



B-327830

February 8, 2017

The Honorable Shelley Moore Capito
Chairman
Subcommittee on Financial Services and General Government
Committee on Appropriations
United States Senate

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

Subject: *Commodity Futures Trading Commission—Consistency of Real Property Leases with the Miscellaneous Receipts Statute*

You asked GAO to examine the Commodity Futures Trading Commission's (CFTC) use of its authority to lease real property.¹ Previously, we concluded that CFTC violated the recording statute, 31 U.S.C. § 1501(a)(1), when it failed to record obligations equal to the government's total liability under four leases.² B-327242, Feb. 4, 2016. *Id.* As agreed with your staff,³ this opinion examines several

¹ Letter from Chairman, Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, Committee on Appropriations, House of Representatives, and Chairman, Subcommittee on Financial Services and General Government, Committee on Appropriations, United States Senate, to Comptroller General (Feb. 9, 2015).

² Also, a previous GAO report addresses some of your other questions. GAO, *Federal Real Property: Commodity Futures Trading Commission Needs Better Leasing Guidance to Improve Cost-effectiveness*, GAO-16-434 (Washington, D.C.: Apr. 2016).

³ Email from Senior Attorney, GAO, to Clerk, Subcommittee on Financial Services and General Government, Committee on Appropriations, United States Senate, and
(continued...)

provisions in CFTC's leases to determine whether they are consistent with the miscellaneous receipts statute, 31 U.S.C. § 3302(b). The miscellaneous receipts statute provides that officials or agents of the government "receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." We will address other issues arising from these leases in separate opinions.⁴

As explained below, we conclude that CFTC violated the miscellaneous receipts statute with some leases when it arranged for its landlords to pay CFTC's legal liabilities to third-party contractors. However, CFTC did not violate the miscellaneous receipts statute in other leases when it made other contractual arrangements through which CFTC and its landlords paid their own liabilities to third-party contractors.

During the course of GAO's audit engagement on CFTC's leasing practices for the period from fiscal year 2008 to 2015 (see footnote 2), CFTC provided GAO copies of its leases for the CFTC offices in Washington, D.C., New York, Chicago, and Kansas City, Missouri. Consistent with our practice for legal opinions, we contacted CFTC to obtain additional factual information and its legal views on this matter.⁵ 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 us with information and its legal views.⁶

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Staff Assistant, Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, Committee on Appropriations, House of Representatives (Sept. 13, 2016).

⁴ These other issues include (1) the consistency of various lease clauses with the statutory prohibition against advance payments, 31 U.S.C. § 3324; (2) the consistency of various lease clauses with the *bona fide* needs rule; and (3) both the permissibility and proper obligational accounting treatment of various lease clauses that may have created open-ended liabilities.

⁵ Letter from Assistant General Counsel, GAO, to General Counsel, CFTC (Aug. 6, 2015); email from Senior Attorney, GAO, to Deputy General Counsel for General Law, CFTC (Apr. 28, 2016).

⁶ Letter from General Counsel, CFTC, to Assistant General Counsel, GAO (Feb. 26, 2016); email from Deputy General Counsel for General Law, CFTC, to Senior Attorney, GAO (May 6, 2016).

BACKGROUND

CFTC currently has real-property leases⁷ in four cities: New York; Washington, D.C.; Kansas City, Missouri; and Chicago. Under these leases, CFTC and its landlords agreed to provisions pertaining to contracts with third parties. Many of these provisions concerned the construction of various improvements in the leaseholds. The leases identified which party would be responsible for entering into contracts for performance of this work and which party would ultimately pay for the work. As described below, another lease provision concerned the payment of CFTC's prior rent obligations under leases CFTC entered into with other parties in 1985 and 1986. In this opinion, we designate as "third-party contracts" the contracts between (1) CFTC and the construction contractors; (2) CFTC's landlords and the construction contractors; and (3) CFTC and the landlord under its 1985 and 1986 leases. This opinion concerns the manner in which the leases arranged for the payment of the costs resulting from the third-party contracts, and whether these arrangements were consistent with the miscellaneous receipts statute.

Though the leases and their amendments varied substantially, we have grouped the lease clauses and associated payments into four categories that are relevant for this opinion. Many lease clauses are members of more than one category. We describe all of these leases and their amendments in more detail in the Attachment.

Categories I and II: CFTC entered into third-party contracts

Many lease clauses contemplated that CFTC would enter into contracts with third parties. Typically the leases provided that CFTC and its landlord would divide responsibility for paying the liabilities to the third-party contractor. We have designated as Categories I and II the situations in which CFTC entered into third-party contracts. What differentiates these two categories is the party that pays the resulting liabilities to the third-party contractors. In Category I, CFTC paid the resulting liability, while in Category II, the landlord paid the resulting liability.

For example, CFTC in 1994 entered into a lease for office space in Washington. At the time the parties entered into the lease, CFTC was already in occupation of space at two other locations in Washington under leases signed in 1985 and 1986. CFTC's new landlord agreed that, under certain circumstances, it would pay a portion of the rent that CFTC owed for occupancy of the space under the 1985 and 1986 leases. CFTC remained liable for paying the balance of the rent under the

⁷ In New York, CFTC entered into a sublease rather than a lease directly with the building's owner or manager. Because this distinction is not relevant for the purposes of this opinion, we will frequently refer to all of CFTC's real-property contracts simply as "leases."

1985 and 1986 leases that the landlord under the 1994 lease had not agreed to pay. CFTC's payments directly to its landlords under its 1985 and 1986 leases are in Category I. Payments that CFTC's landlord under its 1994 lease made to the landlords under the 1985 and 1986 leases are in Category II.

Another lease clause relevant to Categories I and II was in CFTC's New York lease. CFTC agreed that "at its sole cost and expense" it would construct necessary improvements to prepare the space for occupancy. Accordingly, CFTC entered into a contract with a third party for the construction of the improvements. Under the lease, CFTC's landlord agreed to "pay for or reimburse" CFTC up to a specified amount for the costs incurred under this contract. CFTC states that as it received invoices from its third-party construction contractor, it forwarded these invoices to its landlord for payment. Payments CFTC's landlord made to the third-party construction contractor are in Category II. Belonging in Category I are any payments CFTC made to the third-party construction contractor after CFTC's landlord satisfied its contractual obligation to make such payments.

Clauses in two other leases did not explicitly require CFTC to enter into third-party contracts. The lease clauses did, however, permit CFTC's landlords to pay a portion of liabilities that CFTC may have incurred. The first of these clauses was in the Third Amendment to CFTC's Washington lease. This clause provided that "Landlord shall also make payments [up to a specified amount] for qualified costs directly incurred by or on behalf of [CFTC]." The other clause was in CFTC's Chicago lease. It specified that CFTC could direct its landlord to use the landlord's funds to make a payment to CFTC or to a party CFTC could designate. Belonging in Category II are any payments that CFTC's Washington or Chicago landlords made to pay any CFTC liability to third-party contractors.

Categories III and IV: Landlord entered into third-party contracts

Many clauses in several different leases contemplated that CFTC's landlords, not CFTC itself, would enter into third-party contracts. We have placed these clauses and associated payments into Categories III and IV. Typically these lease clauses provided that CFTC and its landlord would divide responsibility for paying the liabilities to the third-party contractor. What differentiates these two categories is the party that paid the resulting liabilities to the third-party contractors. In Category III, CFTC paid the resulting liability, while in Category IV, the landlord paid the resulting liability.

Here we discuss the Fifth Amendment to the Washington, D.C. lease, which contained clauses that are typical for those in Categories III and IV.⁸ We discuss all

⁸ Other leases and amendments in this category are the Washington 1994 lease, Washington 1998 First Amendment to the 1994 lease, the Washington 2003 Third
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the leases and amendments in the Attachment. In this amendment, CFTC and its landlord agreed to add additional space to the leasehold. The lease called for the construction of various improvements in the additional space. CFTC's landlord, not CFTC, entered into the third-party contract for construction of the improvements. However, CFTC selected the contractor that performed the work. CFTC's landlord also delegated to CFTC both its right to supervise the contractor and the benefit of what remedies were available to the landlord if the contractor did not perform in a satisfactory manner. Thus, CFTC both selected and controlled, but did not contract with, the third-party contractor that performed the work.

The lease specified that the work was to be performed at CFTC's "sole cost and expense." The landlord did agree, however, to provide amounts that the lease denoted as "cash allowances." These allowances, which totaled about \$7.1 million, would be "applied solely to the costs of designing, permitting, constructing, and installing" the improvements. CFTC's landlord agreed to pay directly to the contractor any costs that were subject to the application of the allowances. Payments CFTC's landlord made to the third-party contractor are in Category IV.

The lease provided that CFTC would pay the cost of any work that exceeded the available allowances. Any such payments are in Category III. If the allowances exceeded the cost of the work, CFTC's landlord agreed to apply the remaining allowances toward the amount that CFTC owed for rent payments.

We summarize in Table I the four categories, along with examples of lease clauses and payments made under these categories.

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Amendment to the 1994 lease, the Washington 2010 Sixth Amendment to the 1994 lease, the Washington 2010 Seventh Amendment to the 1994 lease, the Chicago 2001 lease, the Chicago 2009 Third Amendment to the 2001 lease, and the Kansas City 2010 lease.

Which party pays for liabilities incurred to the third-party contractor?

		CFTC	Landlord
Which party enters into the contract with the third-party contractor?	CFTC	<p>Category I</p> <ul style="list-style-type: none"> • CFTC payments to its landlords under its 1985 and 1986 leases • CFTC payments to third-party construction contractor in New York 	<p>Category II</p> <ul style="list-style-type: none"> • New York landlord's payments to third-party construction contractor • Any payments CFTC's Washington or Chicago landlords made to pay any CFTC liability to third-party construction contractors • Payments that CFTC's landlord under its 1994 lease made to pay CFTC's liabilities under CFTC's 1985 and 1986 leases
	Landlord	<p>Category III</p> <ul style="list-style-type: none"> • Payments CFTC made in Washington for the cost of work that exceeded the available "cash allowance" 	<p>Category IV</p> <ul style="list-style-type: none"> • Payments CFTC's landlord made to third-party construction contractor in Washington for the cost of work up to the available "cash allowance"

Table 1. Categories of clauses and payments in CFTC's leases

DISCUSSION

At issue here is whether provisions in CFTC's leases that we described above are consistent with the miscellaneous receipts statute, 31 U.S.C. § 3302(b). The miscellaneous receipts statute provides that officials or agents of the government "receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."

Under the miscellaneous receipts statute, an official receiving "money for the Government" must deposit the money in the Treasury. 31 U.S.C. § 3302(b). This requirement advances the primary purpose of the statute, which is to ensure that

Congress retains control of the public purse, thereby protecting Congress's constitutional power to appropriate public money. B-325396, Feb. 23, 2015; B-322531, Mar. 30, 2012. Funds constitute "money for the Government" if they are to be used to bear the expenses of the government or to pay its obligations. B-325396; B-321729, Nov. 2, 2011; B-205901, May 19, 1982.

We have addressed this issue in numerous cases, including ones involving contracts where an agency is legally obligated to make payments but has another party make the payments directly to the contractor. For example, among the functions of the Small Business Administration (SBA) was oversight of lenders who made SBA-guaranteed loans. B-300248, Jan. 15, 2004, at 1. SBA used a contractor to assist with this oversight function. *Id.* Rather than paying the contractor from its appropriations, SBA required the lenders to pay a fee directly to the contractor. *Id.* Because these fees satisfied a government obligation arising from a contract, funds used to pay these contractors was "money for the Government" under the miscellaneous receipts statute. *Id.*, at 7.

In another example, the Securities and Exchange Commission (SEC) entered into a lease for real property. B-265727, July 19, 1996. It then subleased a portion of this space and arranged for its sublessee to make its payments directly to the landlord, who then reduced the amount that SEC owed for rent by a corresponding amount. *Id.* Because the payments that the sublessee made to the landlord satisfied SEC's obligation to pay rent under the contract, the payments were "money for the Government" under the miscellaneous receipts statute.

In contrast, in other cases, where funds were not used to bear the expenses of the government or pay its obligations, those funds were not "money for the Government." For example, the Mine Safety and Health Administration (MSHA) collected registration fees for coal mine rescue contests. B-325396, Feb. 23, 2015. The fees were used to defray the mining industry's costs of attending and participating in the contests. MSHA did not collect the fees to pay any MSHA statutory requirement or to pay MSHA expenses of participating in the contests, and the contests were not a government function or activity. The fees were used not to bear the expenses of the government but, rather, to bear the mining industry's costs of attending and participating in the contests. Therefore, the fees did not constitute "money for the Government" for the purposes of the miscellaneous receipts statute.

In another case, the Office of Federal Housing Enterprise Oversight (OFHEO) agreed to settle a charge it brought against the Federal Home Loan Mortgage Corporation (Freddie Mac). B-306860, Feb. 28, 2006. The agreement required Freddie Mac to provide OFHEO with particular documents belonging to Freddie Mac. To facilitate the production of documents, the agreement further required Freddie Mac to pay a contractor selected by OFHEO up to \$1 million to prepare the documents for OFHEO's use. Though OFHEO selected the contractor and arranged for it to perform the document preparation, the settlement agreement stipulated that

production of the documents to OFHEO's specifications was Freddie Mac's responsibility in return for OFHEO's agreement to settle. OFHEO, thus, told the contractor that it must seek payment only from Freddie Mac for the services rendered, and that it should not incur expenses in excess of \$1 million unless OFHEO instructed it to incur those costs at OFHEO's expense. Therefore, when Freddie Mac made the payments to the contractor, it was not defraying an obligation of OFHEO but, rather, was fulfilling Freddie Mac's obligation as reflected in the settlement agreement. Accordingly, Freddie Mac's payments did not constitute "money for the Government" for the purposes of the miscellaneous receipts statute.

Category II: CFTC violated the miscellaneous receipts statute when it arranged for its landlords to pay a portion of CFTC's liabilities to third-party contractors

As we discussed in the Background, CFTC entered into a contract with a third party for the construction of improvements in its New York leasehold. CFTC also had previously entered into leases in Washington in 1985 and 1986 for which it owed rent payments. CFTC may also have entered into third-party contracts for the construction of improvements in Washington and Chicago. CFTC's leases provided that its landlords would pay a portion of the liabilities arising from these third-party contracts. We have grouped these payments into Category II.

For the liabilities in Category II, CFTC entered into the third-party contract. However, CFTC arranged to have its landlords, rather than CFTC, make the associated payment for the liability. CFTC arranged for its New York landlord to make payments to pay a portion of CFTC's liability to the New York third-party construction contractor. CFTC arranged for its Washington landlord to make payments to pay a portion of CFTC's liability under its previous 1985 and 1986 leases. CFTC also agreed in its leases to have its Washington and Chicago landlords make payments on additional CFTC liabilities under third-party contracts.

CFTC's arrangements for its landlords to make payments to third-party contractors to pay CFTC liabilities are similar to the arrangements at issue in our previous decisions in which agencies violated the miscellaneous receipts statute when they arranged for third parties to make payments to pay obligations of the government. For example, SBA arranged for lenders under an SBA program, rather than SBA itself, to make payments to the SBA contractors who assisted in oversight of the lenders, even though such payments were SBA liabilities under the contract. B-300248. Similarly, SEC arranged for its sublessee, rather than SEC itself, to make payments to SEC's landlord, even though these were SEC's liabilities under the contract. B-265727. Here, as in both the SBA and SEC decisions, CFTC incurred obligations to make payments to the third-party contractors, and therefore, CFTC violated the miscellaneous receipts statute when it arranged for its landlords to pay these obligations.

The facts here are readily distinguishable from the payments in the OFHEO case, in which the purpose of the agreement was to facilitate a settlement, and the agreement made clear that the contractor was to look only to Freddie Mac, and not to the government, for payment. B-306860. In contrast to the OFHEO case, CFTC's leases contained no similar provision. Indeed, in the New York lease, CFTC agreed that the improvements would be made "at its sole cost and expense." In the lease, the landlord agreed to make payments to the third-party construction contractor pursuant to specific requests from CFTC, and the landlord's payments were used to defray CFTC's obligations to the contractor. Thus, CFTC made contractual arrangements to have a third party (that is, the landlord) pay CFTC's legal liabilities. CFTC violated the miscellaneous receipts statute when it arranged for its landlord to make these payments.

The miscellaneous receipts statute requires any officer of the government who receives "money for the Government" to deposit the money in the Treasury without deduction for any charge or claim. 31 U.S.C. § 3302(b). It is not dispositive that, as here, no CFTC employee ever received money from a CFTC landlord. Agencies cannot circumvent this requirement merely by structuring a transaction, as CFTC did, so that no agency employee ever receives the money. For example, in a 1984 case involving the Federal Aviation Administration (FAA), particular fee receipts were "money for the Government" and the miscellaneous receipts statute required FAA to deposit the fees in the Treasury. *Motor Coach Industries v. Dole*, 725 F.2d 958 (4th Cir. 1984). It was of no significance that FAA had structured its transaction so it would appear that no FAA employee received the fees. *Id.* at 961. Similarly, payments that an SEC sublessee made for parking in an SEC building constituted "money for the Government" that SEC was required to deposit in the Treasury, even though the SEC sublessee made the payments directly to SEC's landlord and not to SEC. B-265727, July 19, 1996. *See also Scheduled Airlines Traffic Offices v. Department of Defense*, 87 F.3d 1356 (D.C. Cir. 1996) (Department of Defense violated miscellaneous receipts statute when it entered into contracts that required its contractors to make payments directly to non-appropriated fund instrumentalities); B-307137, July 12, 2006 (Department of Energy impermissibly used contractor as agent to sell government property, with the contractor using the proceeds to carry out government contract work); 4B Op. Off. Legal Counsel 684, 688 (1980) ("the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of [the miscellaneous receipts statute]").

The critical factor in this case, as in those we discuss above, is that CFTC arranged for its landlord to make payments to pay CFTC liabilities; thus, CFTC violated the miscellaneous receipts statute when the landlords made the payments. CFTC should have deposited the amounts of these payments into the Treasury as miscellaneous receipts.

Category IV: CFTC did not violate the miscellaneous receipts statute when its landlords paid their own liabilities to third-party contractors

As we discussed in the Background, CFTC's landlords entered into third-party contracts for the construction of various improvements. CFTC's landlords made payments for a portion of the associated liabilities. We grouped these payments into Category IV.

In contrast to the Category II payments that CFTC arranged for its landlords to make to pay CFTC's liabilities to third-party contractors, CFTC did not violate the miscellaneous receipts statute when its landlords satisfied the landlords' own liabilities by making payments to third-party contractors. The landlords did not make these payments to satisfy government obligations or bear government expenses. Instead, CFTC's landlords made these payments to satisfy the landlords' obligations to third parties.

Some clauses in CFTC's leases provide CFTC with a "cash allowance" of a particular amount. For example, one clause stated that "Landlord agrees to make available to Tenant a cash allowance . . . equal to \$3,197,575.00." Fifth Amendment to Lease Agreement, Aug. 14, 2009, at B-1-2. Despite the lease's designation of this arrangement as a "cash allowance" and the lease's statement that the landlord "agrees to make available" to CFTC this "cash allowance," the landlord transferred no money to CFTC. Rather, the allowance remained the landlord's money, which it used to improve its building as part of the consideration it provided to CFTC under the lease agreement. It was the landlord who entered into, and incurred liabilities under, the third party construction contract, so the landlord's use of this money was not to pay government obligations. Instead, CFTC's landlord used this "cash allowance" to satisfy the landlord's legal liability to make payments to third-party contractors.

Category III: CFTC did not violate the miscellaneous receipts statute when it made payments for the cost of the work performed by its landlord's third-party contractor

As we discussed in the Background, CFTC's landlords entered into third-party contracts for the construction of various improvements. CFTC agreed to pay the cost of work that exceeded a particular "cash allowance." We grouped these payments into Category III. As with the Category I and Category II payments, these payments satisfied a government liability, except that with Category III, the government's liability is to the landlord rather than a third party contractor. CFTC agreed to make these payments in exchange for the landlord's provision of space.

CFTC and its landlord may permissibly agree to base a portion of CFTC's total payments under the lease upon the amount of the landlord's liability to a third-party contractor, even where, as here, CFTC's actions in selecting and supervising the third-party contractor have a substantial effect on the amount of the landlord's

ultimate liability. CFTC may in an arm's-length bargain agree to defray its landlord's liability as a cost of acquiring space.⁹

Category I: CFTC did not violate the miscellaneous receipts statute when it made payments for the cost of the work performed by CFTC's third-party contractor

For the liabilities in Category I, CFTC both entered into the third-party contract and made associated payments to the contractor. These payments, of course, do not constitute violations of the miscellaneous receipts statute.¹⁰

Finally, under some of the lease provisions in Categories III and IV, if the landlord's cost to improve the leasehold is smaller than a particular amount, then the difference is applied to reduce CFTC's rent. This rent reduction is properly regarded as a negotiated reduction in the contract price. Such reductions do not violate the miscellaneous receipts statute. See, e.g., 48 Comp. Gen. 497 (1969) (a rental contract with monthly rental credits applied during the final months of the rental period is acceptable). Similarly, the Fifth Amendment to the Washington Lease provided a "Second Refurbishment Credit" that reduced some of CFTC's monthly rental payments. This is a permissible reduction in the contract price.

We summarize in Table 2 whether payments in each of the four categories violated the miscellaneous receipts statute.

⁹ CFTC's legal liability to pay its landlord for amounts the landlord owed to the third-party contractors may have constituted an obligation under the recording statute, 31 U.S.C. § 1501. We will address this issue in a subsequent opinion.

¹⁰ It is expected that CFTC made these payments and the payments under Category III by properly obligating and liquidating amounts from an available appropriation.

Which party pays for liabilities incurred to the third-party contractor?

		CFTC	Landlord
Which party enters into the contract with the third-party contractor?	CFTC	<p>Category I</p> <p>CFTC did not violate the miscellaneous receipts statute when it obligated and liquidated its appropriation to make payments to satisfy its own legal liabilities to third-party contractors.</p>	<p>Category II</p> <p>CFTC violated the miscellaneous receipts statute when its landlords made payments to satisfy CFTC’s liabilities to third-party contractors, as these payments satisfied government obligations.</p>
	Landlord	<p>Category III</p> <p>CFTC did not violate the miscellaneous receipts statute when it made payments for the cost of some work that third-party contractors performed for CFTC’s landlords; CFTC may permissibly obligate and liquidate its appropriation to satisfy CFTC’s liabilities to the landlords under the leases.</p>	<p>Category IV</p> <p>CFTC did not violate the miscellaneous receipts statute when its landlords made payments to satisfy their own liabilities to third-party contractors, even though the leases designated these payments as a “cash allowance” that the landlords would “make available” to CFTC, because these payments did not satisfy government obligations.</p>

Table 2. Whether CFTC violated the miscellaneous receipts statute through payments made under its leases

CONCLUSION

Under the miscellaneous receipts statute, CFTC must deposit in the Treasury any reimbursements it received from its landlords, as well as the amount of all payments its landlords made to third-party contractors to satisfy CFTC's liabilities. However, other contractual arrangements through which CFTC's landlords made payments to third-party contractors did not violate the miscellaneous receipts statute, as these payments did not satisfy CFTC legal liabilities but, instead, satisfied the landlords' liabilities to third-party contractors. CFTC also did not violate the miscellaneous receipts statute when it made payments for the cost of some work that third-party contractors performed for CFTC's landlords, as these payments satisfied CFTC's liabilities to its landlords.

CFTC should examine its accounts and adjust them as needed to ensure that (1) obligations resulting from all leases and construction contracts it executed were properly recorded against available budget authority, as required by 31 U.S.C. § 1501(a)(1); (2) such obligations were properly liquidated from available appropriations; and (3) amounts it received as reimbursements and amounts its landlords paid to satisfy CFTC's obligations are deposited in the Treasury as miscellaneous receipts. If CFTC's adjustments result in an over-obligation in any of CFTC's appropriation accounts, it should report a violation of the Antideficiency Act as required by 31 U.S.C. § 1351.

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, at (202) 512-4023.

Sincerely yours,



for

Susan A. Poling
General Counsel

Attachment

ATTACHMENT

CFTC currently has real-property leases or subleases in four cities: New York; Washington, D.C.; Kansas City, Missouri; and Chicago.¹ Under these leases and subleases, CFTC and its landlords agreed to provisions pertaining to contracts with third parties. Many of these provisions concerned the construction of various improvements in the leaseholds. The leases and subleases identified which party would be responsible for entering into contracts for performance of the work and which party would ultimately pay for the work. As described below, another lease provision concerned the payment of CFTC's prior rent obligations under leases CFTC entered into with other parties in 1985 and 1986. In this opinion, we designate as "third-party contracts" the contracts between (1) CFTC and the construction contractors; (2) CFTC's landlords and the construction contractors; and (3) CFTC and the landlord under its 1985 and 1986 leases.

Though these leases and their amendments varied substantially, we have grouped the leases and amendments into four categories that are relevant for this opinion. Below, we briefly describe each category and list the leases and amendments that contain clauses belonging to the respective category. Many lease provisions belong to more than one category. We then describe the leases and amendments in detail, with each lease or amendment marked with the appropriate categories.

Categories I and II: CFTC entered into third-party contracts, with both CFTC and the landlords satisfying a portion of the resulting liabilities

Four different leases and amendments contained provisions contemplating that CFTC would enter into contracts with third parties. The landlord agreed to satisfy a portion of CFTC's liabilities to the third parties, with CFTC satisfying the remainder of the liabilities. Provisions in which CFTC satisfied the liabilities are in Category I, while provisions in which the landlord satisfied the liabilities are in Category II. These clauses were in the following leases and amendments:

- New York 2011 amendment to 2001 lease
- Washington 1994 lease
- Washington 2003 Third Amendment to 1994 lease
- Chicago 2001 lease

¹ Generally, the General Services Administration (GSA) has the authority to lease real property for federal agencies. B-327242, Feb. 4, 2016; B-322160, Oct. 3, 2011. However, Congress has granted CFTC authority to enter into contracts for "the rental of necessary space at the seat of Government and elsewhere" and, therefore, CFTC is not required to obtain space through GSA. 7 U.S.C. § 16(b)(3).

Categories III and IV: Landlord entered into third-party contracts, with both CFTC and the landlords satisfying a portion of the resulting liabilities

Nine different lease clauses involved the landlords' contractual liabilities to third parties. The landlord agreed to satisfy a portion of its own liabilities to third parties, with CFTC satisfying the remainder of the liabilities. These clauses were in the following leases and amendments:

- Washington 1994 lease
- Washington 1998 First Amendment to 1994 lease
- Washington 2003 Third Amendment to 1994 lease
- Washington 2009 Fifth Amendment to 1994 lease
- Washington 2010 Sixth Amendment to 1994 lease
- Washington 2010 Seventh Amendment to 1994 lease
- Chicago 2001 lease
- Chicago 2009 Third Amendment to 2001 lease
- Kansas City 2010 lease

Below we describe each lease and amendment, grouped by city and, within each city, with each amendment in chronological order. Each lease or amendment is marked with its relevant categories.

New York 2011 Amendment to 2001 lease (Categories I and II)

In 2001, CFTC executed a sublease for office space in In New York.² In the sublease documents, CFTC is denoted the "Subtenant" while its landlord is denoted the "Sublandlord".³ In 2011, CFTC and Sublandlord agreed to an amendment under which CFTC subleased additional space.⁴ CFTC agreed that "at its sole cost and expense" it would prepare the additional space for occupancy.⁵ The sublease denoted CFTC's construction work as "Subtenant's Work".⁶

CFTC's performance of the Subtenant's Work was subject to a number of conditions.⁷ Among these was that "Sublandlord shall, subject to the terms and

² Sublease between Sublandlord and CFTC, dated Nov. 16, 2001 (New York Sublease).

³ New York Sublease, at 1.

⁴ New York Sublease, Sept. 2011 Amendment, at 2.

⁵ *Id.* at 6.

⁶ *Id.* at 2.

⁷ *Id.* at 6.

conditions of this Paragraph, reimburse or cause to be reimbursed to Subtenant” particular amounts with respect to Subtenant’s Work.⁸ These amounts were known as the “Sublandlord’s Contribution” and were available

“to pay for or reimburse Subtenant for all hard or soft costs incurred by Subtenant in connection with the [the subleased space] including, without limitation, the construction of Improvements, installation of telephone and computer cabling, the cost of Subtenant’s furniture, furnishings and equipment to be located in the Subleased Premises, and the cost of all architectural, engineering, moving costs, and project management costs incurred in connection with Subtenant’s Work.”⁹

The amendment provided that “Sublandlord’s Contribution shall be paid from time to time upon written request of an authorized Contracting Officer of Subtenant (the “Request”) as the applicable Subtenant’s Work progresses and as other costs or expenses for which Sublandlord’s Contribution may be used are incurred.”¹⁰ In addition,

“Sublandlord shall pay or cause to be paid to Subtenant or at Subtenant’s request to such parties named in each Request the respective amounts stated therein to be due, provided, however, that the maximum amount to be paid by Sublandlord pursuant to this Paragraph shall not exceed the Sublandlord Contribution.”¹¹

CFTC states that, in accordance with the sublease, Sublandlord did not provide Sublandlord’s Contribution directly to CFTC.¹² Instead, CFTC entered into contracts for the performance of Subtenant’s Work, and as CFTC received invoices from its contractor, it forwarded these invoices directly to Sublandlord for payment.¹³

⁸ *Id.* at 11.

⁹ *Id.* at 11-12.

¹⁰ *Id.* at 12.

¹¹ *Id.* at 13.

¹² See Letter from General Counsel, CFTC, to Assistant General Counsel, GAO, Feb. 26, 2016 (CFTC Letter), at 8.

¹³ CFTC Letter, at 8-9.

Washington 1994 Lease (Categories I, II, III, and IV)

In 1994, CFTC entered into a lease for office space in Washington, D.C.¹⁴ CFTC and its landlord agreed to “design and construct certain improvements in the Premises,” such as partition walls, electric layout, and lighting.¹⁵ The lease sets forth a process through which CFTC and Landlord would reach agreement upon a set of “Final Plans” for the necessary improvements.¹⁶

The lease sets forth two categories of “Work”. One category, the “Base Building Work,” is “all work and manner of improvements and the like which is to be provided by Landlord at Landlord’s sole cost and expense and is further set forth” in a particular attachment to the lease.¹⁷ Landlord agreed to enter into a “Base Building Work Contract” to perform this work and to “pay all costs and expenses incurred in connection with” that contract.¹⁸ The other category, which is of particular significance to this opinion, is the “Tenant Work,” which is “all work and manner of improvement and the like shown and reflected on the Final Plans and not required to be provided by Landlord.”¹⁹

CFTC and its landlord agreed to a list of general contractors deemed acceptable for performance of the Tenant Work.²⁰ The landlord agreed to request competitive bids from these contractors for performance of the Tenant Work.²¹ The parties agreed that “Landlord and Tenant shall mutually agree as to the selection of the Bidding Contractor to perform the Tenant Work.”²² The landlord is required to “enter into a formal agreement in the same form as the Form of General Contract . . . with the Contractor for the performance of the Tenant Work.”²³

Landlord and CFTC agreed to a particular procedure to pay for the Tenant Work. Though the lease states that the costs of Tenant Work “shall be payable by

¹⁴ Lease between Landlord and Tenant, Dec. 30, 1994 (Washington Lease).

¹⁵ Washington Lease, Exhibit C, at 1.

¹⁶ Washington Lease, Exhibit C, at 1-4.

¹⁷ Washington Lease, Exhibit C, at 5.

¹⁸ Washington Lease, Exhibit C, at 14.

¹⁹ Washington Lease, Exhibit C, at 5.

²⁰ Washington Lease, Exhibit C, at 10.

²¹ *Id.*

²² Washington Lease, Exhibit C, at 13.

²³ *Id.*

Landlord”, ultimately CFTC bore some of these costs.²⁴ The contractor submitted a monthly invoice which was ultimately provided to both CFTC and its landlord.²⁵ Upon approval by CFTC and the landlord, the landlord would pay the monthly invoice.²⁶ Landlord provided an “Allowance” of about \$5.5 million.²⁷ CFTC could direct Landlord to pay for any portion of approved monthly invoices with Allowance funds, with the remainder to be satisfied by payments from CFTC. “If and when the Allowance is exhausted, [CFTC] shall thereafter reimburse Landlord for the amount of each subsequently Approved Monthly Invoice within thirty (30) days (in accordance with the Prompt Payment Act) from and after the date Tenant receives such Approved Monthly Invoice.”²⁸

The lease also describes the consequences of excess “Allowance”. First, the lease denotes as “Landlord’s Cost” the sum of many payments initially made by Landlord, including “General Contract Costs” and “Architect’s Costs,” but excluding some of Landlord’s “administrative, profit, or overhead fees.”²⁹ Then, “[i]n the event the Landlord’s Cost is less than the Allowance” on a date near the completion of the construction contract, “[CFTC] shall receive a credit in an amount equal to (A) the amount of the Allowance less (B) Landlord’s cost,” together with a specified amount for interest.³⁰

The parties also made an agreement regarding CFTC’s lease payments at other properties in Washington.³¹ At the time the parties entered into the lease, CFTC was already in occupation of space at two other locations in Washington, with two other landlords.³² The leases for these two properties expired on June 30, 1995, a date defined as the “Original Term”.³³ The leases for both properties specified the rental payments CFTC would owe if it did not vacate these two premises by that date.³⁴ “In order for Tenant to agree to enter into the Lease with Landlord, Landlord

²⁴ *Id.*

²⁵ Washington Lease, Exhibit C, at 18.

²⁶ Washington Lease, Exhibit C, at 20. The lease also set forth a procedure if CFTC or its landlord did not approve an invoice. *Id.*

²⁷ Washington Lease, Exhibit C, at 17.

²⁸ Washington Lease, Exhibit C, at 21.

²⁹ Washington Lease, Exhibit C, at 22-23.

³⁰ Washington Lease, Exhibit C, at 23.

³¹ Washington Lease, Attachment C, at 1.

³² *Id.* at 1-2.

³³ *Id.* at 2.

³⁴ *Id.* at 3.

has agreed to pay to each of Tenant's current landlords the 'Excess Holdover Rent' to a limited extent.³⁵ These payments were denoted the "K Street Holdover Rent" and the "L Street Holdover Rent."³⁶

The lease defines "Excess Holdover Rent" to be "that portion of the K Street Holdover Rent and the L Street Holdover Rent which is in excess of, or a premium over, the rent payable in the last month of the Original Term."³⁷ Landlord's liability to pay Excess Holdover Rent for the months of July, August, and September 1995 was limited to a particular sum.³⁸ CFTC's landlord agreed to make the payments of Excess Holdover Rent directly to the respective landlords at CFTC's then-current leaseholds.³⁹ Landlord also agreed to pay additional Excess Holdover Rent if CFTC failed to vacate its prior leaseholds due to a delay in construction at CFTC's new leasehold.⁴⁰

Washington Lease Amendments

As described below, CFTC and its landlord entered into several amendments to the Washington, D.C. lease agreement. These amendments expanded the size of the leasehold, and Landlord agreed to enter into contracts to construct particular improvements in the additional space. The lease provided that the improvements would be constructed at CFTC's "sole cost and expense"; Landlord, however, agreed to provide an allowance that would be deducted from the amount CFTC owed for the improvements. Each amendment is described below.

Washington 1998 First Amendment to 1994 lease (Categories III and IV)

CFTC and Landlord entered into the First Amendment to the lease agreement in January 1998, which provided additional space to CFTC.⁴¹ The First Amendment denoted this space the "Fourth Floor Expansion Space" and provided that:

"Landlord shall deliver the Fourth Floor Expansion Space to Tenant in its 'as-is' condition; provided, however, that Landlord, at Tenant's

³⁵ Washington Lease, Attachment C, at 3.

³⁶ *Id.*

³⁷ *Id.* at 4.

³⁸ *Id.* at 4.

³⁹ *Id.* at 5.

⁴⁰ *Id.* at 6.

⁴¹ First Amendment to Lease Agreement, Jan. 1, 1997 (Washington First Amendment), at 1.

sole cost and expense, subject to the application of the Fourth Floor Expansion Space Tenant Allowance . . . shall construct the Fourth Floor Expansion Space Tenant Improvements . . . in the Fourth Floor Expansion Space prior to”

a particular date and subject to many terms.⁴²

Landlord agreed to provide to CFTC

“an allowance (the ‘Fourth Floor Expansion Space Improvement Allowance’) of up to [about \$107,000] to be applied solely to the costs of designing, constructing and installing the Fourth Floor Expansion Space Tenant Improvements . . . After final reconciliation of all costs incurred in connection with the Fourth Floor Expansion Space Improvement Allowance, any unused portion of such allowance (in an amount not to exceed [about \$21,000]) shall be applied by Landlord against Fourth Floor Expansion Space Base Rent next due and payable by Tenant.”⁴³

The lease provided that all improvements would be made at CFTC’s “sole cost and expense.”⁴⁴ The Fourth Floor Expansion Space Improvement Allowance would be deducted from the price of the improvements, with CFTC paying the remainder.⁴⁵

Washington 2003 Third Amendment to 1994 lease (Categories I, II, III, and IV)

In March 2003, CFTC and its landlord agreed to the Third Amendment to Lease Agreement, which provided additional space to CFTC.⁴⁶ The Third Amendment denoted particular additional space in the building as the “Third Amendment Expansion Space,” with other additional space denoted the “Third Amendment

⁴² *Id.* at 2. Though this provision refers to the “Fourth Floor Expansion Space Tenant Allowance,” we located no item with this name in the lease. The language may be referring to the “Fourth Floor Expansion Space Improvement Allowance,” which we describe below.

⁴³ Washington First Amendment, Exhibit B, at 1-2.

⁴⁴ *Id.* at 1.

⁴⁵ *See Id.* at 1-2.

⁴⁶ Third Amendment to Lease Agreement, March 7, 2003 (Washington Third Amendment).

Extension Space.”⁴⁷ The parties agreed that particular improvements would be constructed in the additional space “at Tenant’s sole cost and expense.”⁴⁸

Under the lease as amended, “Landlord agrees to make available to Tenant a cash allowance (the ‘Third Amendment Expansion Space Improvement Allowance’) of up to [about \$2 million].⁴⁹ Landlord also agrees to make available to Tenant a cash allowance (the ‘Third Amendment Extension Space Improvement Allowance’) of up to [about \$4.5 million]”.⁵⁰ Collectively the two allowances were denoted the “Third Amendment Allowances.”⁵¹ The Third Amendment Allowances

“shall be applied solely to the costs of designing, permitting, constructing, and installing the Third Amendment work . . . permits, improvements, cabling, moving, furniture, telecom and other costs related to the occupancy of the Premises [U]pon Tenant’s written request, Landlord agrees to pay directly to the contractor, supplier, or vendor (or, at Tenant’s election, shall reimburse Tenant for) any costs, expenses or fees to which the Third Amendment Allowances may be applied pursuant to the preceding sentence.”⁵²

Upon CFTC’s request, Landlord would increase the Third Amendment Allowances by an amount selected by Tenant, though this could not exceed a particular amount.⁵³ This amount was denoted the “Allowance Increase Amount” and was “deemed to be a hypothetical loan made by Landlord to Tenant” that CFTC would repay by making amortized payments of both principal and interest over ten years.⁵⁴

The lease provides that “[u]pon selection of the Third Amendment Contractor and approval of the subcontractor pricing for the Third Amendment Work, Landlord shall enter into a construction contract . . . for the Third Amendment Work.”⁵⁵ However,

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* at 2.

⁴⁹ Washington Third Amendment, Exhibit B, at 24.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* The increase amount could not exceed “the product of Twenty Dollars (\$20.00) per rentable square foot of the Third Amendment Expansion Space and Third Amendment Extension Space (excluding the Tenth Floor Space, unless Tenant has exercised the Tenth Floor Extension Option).” *Id.*

⁵⁴ *Id.* at 24-25.

⁵⁵ *Id.* at 28.

“all Third Amendment Work to be performed pursuant to this Third Amendment Work Agreement shall be made for Tenant and shall be performed at Tenant’s expense.”⁵⁶

Under the lease, “Landlord shall pay the Third Amendment Contractor directly in accordance with the Third Amendment Construction Contract.”⁵⁷ Payments are to “be deducted from the Third Amendment Allowances, the Allowance Increase Amount or the Funded Excess,” with the “Funded Excess” being “the difference between” “[t]he price of the Third Amendment Work to be performed by the Third Amendment Contractor” and “the Third Amendment Allowances.”⁵⁸ “Landlord shall also make payments from the Third Amendment Allowances for qualified costs directly incurred by or on behalf of Tenant.”⁵⁹

Washington 2009 Fifth Amendment to 1994 lease (Categories III and IV)

In August 2009, CFTC and its landlord executed the Fifth Amendment to Lease Agreement (Washington Fifth Amendment).⁶⁰ It added additional space to the leasehold, with such space collectively denoted the “Fifth Amendment Expansion Space.”⁶¹ The lease called for the construction of various improvements both in the Fifth Amendment Expansion Space and in other space in the leasehold. This construction work was collectively denoted the “Fifth Amendment Work.”⁶²

Under an exhibit to the lease titled the “Fifth Amendment Work Agreement,” “Landlord agrees to make available to Tenant” four separate “cash allowance[s].”⁶³ Collectively, these amounts are denoted the “Fifth Amendment Allowances” and they total about \$7.1 million.⁶⁴ “All Fifth Amendment Work shall be provided in accordance with the terms and conditions of this Work Agreement at Tenant’s sole cost and expense, subject to the application of the Fifth Amendment Allowances.”⁶⁵ Tenant “shall bear the costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction caused by

⁵⁶ *Id.* at 29-30.

⁵⁷ *Id.* at 31.

⁵⁸ *Id.* at 31-32.

⁵⁹ *Id.* at 31.

⁶⁰ Fifth Amendment to Lease Agreement, Aug. 14, 2009.

⁶¹ Washington Fifth Amendment, at 1.

⁶² Washington Fifth Amendment, Exhibit B, at B-1-1.

⁶³ *Id.* at B-1-2 – B-1-3.

⁶⁴ *Id.*

⁶⁵ *Id.* at B-1-2.

any separate contractor engaged by Tenant or otherwise attributable to the wrongful acts or omissions of Tenant. All such reimbursements and costs shall be adjusted by additions to and deductions from, respectively, the Fifth Amendment Allowances.”⁶⁶ “If Tenant fails to timely use or expressly reserve in writing the entire amount of any of the Fifth Amendment Allowances for the Fifth Amendment Work on or before September 30, 2015, then, Landlord shall apply any such portion of the Fifth Amendment Allowances toward payment(s) of annual base rent next coming due under the lease.”⁶⁷

“The Fifth Amendment Allowances . . . shall be applied solely to the costs of designing, permitting, constructing and installing the Fifth Amendment Work,” including “moving, furniture . . . and other costs related to the occupancy of the entire Premises.”⁶⁸ Landlord agreed either to “pay directly to the contractor, supplier or vendor (or, at Tenant’s election, shall reimburse Tenant for) any costs, expenses or fees to which the Fifth Amendment Allowances may be applied.”⁶⁹

After selection of the Fifth Amendment Contractor and approval of the subcontractor pricing for the Fifth Amendment Work, it is Landlord, rather than CFTC, that enters into the construction contract for the Fifth Amendment Work.⁷⁰

The lease states the following concerning payment for the improvements:

“The price of the Fifth Amendment Work to be performed by the Fifth Amendment Contractor (including all change orders, the “Total Price”), minus the amount of the Fifth Amendment Allowances, shall be payable by Tenant . . . prior to the performance of any work. (The difference between the Total Price and the Fifth Amendment Allowances, if any, being hereinafter referred to as the ‘Funded Excess.’) Any Funded Excess Payment actually received by Landlord shall be applied to all requests for payment of costs, expenses and/or fees payable under the Fifth Amendment Construction Contract before any portion of the Fifth Amendment Allowances is so applied for the same portion of the Fifth Amendment Work . . . for the purposes of this [section] all references to payment by Tenant shall mean that Tenant shall have obligated the funds from an appropriated amount (and delivered to

⁶⁶ *Id.*

⁶⁷ *Id.* at B-1-2–B-1-3.

⁶⁸ *Id.* at B-1-3.

⁶⁹ *Id.*

⁷⁰ *Id.* at B-1-7.

Landlord a signed and sworn statement from Tenant's contracting officer that such obligation has been finalized) and deliver such obligated funds to Landlord upon approval of prices of the Fifth Amendment Work by Tenant's Representative."⁷¹

The Washington Fifth Amendment also provides for a "Second Refurbishment" to be made between October 1, 2015 and September 30, 2018.⁷² This Second Refurbishment "shall be conducted at Tenant's sole cost and expense," with CFTC being "entitled to the benefit of all reimbursements due from the Second Refurbishment Contractor due to delays, improperly timed activities or defective construction of the Contractor, or other causes, and shall bear the costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction caused by any separate contractor engaged by Tenant or otherwise attributable to the wrongful acts or omissions of Tenant."⁷³ Landlord enters into a construction contract to complete the Second Refurbishment and makes payments to the contractor using funds that CFTC is to advance to Landlord.⁷⁴ The lease also provides for a "Second Refurbishment Credit," which is "a credit against the monthly payment(s) of Total Rent next coming due under the Lease . . . equal to" about \$5.8 million.⁷⁵

Washington 2010 Sixth Amendment to 1994 lease and Washington 2010 Seventh Amendment to 1994 lease (Categories III and IV)

In March 2010, CFTC and its landlord executed the Sixth Amendment to Lease Agreement (Washington Sixth Amendment).⁷⁶ It contemplated "Tenth Floor Space Tenant Improvements" that "shall be designed and performed in connection with the design and performance of the Fifth Amendment Tenant Improvements by the Fifth Amendment Architect and Fifth Amendment Contractor pursuant to the Fifth Amendment Work Agreement attached as Exhibit B to the Fifth Amendment."⁷⁷ "Accordingly, all of the terms and conditions of the Fifth Amendment Work

⁷¹ *Id.* at B-1-11. A similar paragraph appears in Appendix E, which pertains to the Second Refurbishment Work described below.

⁷² Washington Fifth Amendment, Exhibit E, at E-1.

⁷³ Washington Fifth Amendment, at 29; Washington Fifth Amendment, Exhibit E, at E-2.

⁷⁴ Washington Fifth Amendment, Exhibit E, at E-8-E-9.

⁷⁵ Washington Fifth Amendment, at 29.

⁷⁶ Sixth Amendment to Lease Agreement, Mar. 1, 2010 (Washington Sixth Amendment).

⁷⁷ Washington Sixth Amendment, at 2.

Agreement shall apply with respect to the Tenth Floor Space,” with particular exceptions and additions as noted.⁷⁸ Thus, in all respects material to this opinion, the Washington Sixth Amendment was similar to the Washington Fifth Amendment.

In May 2010, CFTC and its landlord executed the Seventh Amendment to Lease Agreement (Washington Seventh Amendment).⁷⁹ As with the Sixth Amendment, the Seventh Amendment contemplated further “Tenant’s Improvements” that would be performed pursuant to the terms of the Fifth Amendment.⁸⁰ Thus, in all respects material to this opinion, the Seventh Amendment was similar to the Fifth Amendment.

Chicago 2001 lease (Categories I, II, III, and IV)

In December 2001, CFTC executed a lease for office space in Chicago.⁸¹ As described below, the lease and its Third Amendment provided that the Landlord agreed to enter into contracts to construct particular improvements. The lease provided that the improvements would be constructed at CFTC’s sole cost and expense; Landlord, however, agreed to pay up to a specified amount directly to the contractors.⁸² The lease contemplated “Leasehold Improvements”, which were “alterations, improvements, and modifications to be made to the Premises pursuant to the plans and specifications approved by Landlord and Tenant”.⁸³ Under the Lease and an accompanying document known as the “Workletter”:

“Landlord shall obtain from the General Contractor a guaranteed maximum bid for the cost of constructing and installing the Leasehold Improvements in accordance with the terms and conditions of this Workletter and shall submit the amount thereof, together with supporting documentation for such amount, to Tenant for Tenant’s approval. If Tenant fails to notify Landlord of its approval of such cost within five (5) days after Tenant’s receipt of the amount and supporting documentation, Tenant shall be deemed to have approved same Upon approval by Tenant of such costs . . . Landlord shall be deemed to have been authorized to proceed, through the General Contractor . . . with the work of

⁷⁸ *Id.*

⁷⁹ Seventh Amendment to Lease Agreement, May 11, 2010.

⁸⁰ *See id.* at 2.

⁸¹ Lease between Landlord and Tenant, December 2001 (Chicago Lease).

⁸² *Id.* at 7.

⁸³ *Id.* at 4-5.

constructing and installing the Leasehold Improvements in accordance with the terms and conditions of this Workletter.”⁸⁴

The lease provided for a “Landlord’s Contribution” of about \$2 million.⁸⁵ The lease stated that “Landlord shall construct the Leasehold Improvements, at Tenant’s sole cost and expense” and that “Landlord agrees to pay directly to the contractors and subcontractors . . . an amount not to exceed the Landlord’s Contribution toward the cost of such Leasehold Improvements.”⁸⁶

Landlord must make payments of the Landlord’s Contribution:

“Landlord shall make payments to contractors and subcontractors on account of Landlord’s Contribution, on a monthly basis, for the work and services performed, and materials and equipment purchased . . . in accordance with Landlord’s and Tenant’s contracts with such contractors and subcontractors. Landlord acknowledges that such payments shall be subject to Tenant’s approval and acceptance of the work following inspection and direction by the Contracting Officer.”⁸⁷

CFTC also could elect to reserve a portion of the Landlord’s Contribution to be “disbursed to or for the benefit of Tenant.”⁸⁸

Under the lease, CFTC could “increase or decrease the amount of Landlord’s Contribution, pursuant to notice to Landlord.”⁸⁹ If the Landlord’s Contribution is increased above what is denoted the “Threshold Contribution”(about \$2 million) then CFTC’s rent will be increased by a particular sum.⁹⁰ If CFTC decreases Landlord’s Contribution below the Threshold Contribution, the difference is “credited against Rent due and payable under this Lease.”⁹¹

⁸⁴ Chicago Lease, Exhibit H, at 2.

⁸⁵ Chicago Lease, at 5.

⁸⁶ *Id.* at 7.

⁸⁷ *Id.*

⁸⁸ *Id.* at 8.

⁸⁹ *Id.* at 7.

⁹⁰ *Id.* at 8.

⁹¹ *Id.*

In August 2009, CFTC and its landlord executed the Third Amendment to Lease Agreement (Chicago Third Amendment).⁹² This amendment extended the term of the lease and expanded the size of the leasehold.⁹³ The amendment contained provisions for construction of improvements to the leasehold.⁹⁴ In all respects significant for the purposes of this opinion, the Chicago Third Amendment is substantively similar to the original Chicago lease.

Kansas City 2010 lease (Categories III and IV)

On September 20, 2010, CFTC entered into a lease for office space in Kansas City, Missouri.⁹⁵ As described below, the lease provided that CFTC could choose whether it or its landlord would enter into contracts for the construction of improvements. CFTC elected to have the Landlord construct improvements. Under the lease, Landlord paid up to a particular amount for the improvements, with CFTC paying all remaining costs.

The lease contemplated the construction of “Tenant Improvements”, which are denoted as “those items which are supplied, installed and finished by Landlord, according to and described in [plans approved by the Landlord and CFTC] and which shall be paid for by Landlord (subject to the Tenant Improvement Allowance) as provided herein.”⁹⁶ The lease provided that “Tenant shall have the option of either constructing the Tenant Improvements itself or having Landlord do so.”⁹⁷ CFTC states that it elected to have its landlord construct the improvements.⁹⁸

The lease provided for the determination of the cost of the improvements:

“If Landlord is constructing the Tenant Improvements, then upon Tenant’s approval of the final form of the drawings, plans and specifications . . . Tenant shall select the general contractor. The general contractor shall obtain competitive bids from a minimum of three (3) subcontractors and suppliers of each trade and material, and using such bids, shall prepare an analysis of the cost of

⁹² Third Amendment to Lease, Aug. 3, 2009.

⁹³ *Id.* at 1.

⁹⁴ *See, e.g., id.* at 5.

⁹⁵ Office Building Lease between Landlord and Tenant, Sept. 20, 2010 (Kansas City Lease).

⁹⁶ Kansas City Lease, Schedule 5, at 29.

⁹⁷ Kansas City Lease, Schedule 5, at 29.

⁹⁸ CFTC Letter, at 9.

constructing the Tenant Improvements according to the Construction Documents and submit such analysis to Tenant for its approval. Only the Contracting Officer has authority to approve the cost for constructing the Tenant Improvements, which, upon approval by the Contracting Officer, shall be the 'Final Cost'. Landlord shall enter into a construction contract with the general contractor with the Final Cost being the guaranteed maximum price of the Tenant Improvements (the 'Guaranteed Maximum Price')."⁹⁹

Another paragraph pertained to payment for the cost of the improvements:

"Regardless of whether Landlord or Tenant constructs the Tenant Improvements, Tenant acknowledges that Landlord's sole monetary obligation with respect to the Tenant Improvements is to pay up to an aggregate maximum limit of: \$35.00 per square foot of Rentable Area of Premises (the "Tenant Improvement Allowance"), and Tenant shall pay all other costs of the construction of the Tenant Improvements ("Tenant's Share") upon receipt of evidence of the payment thereof after the Tenant Improvement Allowance has been exhausted. The Tenant Improvement Allowance may be used to pay for the cost of the Tenant Improvements, including soft costs, design costs, fixtures, furniture, equipment, cabling and moving expenses of Tenant and architectural expenses relating to the Tenant Improvements. Any unused Tenant Improvement Allowance not used within the first six (6) months of the Lease Term shall be utilized as a credit towards Base Rent until the same is exhausted."¹⁰⁰

⁹⁹ Kansas City Lease, Schedule 5, at 30.

¹⁰⁰ Kansas City Lease, Schedule 5, at 31.