



United States Government Accountability Office
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April 25, 2014

The Honorable Richard C. Shelby
Vice Chairman
Committee on Appropriations
United States Senate

Subject: *Commodity Futures Trading Commission—Fiscal Year 2013 Transfer Authority*

Dear Mr. Vice Chairman:

This responds to your request for our opinion concerning whether the Full-Year Continuing Appropriations Act, 2013 (2013 Appropriations Act) granted the Commodity Futures Trading Commission (CFTC) authority to transfer amounts from a particular line-item appropriation. Letter from Vice Chairman, Committee on Appropriations, United States Senate, to General Counsel, GAO (Nov. 13, 2013). In section 744 of the Financial Services and General Government Appropriations Act, 2012 (2012 Financial Services Act), Congress granted CFTC authority to transfer up to \$10 million from a line-item appropriation available only for information technology investments (Line-Item Appropriation) and to use the amounts to pay for salaries and expenses. CFTC asserts that the 2013 Appropriations Act carried section 744 forward into fiscal year 2013. Letter from General Counsel, CFTC, to Assistant General Counsel for Appropriations Law, GAO (Jan. 8, 2014) (CFTC Letter).

As discussed below, we conclude that the 2013 Appropriations Act did not carry forward the section 744 transfer authority. The 2013 Appropriations Act, as a general matter, carried forward many of the provisions of the 2012 Financial Services Act. However, as explained below, the section 744 transfer authority was not included among these provisions. Pub. L. No. 113-6, div. F, § 1313, 127 Stat. 198, 418. CFTC should adjust its accounts in accordance with this opinion.

In accordance with our regular practice, we contacted CFTC to develop a factual record and obtain its legal position on this matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, CFTC, Dec. 20, 2013; GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/lawresources/resources.html. CFTC provided us a letter with additional information and its legal views. CFTC Letter. At the request of CFTC and Office of Management and Budget

(OMB) officials, we held a telephone conference during which officials from both agencies discussed additional information and their legal views. Telephone Conference with General Counsel, CFTC, General Counsel, OMB, Assistant General Counsel for Appropriations Law, GAO, and others (Jan. 6, 2014).

BACKGROUND

Three statutes are of central importance in this matter: (1) a November 2011 enactment that provided a fiscal year 2012 line-item appropriation to CFTC for information technology investments; (2) a December 2011 enactment that provided CFTC with authority to transfer limited amounts from the line-item appropriation for use for CFTC's salaries and expenses; and (3) a March 2013 enactment that provided continuing appropriations to CFTC for fiscal year 2013.

In the first enactment, Congress appropriated a lump sum for the necessary expenses of CFTC. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012, Pub. L. No. 112-55, div. A, 125 Stat. 552, 553, 579 (Nov. 18, 2011) (2012 Appropriations Act). From this lump sum, Congress provided that \$55 million was available only for information technology investments (Line-Item Appropriation). *Id.*

About one month later, Congress passed and the President signed into law the second statute that is important in this matter: the Financial Services and General Government Appropriations Act, 2012 (2012 Financial Services Act). Pub. L. No. 112-74, div. C, 125 Stat. 786, 884 (Dec. 23, 2011). This Act did not provide CFTC with any appropriations. However, section 744 of this Act did provide CFTC the authority to transfer no more than \$10 million from the Line-Item Appropriation and to use the transferred amounts for salaries and expenses. *Id.*, title VII, § 744, 125 Stat. at 939-940.

Finally, on March 26, 2013, the President signed into law the third statute: the Consolidated and Further Continuing Appropriations Act, 2013. Pub. L. No. 113-6, 127 Stat. 198. Up until that time, Congress had funded CFTC's fiscal year 2013 operations from a six-month continuing resolution. Continuing Appropriations Act, 2014, § 101(a)(6), Pub. L. No. 113-46, 127 Stat. 558 (Oct. 17, 2013). One division of the March 2013 act, titled the Full-Year Continuing Appropriations Act, 2013 (2013 Appropriations Act), provided appropriations to fund CFTC through the end of fiscal year 2013. Section 1313 of the 2013 Appropriations Act provides:

“Notwithstanding section 1101 of this division or [the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2013], the level for the ‘Commodity Futures Trading Commission’ shall be the level specified under [the 2012 Appropriations Act] and the authorities and conditions, including comparable periods of availability, provided under [the 2012 Appropriations Act] shall apply to such appropriation.”

Pub. L. No. 113-6, § 1313, 127 Stat. at 418.¹ As noted above, the 2012 Appropriations Act, to which section 1313 refers, enacted CFTC's fiscal year 2012 appropriation, but not the transfer authority at issue here. It was the 2012 Financial Services Act that provided CFTC the transfer authority. While section 1101 of the 2013 Appropriations Act continued the authorities and conditions of the 2012 Financial Services Act (which contained the section 744 transfer authority), section 1313 of the 2013 Appropriations Act, enacting CFTC's fiscal year 2013 appropriation, provided the appropriation "[n]otwithstanding section 1101", and under the authorities and conditions of the 2012 Appropriations Act, not the 2012 Financial Services Act.

DISCUSSION

At issue here is whether the 2013 Appropriations Act carried forward the fiscal year 2012 section 744 transfer authority. This is a matter of statutory construction of section 1313, and particularly the intersection of section 1313 with section 1101.

To determine the meaning of any statute, we must begin by analyzing its language. *Duncan v. Walker*, 533 U.S. 167, 172 (2001); B-322455, Aug. 16, 2013. Generally, we must give effect to all words in the statute, as Congress does not enact unnecessary language. *Hibbs v. Winn*, 542 U.S. 88, 89 (2004); 70 Comp. Gen. 351 (1991). In this context, we consider the meaning of section 1313, which appropriated amounts to CFTC.

Section 1313 applies "[n]otwithstanding section 1101" of the 2013 Appropriations Act. A provision's use of the word "notwithstanding" indicates that the provision overrides other, conflicting provisions. *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993). In that decision, the Supreme Court reconciled 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 difference between subsidized and market rates. *Id.* 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 trumped the annual adjustment provision. *Id.* at 18-19. The Court noted that in construing statutes, the use of a notwithstanding clause

¹ In the Consolidated and Further Continuing Appropriations Act, 2013, Congress enacted the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2013. Pub. L. No. 113-6, div. A, 127 Stat. at 199. However, the Agriculture and Rural Development division appropriated no amounts for CFTC. In addition, although the 2013 Appropriations Act continued the 2012 Financial Services Act, the latter measure appropriated no amounts for CFTC. Thus, but for the enactment of section 1313, CFTC would have received no appropriation for the remainder of fiscal year 2013.

“clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.” *Id.* at 18.

In our view, the use of the word “notwithstanding” in this case indicates that to the extent of any overlap between sections 1313 and 1101, section 1313 supersedes section 1101. *See id.*; *see also* B-303961, Dec. 6, 2004, and cases cited therein. Therefore, we must turn to section 1101 to determine how it might overlap or intersect with section 1313.

Because none of the appropriations acts enumerated in section 1101 provided amounts to CFTC, section 1101 appropriated no amounts to CFTC. Thus, the “notwithstanding section 1101” clause cannot be read to affect the amount appropriated under section 1313. Such a reading would render the “notwithstanding” language superfluous, in contravention of the principle that Congress does not enact redundant language. *Duncan*, 533 U.S. at 174. Instead, the intersection between section 1101 and section 1313 concerns the authorities and conditions that applied to the section 1313 appropriation. Section 1313 states that the authorities and conditions applicable to funds appropriated to CFTC in fiscal year 2013 would derive from those specified in the 2012 Appropriations Act. Meanwhile, section 1101 brings forward the 2012 Financial Services Act, which provided in section 744 an additional authority applicable to CFTC’s appropriated funds: the authority to transfer amounts from the Line-Item Appropriation. The “notwithstanding section 1101” clause means that the authorities and conditions of the 2012 Appropriations Act supersede authorities and conditions that might otherwise have been available under the acts enumerated in section 1101, specifically the 2012 Financial Services Act, including the section 744 transfer authority. Therefore, the 2013 Appropriations Act did not carry forward the transfer authority provided in the 2012 Financial Services Act.²

CFTC asserts that it retained the transfer authority provided in the 2012 Financial Services Act while it operated under the 2013 Appropriations Act. CFTC Letter, at 2. CFTC notes that section 1105 of the 2013 Appropriations Act carries forward the requirements, authorities, conditions, limitations, and other provisions of the appropriations acts listed in section 1101. *Id.* Section 1101 refers to the 2012 Financial Services Act, which contained the transfer authority. 127 Stat. at 412. CFTC argues

² You also asked us whether CFTC retained the section 744 transfer authority while it operated under the Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 127 Stat. 558 (Oct. 17, 2013) (2014 Continuing Resolution). This measure appropriated amounts to CFTC at the rate for operations and under the terms and conditions provided in the 2013 Appropriations Act. *Id.*, § 101(a)(6). As discussed above, the 2013 Appropriations Act did not carry forward the section 744 transfer authority. Because the 2014 Continuing Resolution carries forward the provisions of the 2013 Appropriations Act, it, too, did not provide any section 744 transfer authority to CFTC.

that because the 2013 Appropriations Act “does not expressly withdraw or otherwise specifically address CFTC’s transfer authority,” CFTC retained the transfer authority. CFTC Letter, at 2.³ CFTC’s analysis neglects to consider the import of the “notwithstanding” clause in the 2013 Appropriations Act. In our view, this clause does address CFTC’s transfer authority, as it refers to section 1101 of the 2013 Appropriations Act. As discussed above, this reference to section 1101 can only mean that the transfer authority provided in the 2012 Financial Services Act was no longer available to CFTC as it operated under the 2013 Appropriations Act.

CFTC should adjust its accounts in accordance with this opinion. After making these necessary adjustments, if CFTC finds that obligations in the account it uses for salaries and expenses exceed amounts available, CFTC should report a violation of the Antideficiency Act as required by 31 U.S.C. § 1351.

CONCLUSION

The 2013 Appropriations Act did not carry forward the section 744 transfer authority. While the 2013 Appropriations Act did, as a general matter, refer to and carry forward the provisions of the 2012 Financial Services Act, which contained the section 744 transfer authority, it must be interpreted in accordance with section 1313, which provided CFTC’s fiscal year 2013 appropriations. Because of the notwithstanding clause in section 1313, the authorities and conditions of the 2012 Appropriations Act supersede any authorities and conditions in the 2012 Financial Services Act that might otherwise be applicable to CFTC’s appropriation, including the section 744 transfer authority. Therefore, the 2013 Appropriations Act did not carry forward the transfer authority provided in the 2012 Financial Services Act. CFTC should adjust its accounts in accordance with this opinion.

³ The 2012 Financial Services Act provided that the transfer authority was available until September 30, 2013. 2012 Financial Services Act, § 744, 125 Stat. at 939. CFTC maintains that the 2013 Appropriations Act continued the applicability of the transfer authority despite the lapsed expiration date. *Id.* at 2. Because the 2013 Appropriations Act did not continue the applicability of the transfer authority, we need not address the possible implications of the lapsed expiration date.

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 yours,

A handwritten signature in black ink, appearing to read "Susan A. Poling". The signature is written in a cursive style with a large initial "S" and a long, sweeping underline.

Susan A. Poling
General Counsel