



B-329955

May 16, 2019

The Honorable Susan Collins
Chairman
The Honorable Jack Reed
Ranking Member
Subcommittee on Transportation, Housing and Urban Development,
and Related Agencies
Committee on Appropriations
United States Senate

The Honorable David Price
Chairman
The Honorable Mario Diaz-Balart
Ranking Member
Subcommittee on Transportation, Housing and Urban Development,
and Related Agencies
Committee on Appropriations
House of Representatives

Subject: *U.S. Department of Housing and Urban Development—Compliance with
Statutory Notification Requirement and the Antideficiency Act*

This responds to your request for our legal opinion regarding the U.S. Department of Housing and Urban Development’s (HUD) obligation of its fiscal year (FY) 2016 and FY 2017 appropriations for items for the Office of the Secretary. Specifically, you asked whether HUD’s obligation of these funds was consistent with section 710 of the Financial Services and General Government Appropriations Act, 2016, section 710 of the Financial Services and General Government Appropriations Act, 2017 (collectively referred to as “section 710”), and the Antideficiency Act.¹ Section 710

¹ Letter from Susan Collins, Chairman, Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, Committee on Appropriations, United States Senate; Jack Reed, Ranking Member, Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, Committee on Appropriations, United States Senate; Mario Diaz-Balart, Then-Chairman, Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, Committee on Appropriations, House of

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prohibits an agency from obligating or expending in excess of \$5,000 to furnish, redecorate, purchase furniture for, or make improvements for the office, or suite of offices, of a presidential appointee during the period of appointment without prior notification to the Committees on Appropriations of the House of Representatives and the Senate. Pub. L. No. 115-31, div. E, title VII, § 710, 131 Stat. 135, 379 (May 5, 2017); Pub. L. No. 114-113, div. E, title VII, § 710, 129 Stat. 2242, 2475 (Dec. 18, 2015). The Antideficiency Act prohibits federal agencies from incurring obligations in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a).

As explained below, we conclude that HUD did not violate section 710 when it obligated \$4,160.81 for new blinds for the Secretary's inner and outer office suite without providing advance notice to the Committees on Appropriations of the House of Representatives and the Senate because this purchase did not exceed section 710's \$5,000 threshold. We also conclude, however, that HUD did violate section 710 when it obligated \$31,561.00 for the purchase of a dining set for the HUD Secretary's dining room and \$8,812.84 for the purchase and installation of a new dishwasher and associated water treatment system in the kitchen connected to the dining room without providing advance notice to the Committees on Appropriations of the House of Representatives and the Senate. Further, because HUD obligated appropriated funds in a manner specifically prohibited by law with regard to the dining set, as well as the dishwasher and associated water treatment system, we conclude that HUD violated the Antideficiency Act.

Consistent with our practice for legal opinions, we requested and received from HUD information regarding the factual circumstances of this matter, as well as its legal views regarding whether its actions complied with section 710 and the Antideficiency Act. Letter from Director, Appropriations Law Staff, HUD, to Managing Associate General Counsel, GAO (Aug. 17, 2018) (HUD Letter); 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.

BACKGROUND

The current Secretary's term of office began on March 2, 2017. HUD Letter, at 4. HUD states that it obligated funds for three different items since March 2, 2017, which HUD acknowledges are within the purview of section 710. *Id.*, at 2–4. HUD did not, however, provide advance notice to the Committees on Appropriations of the

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Representatives; David Price, Then-Ranking Member, Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, Committee on Appropriations, House of Representatives, to the Comptroller General (Mar. 6, 2018).

House of Representatives and the Senate for any of the three obligations. *Id.*, at 3–4.

First, in March and April 2017, HUD obligated a total of \$4,160.81 for new blinds for the Secretary’s inner and outer office suite. *Id.* HUD noted that these blinds are not the standard-issue blinds utilized for other HUD windows, but are upgraded wooden blinds in a style that HUD describes as more appropriate for the Secretary’s inner and outer office suite. *Id.* In its letter, HUD states that this was the first obligation covered by the scope of section 710 during the Secretary’s term of office. *Id.*, at 4.

Second, in November 2017, HUD obligated a total of \$8,812.84 to purchase and install a new dishwasher and associated water treatment system for a kitchen (collectively referred to as “dishwasher” in this opinion). *Id.* The new dishwasher replaced a nonfunctional dishwasher in the kitchen that had been damaged by hard water, thus necessitating the water treatment system. *Id.* HUD specified that the kitchen is part of the Secretary’s office suite and is generally used to meet the needs of the Secretary, including when he is representing the agency by hosting external guests in the dining room. *Id.* The kitchen is also available for use by the Secretary’s immediate staff but is accessible only through the Secretary’s dining room. *Id.* If the dining room is in use by the Secretary, the kitchen is not available for general use. *Id.*

In December 2017, HUD obligated \$31,561.00 for a dining set to replace a damaged dining set used for the Secretary’s dining room. *Id.*, at 2–3. The total amount obligated provided for a dining room table, 10 chairs, a matching sideboard, and delivery and installation costs. *Id.*, at 2. According to HUD, the dining room is inside the Secretary’s office suite and is used by the Secretary to eat, including when he is representing the agency by hosting external guests. *Id.*

DISCUSSION

Section 710: Statutory Notification Requirement

The three obligations in question evoke two identical notification requirements enacted in FYs 2016 and 2017. Pub. L. No. 115-31, div. E, title VII, § 710; Pub. L. No. 114-113, div. E, title VII, § 710. Specifically, at the time HUD obligated funds for the blinds, the FY 2016 notification requirement had been carried forward by a continuing resolution. Pub. L. No. 114-113, div. E, title VII, § 710 *as carried forward by Continuing Appropriations Act, 2017*, Pub. L. No. 114-223, div. C, § 101, 130 Stat. 857, 908 (Sept. 29, 2016), *as amended by* Pub. L. No. 115-30, 131 Stat. 134, 134 (Apr. 28, 2017). Similarly, the FY 2017 notification requirement was carried forward at the time HUD obligated funds for both the dishwasher and dining set. Pub. L. No. 115-31, div. E, title VII, § 710, *as carried forward by Continuing Appropriations Act, 2018*, Pub. L. No. 115-56, div. D, § 101, 131 Stat. 1129, 1139 (Sept. 8, 2017), *as amended by* Pub. L. No. 115-90, div. A, § 101, 131 Stat. 1280, 1280 (Dec. 8, 2017); B-324481, Mar. 21, 2013 (holding that continuing resolutions

carry forward the authorities and conditions of the identified appropriation for the duration of the continuing resolution).

Section 710 provides:

“During the period in which the head of any department or agency, or any other officer or civilian employee of the Federal Government appointed by the President of the United States, holds office, no funds may be obligated or expended in excess of \$5,000 to furnish or redecorate the office of such department head, agency head, officer, or employee, or to purchase furniture or make improvements for any such office, unless advance notice of such furnishing or redecoration is transmitted to the Committees on Appropriations of the House of Representatives and the Senate. For the purposes of this section, the term ‘office’ shall include the entire suite of offices assigned to the individual, as well as any other space used primarily by the individual or the use of which is directly controlled by the individual.”

Pub. L. No. 115-31, div. E, title VII, § 710; Pub. L. No. 114-113, div. E, title VII, § 710.

As applied to this case, section 710 requires that an agency notify the appropriations committees before it (1) obligates in excess of \$5,000 to (2) furnish, redecorate, purchase furniture for, or make improvements for (3) the office of the department head, with the word “office” having a specific statutory definition for the purposes of the section. Section 710’s requirement applies “[d]uring the period in which the head of any department or agency, or any other officer or civilian employee of the Federal Government appointed by the President of the United States, holds office.” The \$5,000 threshold for this notification requirement therefore covers the entire time that the individual holds that office. Section 710 is applicable to obligations related to the Secretary, as the Secretary serves as the head of the agency and is appointed by the President by and with the advice and consent of the Senate. 42 U.S.C. § 3532.

Blinds

HUD’s obligation of \$4,160.81 in March and April 2017 for new blinds for the Secretary’s office and office suite was the first obligation covered by the scope of section 710 during this Secretary’s term of office. HUD Letter, at 4. As HUD obligated less than \$5,000 for the blinds and, because HUD states this was the first purchase during the Secretary’s tenure that was within the scope of the notification requirement, this purchase did not exceed section 710’s \$5,000 threshold.

Although this particular obligation did not require notification, the section 710 notification requirement covers the entire time the individual holds office. Further, the dollar limit is cumulative in nature. Section 710, by its very terms, imposes the \$5,000 limit “[d]uring the period in which the head of any department or agency . . .

holds office.” Where an agency obligates in excess of \$5,000 total for purchases within the scope of section 710, it must notify Congress of the obligation that breaches the \$5,000 threshold and any subsequent obligations while the specified individual holds office, regardless of the dollar amount of any individual obligation. Therefore, the amount obligated for the blinds contributed toward the \$5,000 threshold, thus increasing the likelihood that future purchases related to the Secretary’s office space would require notification.

Dishwasher and Dining Set

HUD obligated \$8,812.84 in November 2017 to purchase and install a new dishwasher in the kitchen within the Office of the Secretary. HUD Letter, at 4. Shortly thereafter, HUD obligated \$31,561.00 for a new dining set in the Secretary’s dining room in December 2017. *Id.*, at 2. Both the obligation for the dishwasher and the obligation for the dining set meet the first element of the section 710 analysis, as the amounts obligated exceed the \$5,000 threshold set forth by section 710 not only individually, but also collectively after including the amount obligated for the new blinds.

For these two obligations, the relevant inquiries are whether the dining room and connected kitchen within the Office of the Secretary fall within the section 710 definition of “office” and, if so, whether the funds were obligated to furnish, redecorate, purchase furniture for, or make improvements for the relevant space. We now analyze both elements of the test in turn.

As established above, section 710 defines office as “the entire suite of offices assigned to the individual, as well as any other space used primarily by the individual or the use of which is directly controlled by the individual.” Pub. L. No. 115-31, div. E, title VII, § 710. HUD states that it obligated funds for the dining set for the Secretary’s dining room, which is located within the Secretary’s suite. HUD also obligated funds for the dishwasher to replace a broken unit in the kitchen connected to the dining room. Both the dining room and the kitchen are used by the Secretary to eat and to meet the dining needs of the Secretary, including when the Secretary is representing the agency by hosting guests external to the agency in the dining room. HUD Letter, at 2, 4. HUD states that the dining room is primarily used by and directly controlled by the Secretary. *Id.*, at 2. HUD notes that members of the Secretary’s immediate staff also use the kitchen area. However, the kitchen is accessible only via the dining room, and if the room is in use by the Secretary, the kitchen is not available for general use. *Id.*, at 4.

Here, whether the dining room and kitchen fall under the definition of office turns on whether the relevant space is “used primarily by” and “directly controlled by” the Secretary as envisioned by section 710. See Pub. L. No. 115-31, div. E, title VII, § 710. The dining room is within the Secretary’s suite and the Secretary maintains primary use and direct control over the dining room. Thus, it is apparent that the dining room falls within the definition of “office” set forth by section 710. The kitchen,

like the dining room, is located within the Secretary's suite of offices and is generally used to meet the dining needs of the Secretary. Although the kitchen is available at times to those on the Secretary's immediate staff, HUD states that staff access to the kitchen is directly within the control of the Secretary. HUD Letter, at 4. Furthermore, access to the kitchen requires entrance through the Secretary's dining room, which, as established above, falls within the purview of the specific definition of office as used by section 710. Therefore, both the dining room and the kitchen are included within the definition of "office" as set forth by section 710.

Finally, we must determine whether the funds obligated for the dining set and the dishwasher were obligated to furnish, redecorate, purchase furniture for, or make improvements for the Secretary's office. The dining set plainly fits within the scope of purchases contemplated by section 710 as the dining set is, unmistakably, furniture. Thus, the salient question here is whether the dishwasher falls within the scope of purchases that section 710 enumerates.

We recently concluded that the use in section 710 of the word "furnish" includes not only the purchase of furniture, but also supplying the office or space with other equipment. B-329603, Apr. 16, 2018. In that case, the Environmental Protection Agency (EPA) stated that a privacy booth in the EPA Administrator's office provided the office with additional functionality. *Id.*, at 5. We concluded that because the booth equipped the office with something EPA asserted it needed, the obligation of funds for the construction and installation of the booth in the office fell under the meaning of furnish. *Id.*, at 6. The dishwasher, like the privacy booth, is equipment. As with the privacy booth, the dishwasher equipped the office with something that HUD believed the office needed. Accordingly, the obligations were made to furnish a space as that term is used in section 710.

In its response, HUD noted that its administrative staff had historically considered the obligation of funds to replace existing, damaged items to be out of the scope of section 710. HUD Letter, at 3. This position reads into section 710 an exception that is not in the plain text of the statute. Section 710 provides simply that agencies must provide notification before making obligations for enumerated purposes. It provides no exception for the replacement of existing, damaged items. Whether an agency must notify for the replacement of an item depends upon whether the obligation is for a purpose enumerated in section 710. The mere fact that a particular obligation is for replacement does not exclude it from the notification requirement of section 710. Here, HUD made obligations to purchase furniture and to furnish the office, regardless of whether these obligations were made for a concomitant purpose of replacing a damaged item.

In light of these facts, we find that the obligation of funds for the dining set and the dishwasher meets all three elements of the notification requirement. Accordingly, section 710 applied to the obligation of funds for the dining set for the Secretary's dining room and the dishwasher for the Secretary's kitchen. As HUD failed to notify the relevant congressional committees prior to obligating funds for the dining set and

dishwasher, we conclude that HUD violated the section 710 statutory notification requirement.²

In its response letter, HUD stated that in its view, the purchases of the dishwasher and dining set required notification under section 710. HUD Letter, at 3–4. HUD also stated that it obligated funds for the dishwasher prior to our issuance of the opinion in which we concluded that EPA violated section 710 when it obligated funds for the then-Administrator’s privacy booth. HUD Letter, at 4. See B-329603, Apr. 16, 2018. HUD noted that it had identified a lack of written policies and procedures with regard to section 710 and acknowledged that the gap in these internal controls contributed to the noncompliance at issue in this opinion. HUD Letter, at 1. Accordingly, HUD stated that it will stand up a departmentwide task force to identify such gaps and improve its internal procedures. *Id.* HUD has also instituted a mandatory review process under which both its Office of Administration and Office of the Chief Financial Officer must preapprove all obligations or expenditures for covered purchases that affect any offices of any of HUD’s presidentially appointed officials. *Id.*

Application of the Antideficiency Act

An agency violates the Antideficiency Act if it incurs an obligation in excess of legally available amounts. 31 U.S.C. § 1341(a); B-329603, Apr. 16, 2018; B-327432, June 30, 2016; B-319009, Apr. 27, 2010. For example, where EPA violated section 710, it also violated the Antideficiency Act, as Congress had conditioned the availability of funds on the agency’s compliance with the notification requirement and failure to comply with the requirement rendered the funds unavailable. B-329603, Apr. 16, 2018; see also B-327432, June 30, 2016, at 3–4 (noting that “Congress has the right to predicate the availability of appropriations on compliance with specified notification requirements”).

In this case, HUD violated section 710 when it obligated funds in excess of \$5,000 without providing the appropriations committees with advance notice of the obligations for both the dining set and the dishwasher. Because HUD did not comply with the notification requirement, the funds were unavailable at the time HUD incurred the obligations. By obligating in excess of the amount available, HUD violated the Antideficiency Act. 31 U.S.C. § 1341(a). HUD should report its

² The contract for the dining set was terminated on March 1, 2018, at no cost to the government. HUD Letter, at 3. The contract termination, however, has no bearing on our analysis, as the violation of section 710 occurred at the point of obligation of HUD’s appropriations for the contract. See 31 U.S.C. § 1341(a); GAO, *Principles of Federal Appropriations Law*, Vol. II, 3rd ed., ch. 6, § C.2.b(4), GAO-06-382SP (Washington D.C.: Feb. 2006) (stating that “compliance with the Antideficiency Act is determined first on the basis of when an obligation occurs, not when actual payment is scheduled to be made.”)

Antideficiency Act violation as required by law. *Id.* § 1351. In its response to us, HUD agreed that the violation should be reported and noted that steps are being taken to identify, document, and properly track future obligations or expenditures in a cumulative manner for correct application of section 710 through the term of office of each presidentially appointed official. HUD Letter, at 5.

CONCLUSION

HUD did not violate section 710 of the Financial Services and General Government Appropriations Act, 2016 when it obligated funds for new blinds for the Secretary's inner and outer office suite. HUD did violate section 710 of the Financial Services and General Government Appropriations Act, 2017 when it failed to notify the Committees on Appropriations of the House of Representatives and the Senate prior to obligating in excess of \$5,000 for the purchase of a dining set for the HUD Secretary's dining room and for the purchase and installation of a dishwasher in the adjoining kitchen. Further, because HUD obligated its appropriations in a manner specifically prohibited by law, HUD violated the Antideficiency Act. HUD should report its Antideficiency Act violation as required by law.

If you have any questions, please contact Shirley Jones, Managing Associate General Counsel, at (202) 512-8156, or Omari Norman, Assistant General Counsel for Appropriations Law, at (202) 512-8272.

A handwritten signature in black ink that reads "Thomas H. Armstrong". The signature is written in a cursive style with a long horizontal line extending from the top of the "y" in "Armstrong".

Thomas H. Armstrong
General Counsel