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January 23, 2013

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

The Honorable Jack Kingston
House of Representatives

Subject: *Commodity Futures Trading Commission—Reprogramming Notification*

This responds to the August 1, 2012 request for our legal opinion regarding whether the Commodity Futures Trading Commission (CFTC) complied with reprogramming notification requirements when it eliminated the positions of two administrative law judges (ALJs) and their associated support staff and terminated one of the ALJs through a reduction-in-force (RIF).[1] Specifically, section 730 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012 (Act)[2] requires CFTC to notify the appropriations committees prior to obligating or expending funds through a reprogramming to undertake certain enumerated activities.

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[1] The letter requesting our legal opinion referred to reprogramming requirements of section 712 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010, as extended to fiscal year 2011 by the Full-Year Continuing Appropriations Act, 2011. *See* Pub. L. No. 111-80, 123 Stat. 2090, 2120 (Oct. 21, 2009); Pub. L. No. 112-10, div. B, 125 Stat. 38, 102 (Apr. 15, 2011). However, as we developed the factual record for this opinion, we learned that CFTC consummated the RIF in fiscal year 2012. Accordingly, the applicable reprogramming requirement is contained in section 730 of Pub. L. No. 112-55, which imposes substantially similar notification requirements as section 712 of Public Law 111-80.

[2] Pub. L. No. 112-55, 125 Stat. 552, 553, 585 (Nov. 18, 2011).

CFTC told us that it has not yet obligated the $755,109 that it saved from eliminating the positions, nor has it indicated to us when and how it will obligate these funds. Letter from General Counsel, CFTC, to Assistant General Counsel for Appropriations Law, GAO, Sept. 21, 2012 (CFTC Letter), at 7; telephone conversation between Deputy General Counsel for General Law, CFTC, and Senior Attorney, GAO, January 18, 2013. We conclude that, at this time, CFTC has not reprogrammed funds to carry out any of the activities enumerated in section 730—the event that would trigger the reprogramming notification requirement. CFTC advised us that prior to reprogramming any of the cost savings to effectuate any of the activities set forth in section 730, it will notify the appropriations committees. *Id.*

Our practice when issuing decisions and opinions is to obtain the views of the relevant agency in order to develop a factual record and to establish the agency's legal position 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/legal/lawresources/resources.html. In this case, CFTC provided its legal views in writing and additional factual information by telephone. CFTC Letter; Telephone Conference among Counsel, CFTC, Assistant General Counsel, GAO, and others, Oct. 16, 2012 (Telephone Conference).

BACKGROUND

CFTC's ALJs were responsible for conducting formal administrative enforcement proceedings. In light of a substantial decrease in administrative enforcement cases, coupled with CFTC's changing responsibilities under the Dodd-Frank Wall Street Reform and Consumer Protection Act,[3] CFTC determined that it would be more efficient to secure the services of retired ALJs or ALJs from other agencies on an as-needed basis rather than to retain two full-time ALJs. CFTC Letter, at 3. Accordingly, in September 2011, CFTC notified its two ALJs that they would be separated from CFTC through a RIF. CFTC Letter, at 3. One ALJ had notified CFTC of his intention to retire from federal service prior to receiving the RIF notice, and he subsequently retired on October 1, 2011. *Id*. The other ALJ was separated on December 12, 2011. *Id*. CFTC also eliminated the positions of the three staff members who supported the ALJs. None of these three staff members were subjected to a RIF; instead, two were reassigned within CFTC and the third retired in November 2011. CFTC Letter, at 3. Consequently, the RIF resulted only in the involuntary separation of one ALJ.

Prior to the RIF, the ALJs were assigned to the Office of Proceedings, which reports administratively to the Office of the Executive Director. CFTC Letter, at 2–3. The Office of Proceedings also includes Judgment Officers, who decide reparations complaints in voluntary decisional proceedings and proceedings where the amount in controversy is less than $30,000. CFTC Letter, at 2 n.1. In fiscal year 2012, CFTC incorporated the Office of Proceedings into the Office of Executive Director

[3] Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

due to the small number of employees required to perform the functions of the Office of Proceedings. CFTC Letter, at 3; Telephone Conference.

According to CFTC, the elimination of the positions of the ALJs and support staff resulted in cost savings of $755,109 in fiscal year 2012. *Id*. CFTC states that it has not yet obligated these funds. *Id*. "The agency intends to send a reprogramming notice to the Committees on Appropriations in both the House and Senate prior to reprogramming or obligating these funds." *Id*. at 7. For fiscal year 2012, CFTC received a total appropriation of about $205 million, to remain available until September 30, 2014. Pub. L. No. 112-55, 125 Stat. at 579.

DISCUSSION

At issue here is whether CFTC's elimination of the ALJ positions and associated supporting positions required the notification of Congress prescribed by section 730. Section 730 requires notification if (1) CFTC has reprogrammed the amounts at issue, and (2) CFTC will use the reprogrammed amounts for any of the activities enumerated in section 730.

"Reprogramming" is defined, generally, as "the application of appropriations within a particular account to purposes, or in amounts, other than those justified in the budget submissions or otherwise considered or indicated by congressional committees in connection with the enactment of appropriation legislation." B-164912-O.M., Dec. 21, 1977; *see also* B-308773, Jan. 11, 2007; B-215002, Aug. 3, 1987; GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005) (Budget Glossary), at 85. Reprogramming can be a difficult concept to understand, and is best understood in comparison to another concept: the transfer.

A transfer is the shifting of budget authority from one appropriation to another. 70 Comp. Gen. 592 (1991); 33 Comp. Gen. 214 (1953); *see also* Budget Glossary, at 95. While transfers and reprogrammings are similar in that they both allow agencies to shift funds in response to changing circumstances, they differ in two key respects. First, while a transfer shifts budget authority from one appropriation to another, a reprogramming shifts funds within an appropriation. Second, agencies generally may transfer funds only with explicit statutory authority. 31 U.S.C. § 1532; 70 Comp. Gen. 592 (1991). In contrast, agencies generally are free to reprogram, even if doing so is inconsistent with the budget estimates presented to the Congress, as long as the resulting obligations and expenditures are consistent with the purpose restrictions applicable to the appropriation. *See Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); B-215002; 55 Comp. Gen. 307 (1975). However, Congress may enact restrictions upon an agency's ability to reprogram, as it has done here in section 730.

It is comparatively easy to assess a transfer: each appropriation is well-defined and delineated with specific language in an appropriations act. The shifting of funds from one of these appropriations to another is a transfer. In contrast, a reprogramming is a shifting of funds from one purpose to another *within* a single appropriation. The appropriations act does not set forth the subdivisions that are relevant to determine whether an agency has reprogrammed funds. Therefore, reference to the language of the relevant appropriations act sheds little light on whether a particular shifting of funds is indeed a reprogramming.

Nevertheless, it is imperative to define the necessary subdivisions to give meaning and force to a legislatively enacted restriction, such as section 730, which serves to facilitate congressional oversight over the use of public money. In this regard, we typically look to the itemizations and categories in the agency's budget documents, as well as statements in committee reports and the President's budget submission, to ascertain the subdivisions within an agency's appropriation that are relevant to determine whether the agency has reprogrammed funds. *See* B-215002, Aug. 3, 1987.

In this case, the committee reports provide no relevant subdivisions of CFTC's appropriation. *See*, *e.g.*, H.R. Rep. No. 112-542, at 48 (June 20, 2012). We turn, therefore, to the President's budget submission and to CFTC's budget documents, both of which subdivide CFTC's appropriation. *Appendix, Budget of the United States Government for Fiscal Year 2012*, at 1196; CFTC, *President's Budget and Performance Plan, Fiscal Year 2012*, *available at* www.cftc.gov/About/CFTCReports/ssLINK/cftcbudget2012 (last visited Dec. 10, 2012) (FY 2012 Budget Request). These documents show that CFTC included an item in its budget for the Office of Proceedings, and CFTC told us that it paid its ALJs and their associated support staff from this budget item. CFTC Letter, at 3. A reprogramming would occur if CFTC were to shift amounts that it had previously designated to carry out the functions of the Office of Proceedings to carry out different functions.

In its fiscal year 2012 budget request, CFTC identified several purposes for which it planned to use amounts it allocated to the Office of Proceedings, including, for example, costs of deciding certain reparations complaints. FY 2012 Budget Request, at 94. Although CFTC no longer employs ALJs, the Office of Proceedings continues to perform those functions, except that formal administrative enforcement proceedings will now be conducted by retired ALJs or ALJs from other agencies whose services are procured by CFTC on an as-needed basis. CFTC Letter, at 3; Telephone Conference.

CFTC maintains that it has not obligated or expended any of the $755,109 cost savings derived from the elimination of the ALJ positions and their associated support staff, nor has it made the funds available for any other purpose. CFTC Letter, at 7; telephone conversation between Deputy General Counsel for General Law, CFTC, and Senior Attorney, GAO, January 18, 2013. Consequently, at this time, CFTC has not reprogrammed those funds. A reprogramming would arise if CFTC were to make the cost savings available for a purpose other than the costs of the Office of Proceedings. If and when CFTC decides to obligate or expend any of the cost savings, and the purpose of such action is to consummate any one of the activities enumerated in section 730,[4] CFTC must provide the appropriations committees advance notification in compliance with section 730.

CONCLUSION

CFTC has not reprogrammed funds allocated to the functions performed by the Office of Proceedings. Prior to obligating any of the cost savings to accomplish any of the activities set forth in section 730, CFTC must comply with the notification requirements of section 730.

If you have any questions, please contact Edda Emmanuelli Perez, Managing Associate General Counsel, at (202) 512-2853, or Omyra M. Ramsingh, Assistant General Counsel for Appropriations Law, at (202) 512-6152.

Sincerely yours,

Susan A. Poling
General Counsel

[4] Activities that section 730 enumerates include, for example, the creation of new programs; the elimination of a program, project, or activity; or the reorganization of offices, programs, or activities. Pub. L. No. 112-55, 125 Stat. at 585-586.