



## Decision

**Matter of:** U.S. Commodity Futures Trading Commission—Customer Protection Fund

**File:** B-324469

**Date:** November 8, 2013

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### DIGEST

The U.S. Commodity Futures Trading Commission (Commission) administers the Customer Protection Fund, which is available for the payment of awards to eligible whistleblowers, and the funding of customer education initiatives. In accordance with statute, the Commission shall deposit certain collected monetary sanctions into the Fund as long as the balance of the Fund at the time the monetary sanction is collected is less than \$100 million. 7 U.S.C. § 26(g)(3). This applies even where the deposit would cause the balance of the Fund to exceed \$100 million. Additionally, the Commission may use the Fund to pay travel expenses incurred by personnel of the Commission's Whistleblower Office for speaking engagements and attending conferences, at which the public will be informed and educated in accordance with section 26(g)(2), about the Whistleblower Office and the whistleblower provisions of the Commodity Exchange Act.

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### DECISION

The General Counsel of the U.S. Commodity Futures Trading Commission (Commission) requested a decision as to whether the Commission may deposit certain monetary sanctions into the Commission's Customer Protection Fund that would result in the balance of the Fund exceeding \$100 million, and whether the Commission may use the Fund to pay for certain travel expenses incurred by personnel working in the Commission's Whistleblower Office. Letter from the General Counsel, Commission, to the Comptroller General (Feb. 13, 2013) (Request Letter). As explained below, the Commission must deposit monetary sanctions into the Fund when the balance of the Fund at the time of the collection is less than \$100 million even if the deposit would cause the balance of the Fund to exceed \$100 million. In addition, the Fund is available to pay the travel expenses, related to

carrying out 7 U.S.C. § 26(g)(2) (customer education initiatives), of personnel working in the Commission's Whistleblower Office.<sup>1</sup>

## BACKGROUND

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) amended the Commodity Exchange Act, and required the Commission to implement whistleblower incentive and customer education programs. Pub. L. No. 111-203, title VII, subtitle A, pt. II, § 748, 124 Stat. 1376, 1742–43 (July 21, 2010), *codified at* 7 U.S.C. § 26(g). Dodd-Frank established the Customer Protection Fund, which is available to the Commission without fiscal year limitation for two purposes: (1) “the payment of awards to whistleblowers” who provide original information that leads to the successful resolution of a covered judicial or administrative action, or related action, and (2) “the funding of customer education initiatives.” 7 U.S.C. § 26(g)(2). A covered judicial or administrative action is one brought by the Commission under the Commodity Exchange Act or its rules and regulations, and results in monetary sanctions exceeding \$1 million. *Id.* § 26(a)(1). Customer education initiatives are designed to help market participants and the public protect themselves against fraud or other violations of the Commodity Exchange Act or its rules and regulations. *Id.* § 26(g)(2). The Fund must be credited with any monetary sanctions collected by the Commission in a covered judicial or administrative action that are not otherwise distributed to victims in such an action, “unless the balance of the Fund at the time the monetary judgment is collected exceeds \$100,000,000.”<sup>2</sup> *Id.* § 26(g)(3)(A); 17 C.F.R. § 165.12(b).

The Fund is available to make payments to whistleblowers without further legislative action. 7 U.S.C. § 26(g)(2). The amount of the whistleblower's award must be between 10 and 30 percent of the monetary sanctions collected in a covered judicial or administrative action, or related action. *Id.* § 26(b). The Commission has discretion to determine the amounts of the award, and in doing so, must consider the significance of the information, the programmatic interest in deterring violations of the Commodity Exchange Act and its and regulations, and other relevant factors. *Id.*

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<sup>1</sup> Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* [www.gao.gov/legal/resources.html](http://www.gao.gov/legal/resources.html). The General Counsel's request letter contained the pertinent facts and the legal views of the Commission.

<sup>2</sup> Funds are considered to be “collected by the Commission” when the funds are “received, and confirmed, by the U.S. Department of the Treasury, in satisfaction of part or all of a civil monetary penalty, disgorgement obligation, or fine owed to the Commission.” 17 C.F.R. § 165.2(d).

§ 26(c). In this regard, if the Commission determines that a whistleblower is entitled to an award because the whistleblower “voluntarily provided original information to the Commission that led to the successful enforcement of the covered . . . action,” the awards “shall be paid from the Fund.” *Id.* § 26(b).

The Commission also receives an annual lump sum appropriation to “carry out the provisions of the Commodity Exchange Act.” See, e.g., Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, div. A, title VI, 125 Stat. 577, 579 (Nov. 18, 2011).

## DISCUSSION

### Deposits in or Credits to the Fund

Section 26(g)(3) of title 7 of the U.S. Code provides in relevant part as follows:

“There shall be deposited into or credited to the Fund . . . [a]ny monetary sanctions collected by the Commission in any covered judicial or administrative action that is not otherwise distributed to victims of a violation . . . unless the balance of the Fund at the time the monetary judgment is collected exceeds \$100,000,000.”

The Commission asks, in light of the above statutory language, whether it is permissible to deposit a monetary sanction into the Fund, where the deposit would cause the balance of the Fund to exceed \$100 million, or whether the \$100 million set forth in the statute acts as a fixed limit or cap to the Fund’s total. Request Letter, at 1–2. The Commission notes here that in 2012, it collected a covered sanction of \$200 million. The Commission adds that because at the time the sanction was collected, the Fund had a balance of \$76 million, the Commission deposited only \$24 million into the Fund, and transmitted the remaining \$176 million to the U.S. Treasury. The Commission now questions whether the statutory language requires this result. The Commission states that, in its view, “it is reasonable to interpret [7 U.S.C. § 26(g)(3)] so as not to impose a fixed limit of \$100 million on the balance in the Fund that may result from the deposit of collected sanctions, but rather as a prohibition on further deposits into the Fund when the balance of the Fund at the time the judgment is collected exceeds \$100 million.” *Id.*

As with any question involving statutory interpretation, the analysis begins with the plain language of the statute. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). This is because the “starting point in discerning congressional intent is the existing statutory text.” *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). When the language of a statute is clear and unambiguous on its face, it is the plain meaning of that language that controls. *Carciari v. Salazar*, 555 U.S. 379, 387 (2009); B-307720, Sept. 27, 2007; B-306975, Feb. 27, 2006.

In our view, the meaning of section 26(g)(3) is clear. The statute states that the Commission shall deposit into the Fund any monetary sanctions that the Commission collects (that are not otherwise distributed to victims of the violation) unless the balance of the Fund “*at the time the monetary judgment is collected* exceeds \$100,000,000.” 7 U.S.C. § 26(g)(3) (emphasis added). As such, in the context of the example cited to us by the Commission and set forth above, we agree with the Commission that because the Fund’s balance at the time the sanction was collected totaled \$76 million, the total collected sanction of \$200 million should have been deposited into the Fund. Given its plain meaning and context, the language of section 26(g)(3) does not establish or otherwise indicate that the \$100 million is meant as an absolute cap. Indeed, the statute, by its very terms, envisions the possibility that the balance of the Fund may exceed \$100 million. At such time, collections may not be deposited into the Fund. However, if the balance of the Fund is less than \$100 million at such time as the sanction is collected, the entire amount should be deposited into the Fund.<sup>3</sup>

#### Travel Expenses of Whistleblower Office Personnel

The Commission asks if it may use the Fund to pay for the travel expenses incurred by the Commission’s Whistleblower Office personnel for speaking engagements and attending conferences at which the public will be informed and educated about the Whistleblower Office and the whistleblower provisions of the Commodity Exchange Act. Request Letter, at 2–3. The Commission notes that in a previous decision, we concluded that the Commission may use the Fund to establish an office and hire personnel to carry out whistleblower incentive and customer education programs. B-321788, Aug. 8, 2011. In doing so, we agreed with the Commission that the administrative and salary expenses of establishing the office and hiring personnel are necessary and incident to carrying out these programs. *Id.*

Appropriations are available only for the objects for which they were made unless otherwise provided by law. 31 U.S.C. § 1301(a). However, every item of expenditure does not need to be specified in an appropriations act. B-321788, Aug. 8, 2011. Appropriations are available for expenses that are necessary or incident to achieving the object of the appropriation. *Id.* An analysis of whether an appropriation is available for certain expenses recognizes that when Congress makes an appropriation for a particular purpose, by implication it authorizes the agency involved to incur expenses that are necessary or incident to the accomplishment of that purpose. *Id.*

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<sup>3</sup> As noted by the Commission, the legislative history of Dodd-Frank is silent on the issue presented here concerning 7 U.S.C. §26(g)(3).

We use a three-part test to determine whether a specific expenditure is a necessary expense of an appropriation: (1) the expenditure must bear a logical relationship to the appropriation sought to be charged; (2) the expenditure must not be prohibited by law; and (3) the expenditure must not be provided for by another appropriation. *Id.* As in our previous decision, we do not identify any law prohibiting the Commission from using the Fund for this purpose. *Id.* Therefore, we analyze the first and third parts of the test, determining whether these expenses bear a logical relationship to the objects of the Fund, and whether these expenses are provided for by another appropriation.

With regard to the first step in our analysis, we note that an agency has reasonable discretion to determine how to carry out the objects of its appropriation. In our previous decision finding that the Commission could use the Fund to establish a new office and hire personnel, we found it reasonable that the Commission would incur personnel and administrative costs to implement payments of awards to whistleblowers. *Id.* As the Commission explained, it would need personnel to receive whistleblower tips and complaints, to determine who is eligible for an award and how much the individual should receive based on the Commission's criteria, and to generally manage the whistleblower claims process. *Id.*; see 7 U.S.C. §§ 26(b), 26(c). We similarly found it reasonable that the Commission would incur personnel and administrative costs in funding customer education programs, given the Commission's explanation that it would need personnel to design, implement, and oversee its initiatives to inform customers how to protect themselves against fraud and other commodity exchange violations. B-321788, Aug. 8, 2011. We concluded that these costs were necessary and incident to achieving the purposes for which the Fund was established, and therefore, that the costs bore a logical relationship to the Fund. *Id.*

We reach the same conclusion with regard to the travel expenses incurred by the Commission's Whistleblower Office personnel for speaking engagements and attending conferences at which the public will be informed and educated about the Whistleblower Office and the whistleblower provisions of the Commodity Exchange Act. The Commission has explained here that travel by Whistleblower Office personnel for such speaking engagements and conferences "is appropriate to inform the public about the [Whistleblower Office] and the whistleblower provisions of the [Commodity Exchange Act]." Request Letter, at 2. The Commission adds that the participation in such speaking engagements and conferences by Whistleblower Officer personnel "furthers the purposes of . . . [7 U.S.C. § 26(g)(2)] by educating market participants and members of the public about the Commission's Whistleblower Incentive Awards program." *Id.*, at 3. The Commission continues here by explaining that this "can be expected to help the public to provide more effective tips and referrals, improve the Commission's ability to detect violations and enforce the provisions of the Act, and ultimately yield payments of awards to

whistleblowers.” *Id.* In light of the Commission’s explanation, we have no objection to the agency’s payment of the travel expenses of Whistleblower Office personnel for speaking engagements and their attendance at the conferences at which the public will be informed and educated about the Whistleblower Office and the whistleblower provisions of the Commodity Exchange Act. These costs, as a component of the personnel and administrative costs necessary to carry out the objects of the Fund, are necessary and incident to the purpose for which the Fund was established, and accordingly, bear a logical relationship to the Fund.

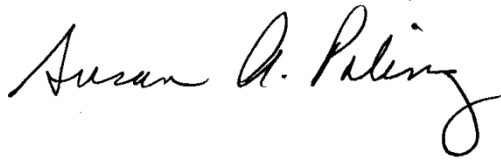
In applying the third step of the test, we look to see if there is an appropriation, other than the Fund, that is more specifically available for these expenses. If an agency receives a specific appropriation for a particular object, it should use that appropriation to the exclusion of a more general appropriation broad enough to cover the same objects. *Id.*

As we explained in our prior decision, the Commission also receives a general lump sum appropriation to “carry out the provisions of the Commodity Exchange Act.” See, e.g., Pub. L. No. 112-55, 125 Stat. at 579. The lump sum appropriation is available for the Commission’s personnel and administrative costs generally, and, arguably, could be available for the costs at issue here. The better view, however, is that the Fund is the more specific appropriation for expenses incidental to customer education initiatives and the whistleblower incentive awards. Although Dodd-Frank does not expressly address administrative and personnel costs for the Fund, we take note of the fact that the primary costs of customer education initiatives would be personnel costs, including travel expenses, and those costs are necessarily part of “the funding of customer education initiatives.” As we held in B-321788, parallel construction between whistleblower incentive awards and customer education initiatives would suggest that we read the statutory language providing that the Fund is available for “payment of awards to whistleblowers” to cover costs such as administrative and personnel costs, including travel expenses, incidental to making whistleblower payments.

## CONCLUSION

The Commission shall deposit certain monetary sanctions into the Fund where the deposit would cause the balance of the Fund to exceed \$100 million, as long as the balance of the Fund at that time the monetary sanction is collected is less than \$100 million. The Commission may use the Fund to pay for travel expenses incurred by the Commission’s Whistleblower Office personnel for speaking

engagements and attending conferences, at which the public will be informed and educated about the Whistleblower Office and the whistleblower provisions of the Commodity Exchange Act.

A handwritten signature in black ink that reads "Susan A. Poling". The signature is written in a cursive style with a large, looping 'P' at the end.

Susan A. Poling  
General Counsel