingly, the court held that the appropriations provision suspended the statute of limitations until an accounting of the trust was received. *Id.* at 1354.

⁹ Of course, a “notwithstanding” clause is “not necessarily preemptive” of all laws. *E.P. Paup Co. v. Director, Office of Workers Compensation Programs*, 999 F.2d 1341, 1348 (9th Cir. 1993). Depending on the context and circumstances, federal laws of general applicability may remain relevant. For instance, the Court of Appeals for the D.C. Circuit found that a provision of the Federal-Aid Highway Act directing construction of a bridge “notwithstanding any other provision of law” did not render inapplicable certain federal statutes regarding protection of historic sites. *District of Columbia Federation of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1265 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972). In another case, our office found that a general “notwithstanding any other provision of law” clause in an appropriations provision did not waive the application of the Antideficiency Act. B-303961, Dec. 6, 2004.

determines that it is “appropriate to respond to the emergency.” 7 U.S.C. § 1722(a). Therefore, in some cases, section 202(a) renders inapplicable the \$350 million minimum funding level for nonemergency food assistance in section 412(e). Here, USAID told us that the Administrator “exercised the notwithstanding authority in section 202(a) of the [Food for Peace] Act to enable [USAID] to . . . respond to urgent and unprecedented emergency food aid needs around the world” in FY 2014. USAID Letter, at 2. Accordingly, we find that USAID did not violate the minimum funding level in FY 2014 when it obligated only \$261.4 million of Food for Peace Title II Grants appropriations for nonemergency food assistance programs.

Obligation of Amounts from the Food for Peace Title II Grants Appropriation and the Development Assistance Appropriation

You indicated that USAID previously may have attempted to meet the minimum funding level by obligating some amounts from the Food for Peace Title II Grants appropriation and some amounts from the Development Assistance appropriation. In FY 2014, USAID obligated \$261.4 million from the Food for Peace Title II Grants appropriation for nonemergency food assistance pursuant to the Food for Peace Act and \$80 million from the Development Assistance appropriation for similar nonemergency food assistance pursuant to the Foreign Assistance Act. These obligations totaled close to over \$341 million, about \$9 million less than the \$350 million minimum funding level. You ask whether USAID improperly obligated two appropriations for the same purpose.

Generally, agencies may not obligate two appropriations for the same purpose. If a specific appropriation exists for a particular item, then that appropriation must be used and it is improper to charge another appropriation as a substitute. 20 Comp. Gen. 272 (1940) (a specific appropriation for the construction of a wing on a building may not be supplemented by a more general appropriation to build a larger and more expensive wing). If the agency exhausts a specific appropriation, it may not turn to a general appropriation, absent specific statutory authority.¹⁰ B-327003, Sept. 29, 2015; B-272191, Nov. 4, 1997.

¹⁰ USAID has previously requested statutory authority to “count a specified amount of [Development Assistance] funding toward meeting the [minimum funding level]” in the Food for Peace Act. USAID Letter, at 2. For instance, for FY 2016, USAID’s request for the Food for Peace Title II Grants appropriation “includes \$270 million to be used for development programs. An additional \$80 million is requested in the Development Assistance (DA) account . . . , bringing the total funding for these types of programs to \$350 million. Together, these resources support development food assistance programs’ efforts to address chronic food insecurity in areas of recurrent crises using a multi-sectoral approach to reduce poverty and build resilience.”

Department of State, Foreign Operations, and Related Programs, Congressional Budget Justification, Fiscal Year 2016 (Feb. 2, 2015), at 133, available at

(continued...)

USAID explains that it has not obligated two appropriations to meet the minimum funding level. USAID Letter, at 2. Instead, USAID exercised the “notwithstanding authority” in section 202(a) of the Food for Peace Act to obligate less than the minimum funding level for FY 2014. *Id.* USAID contends that it still “recognized the important objectives of the nonemergency food assistance program,” though. *Id.* Accordingly, USAID relied on section 103 of the Foreign Assistance Act, classified at 22 U.S.C. § 2151a, to obligate amounts from its Development Assistance appropriation to support activities that further similar objectives. *Id.*, at 2–3.

We do not object to USAID’s obligational practices where USAID is relying on provisions in the Food for Peace Act and the Foreign Assistance Act that authorize similar activities. Section 103 of the Foreign Assistance Act is an independent authority that permits USAID to engage in complementary nonemergency food assistance activities. In fact, section 103(f) of the Foreign Assistance Act acknowledges the similar objectives authorized by the Food for Peace Act:

“The Congress finds that the efforts of developing countries to enhance their national food security deserves encouragement as a matter of United States development assistance policy. Measures complementary to assistance for expanding food production in developing countries are needed to help assure that food becomes increasingly available on a regular basis to the poor in such countries. Therefore, United States bilateral assistance under this chapter and the Food for Peace Act [7 U.S.C. [§] 1691 et seq.], and United States participation in multilateral institutions, shall emphasize policies and programs which assist developing countries to increase their national food security by improving their food policies and management and by strengthening national food reserves, with particular concern for the needs of the poor, through measures encouraging domestic production, building national food reserves, expanding available storage facilities, reducing postharvest food losses, and improving food distribution.”

22 U.S.C. § 2151a(f). These practices are consistent with the purposes of their respective appropriations acts.

CONCLUSION

In FY 2014, USAID properly relied on “notwithstanding” language in section 202(a) of the Food for Peace Act to obligate less than the minimum funding level required

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www.usaid.gov/sites/default/files/documents/9276/FY16CBJStateFORP.pdf (last visited Apr. 7, 2016). However, to date, Congress has not enacted such legislation.

by section 412(e) of the Food for Peace Act. We do not object to USAID's obligation of the Food for Peace Title II Grants appropriation for nonemergency food assistance pursuant to the Food for Peace Act and the obligation of the Development Assistance appropriation for similar activities pursuant to the Foreign Assistance Act.

If you have any questions, please contact Edda Emmanuelli Perez, Managing Associate General Counsel, at (202) 512-2853, or Julia C. Matta, Assistant General Counsel for Appropriations Law, at (202) 512-4023.

Sincerely,

A handwritten signature in cursive script, appearing to read "S. Poling".

Susan A. Poling
General Counsel