



Decision

Matter of: Commodity Futures Trading Commission—Availability of Appropriations for Inspector General Overhead Expenses

File: B-327003

Date: September 29, 2015

DIGEST

Both the Commodity Futures Trading Commission's (CFTC) lump-sum appropriation and the earmark for the CFTC Office of Inspector General (OIG) (contained within the lump-sum appropriation) for fiscal year (FY) 2015 are legally available to pay OIG overhead expenses. CFTC is not required to choose one of these appropriations to the exclusion of the other; rather, the language in the FY 2015 appropriations act establishes a floor of \$2.62 million for the OIG and permits the use of the CFTC lump-sum appropriation in addition to the earmark for purposes related to the OIG.

DECISION

The Office of Inspector General (OIG) of the Commodity Futures Trading Commission (CFTC) requests a decision under 31 U.S.C. § 3529 regarding the availability of FY 2015 appropriated funds to pay for general overhead expenses of the CFTC OIG. Letter from Deputy Inspector General and Chief Counsel, CFTC OIG, to General Counsel, GAO (May 13, 2015) (Request Letter). As explained below, both the general lump-sum appropriation for the CFTC and the earmark for the OIG (contained within the lump-sum appropriation) are available to pay these overhead expenses.

Our practice when rendering decisions is to obtain the legal views of the relevant agency and to establish a factual record on the subject 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/products/GAO-06-1064SP. In its request, CFTC OIG provided relevant facts and its legal views, as well as a copy of a memorandum from the CFTC General Counsel to the CFTC Executive Director and Chief Financial Officer (CFO) addressing this issue.

CFTC confirmed that this memorandum set forth all relevant information and its legal analysis and conclusions. Letter from General Counsel, CFTC, to Assistant General Counsel for Appropriations Law, GAO (July 16, 2015).

BACKGROUND

An agency covered by the Inspector General Act of 1978, as amended, is required to submit its IG's budget estimate and request to the head of the agency as part of its justification materials. Inspectors General Act (IGA), 5 U.S.C. app. § 6(f); OMB Circular No. A-11, *Preparation and Submission of Budget Estimates*, pt. 2, § 51.16 (June 30, 2015). The head of the agency must include in its proposed budget to the President the aggregate request of the IG and any comments of the affected IG with respect to the proposal. IGA, § 6(f)(2). The President is then required to include in each budget submitted to Congress a separate statement of the IG's budget estimate and "any comments of the affected [IG] with respect to the proposal if the [IG] concludes that the budget submitted by the President would substantially inhibit the [IG] from performing the duties of the office." *Id.* § 6(f)(3).

In August 2013, the CFTC Inspector General (IG) submitted an FY 2015 budget request to the Chairman of the CFTC for approximately \$1.9 million. Request Letter, at 1. The request did not include a separate statement of projected overhead costs. *Id.*, Appendix 1. On March 5, 2014, CFTC submitted its FY 2015 budget request to the House and Senate appropriations committees. The request identified \$2,574,033 for the CFTC OIG, including projected overhead costs. CFTC, *President's Budget and Performance Plan*, at 82, available at www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2015.pdf (last visited Sept. 25, 2015).

On March 7, 2014, the IG transmitted a memorandum to the Acting Chairman, noting that CFTC's FY 2015 budget did not include the budget estimate prepared by the OIG. Request Letter, Appendix 2. The IG did not object to CFTC's increased request for the OIG, but noted that CFTC was required by the Inspector General Act of 1978 to include a separate statement of the budget request prepared by the IG in any budget submitted to Congress. *Id.*

In October 2014, CFTC OIG submitted an amended FY 2015 budget request directly to staff on the House and Senate appropriations committees. Email from Deputy Inspector General and Chief Counsel, CFTC OIG, to Senior Attorney, GAO, *Subject: FW: The CFTC OIG budget* (June 22, 2015) (June E-mail). CFTC OIG's total amended budget request was for \$2,624,105, which included \$321,775 for "CFTC Lease and Admin Charges." *Id.* CFTC calculated the overhead and provided the information to the OIG for inclusion in the OIG's amended budget request. Telephone Conversation with Deputy Inspector General and Chief Counsel, CFTC OIG (July 31, 2015) (OIG Conversation).

In December 2014, CFTC received a lump-sum appropriation of \$250 million, including an earmark of “not less than \$2,620,000 . . . for the Office of the Inspector General.” Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. E, title V, 128 Stat. 2130, 2357 (Dec. 16, 2014).¹ After the enactment of the FY 2015 appropriations act, CFTC estimated that the OIG’s overhead expenses would be about \$9,000 more than \$321,775, the amount previously calculated by CFTC and included in OIG’s amended budget request. CFTC decided to charge the full \$330,000 to the OIG earmark. Request Letter, at 2.

In January 2015, the CFO asked CFTC’s Office of General Counsel (OGC) whether overhead expenses for the OIG could be charged against either the OIG earmark or CFTC’s general lump-sum appropriation for salaries and expenses. *Id.*, Appendix 3. On March 31, 2015, OGC issued a guidance memorandum to CFTC’s Executive Director and CFO, concluding that the CFTC has the discretion and authority to charge overhead expenses for the OIG to either the OIG earmark or CFTC’s general salaries and expenses appropriation. *Id.*, Appendix 4. The Executive Director transmitted a copy of the memorandum to the IG. *Id.*, at 2.

CFTC OIG questions the use of the OIG earmark for payment of OIG overhead expenses. The OIG asked for our decision on the availability of CFTC’s lump-sum appropriation and the OIG earmark (contained within the CFTC lump-sum appropriation) for this purpose.

DISCUSSION

Appropriated funds may only be used for authorized purposes. 31 U.S.C. § 1301(a). The general rule is that where an appropriation is not specifically available for a particular item, its purchase may be authorized as a necessary expense if there is a reasonable relationship between the object of the expenditure and the general purpose for which the funds were appropriated, so long as the expenditure is not otherwise prohibited by law. 66 Comp. Gen. 356, 359 (1987).

Generally, an appropriation for a specific object is available for that object to the exclusion of a more general appropriation that might otherwise be considered available for the same object. B-318426, Nov. 2, 2009. There may be rare situations in which either of two appropriations can be construed as available for a particular object, but neither can reasonably be called the more specific of the two. In those situations, an agency may select which appropriation to charge for the expenditure in question; generally, once that election has been made, the agency must continue to use the same appropriation for that purpose unless it informs

¹ Prior to FY 2014, the CFTC OIG did not receive an earmark within the CFTC lump-sum appropriation. Request Letter, at 1.

Congress of its intent to change. B-272191, Nov. 4, 1997. In its guidance memorandum, CFTC OGC relied on this principle in determining that CFTC had the authority to determine which appropriation—the lump sum or the earmark—should be charged exclusively for OIG overhead expenses. Request Letter, Appendix 4. However, where statutory language, as here, clearly demonstrates congressional intent to make one appropriation available to supplement or increase a different appropriation for the same object, both appropriations are available. B-272191.

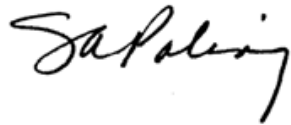
CFTC is not required to choose between the lump sum and the earmark and charge OIG overhead expenses solely to either of those appropriations. For FY 2015, CFTC received a lump-sum appropriation of \$250 million, of which “not less than” \$2.62 million was available for the OIG. Pub. L. No. 113-235, 128 Stat at 2357. This “not less than” language is an earmark that establishes a minimum amount for a specific purpose.² The use of this phrase is not intended to limit funds for a given program; rather, “not less than” is used to assure that at least that minimum amount will be available for the program and will not be used for other authorized operating expenses. B-128943, Sept. 27, 1956. The use of “not less than” with regard to the OIG earmark serves a protective purpose, assuring that at least \$2.62 million will be available for the OIG. It does not bar the CFTC lump-sum appropriation from also being used for these purposes.

CONCLUSION

Both the CFTC lump-sum appropriation and the OIG earmark (contained within the lump-sum appropriation) for FY 2015 are legally available for payment of OIG overhead expenses. CFTC is not required to choose one of these appropriations to the exclusion of the other; rather, the language in the FY 2015 appropriations act establishes a floor of \$2.62 million for the OIG from the lump-sum appropriation and

² A lump-sum appropriation is one that is generally available to cover the necessary expenses of a number of programs, projects, or items. See, e.g., Pub. L. No. 113-235, 128 Stat at 2357 (making an appropriation “[f]or necessary expenses to carry out the provisions of the Commodity Exchange Act”); see also *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 825 (1985). An earmark designates a portion of a lump-sum appropriation for particular purposes. See, GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005). For a fuller discussion of earmarks, see GAO, *Congressional Directives: Selected Agencies’ Processes for Responding to Funding Instructions*, GAO-08-209 (Washington, D.C.: Jan. 31, 2008).

permits the use of the CFTC lump-sum appropriation to supplement that amount for purposes related to the OIG.

A handwritten signature in black ink, appearing to read "S. Poling". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Susan A. Poling
General Counsel