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The Honorable Shelley Moore Capito
Chairman
Subcommittee on Financial Services and General Government
Committee on Appropriations
United States Senate

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

Subject: *Commodity Futures Trading Commission—Liabilities Outside of the Government's Control*

In 2015, you asked GAO to examine the Commodity Futures Trading Commission's (CFTC) use of its authority to lease real property. Some of the lease clauses created uncontrolled liabilities; that is, CFTC did not completely control the total amount of the government's final liability. This opinion addresses the Antideficiency Act consequences of these uncontrolled liabilities and their proper treatment under the recording statute. Our previous work addresses other legal issues arising from these leases.[1]

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[1] We concluded that CFTC violated 31 U.S.C. § 1501(a)(1), known as the recording statute, when it failed to record obligations equal to the government's total liability under four leases. B-327242, Feb. 4, 2016. We also concluded that CFTC violated 31 U.S.C. § 3302(b), known as the miscellaneous receipts statute, when certain lease provisions provided for CFTC's landlords to pay CFTC's legal liabilities to third-party contractors. B-327830, Feb. 8, 2017. No violation of the miscellaneous receipts statute arose through clauses in which CFTC and its landlords paid their own liabilities to third-party contractors. *Id*. A GAO report also addressed some of your other questions. GAO, *Federal Real Property: Commodity Futures Trading Commission Needs Better Leasing Guidance to Improve Cost-effectiveness*, GAO-16-434 (Washington, D.C.: Apr. 2016).

Consistent with our regular practice, we contacted CFTC to obtain additional factual information and the agency's legal views.[2] 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. CFTC provided us with further information and its legal views.[3]

As explained below, we conclude that an agency violates the Antideficiency Act when it enters into an uncontrolled liability that has no fixed limit that the government may ascertain when it agrees to assume the liability, unless the agency has specific statutory authority that permits it to do so. CFTC violated the Antideficiency Act when it entered into leases with such liabilities. However, an agency does not violate the Antideficiency Act when it enters into an uncontrolled liability that has a fixed limit that the government may ascertain when it agrees to assume the liability, provided that the agency has sufficient available budget authority to record the proper corresponding obligation. The recording statute requires the agency to record an obligation for the amount of the fixed, ascertainable limit.

BACKGROUND

As explained in detail in our February 2016 opinion, CFTC has leases for real property in four cities: Washington, D.C.; New York, New York; Chicago, Illinois; and Kansas City, Missouri.[4] Relevant here, certain lease provisions required CFTC to pay its landlord additional amounts above the minimum base rental payment. After agreeing to these lease clauses, CFTC did not control the amounts that it would owe. In some instances, these amounts, while indeterminable at the time the lease was executed, were specifically capped in the lease at some maximum amount.

For example, under the terms of the Washington lease, a portion of CFTC's rent would increase or decrease based on a rate tied to fluctuations in the Consumer Price Index (CPI).[5] The variable component of the rent was calculated by multiplying the base rent amount for a given month by an adjustment factor

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[2] During the course of GAO's audit engagement on CFTC's leasing practices, for the period from fiscal year 2008 to 2015 (see note 1, *supra*), CFTC provided GAO with copies of its leases for the four CFTC offices at issue here.

[3] Letter from General Counsel, CFTC, to Assistant General Counsel, GAO (Feb.26, 2016); email from Deputy General Counsel for General Law, CFTC, to Senior Attorney, GAO (May 6, 2016).

[4] B-327242, at 2–5.

[5] Washington Lease, at 30–34.

derivative of the change in the prior month's CPI.[6] The total CPI-adjusted payment was capped for each lease year.[7] As another example, under the Kansas City lease, CFTC was required to pay a pro-rata share of the landlord's operating costs, which was defined as all reasonable costs paid or incurred by the landlord during the lease term for maintaining, operating, owning, and repairing the building.[8] CFTC's share of the operating costs was capped at 5 percent of CFTC's total base rent for each lease year.[9]

Other lease provisions also required CFTC to pay additional variable amounts that CFTC did not control. However, these provisions were *not* subject to a fixed ceiling or maximum amount, or otherwise capped. As an example, the New York, Washington, and Chicago leases all contained clauses that required CFTC to make additional payments to the landlord for specified real property taxes incurred by the property owner.[10] Under these lease provisions, CFTC was responsible for paying, for each lease year, its proportional share (based on its leased square-footage of the building, as a whole) of the landlord's total real estate tax liability for the building; such payments were to be made without limitation. As another example, several lease provisions required CFTC to pay its share of the building's operating overhead expenses, for such costs as building repair, maintenance, and administration costs.[11] While the Kansas City lease, as described above, capped this amount, the New York, Washington, and Chicago leases did not so limit or restrict CFTC's maximum potential payment.

Finally, several of the leases contained indemnification provisions. Under an indemnification agreement, one party promises to reimburse another party in the case of a covered loss falling upon him. CFTC's New York, Washington, and Chicago leases contained such indemnity clauses, whereby CFTC agreed to indemnify its landlord, or third-parties, against specified losses.[12] For instance,

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[6] *Id*. at 31.

[7] *Id*., at 32.

[8] Kansas City Lease, at 11–12.

[9] *Id*. at 15–16.

[10] Chicago Lease, at 18–20; New York Sublease, at 38–40; Washington Lease, at 34, 52.

[11] Chicago Lease, at 18, 20; New York Sublease, at 38; Washington Lease, at 34–36, 43.

[12] Chicago Lease, at 44; New York Sublease, Redacted Lease between Sub-landlord and Prime Landlord, at 125, 186; Washington Third Amendment, at 32; Washington Fifth Amendment, pt. 1, at 46.

under the terms of the New York lease, CFTC was liable to the landlord for all liabilities that were not reimbursable by insurance and that were caused by CFTC's breach of the lease or negligent conduct.[13] Similarly, under the terms of the Washington lease, CFTC agreed to be liable for any and all claims made against the landlord arising out of CFTC's construction and expansion of its leased space.[14] The Chicago lease had similar provisions, whereby CFTC agreed to reimburse its landlord for losses or liabilities resulting from claims arising out of any CFTC action, to include those for accidents or injuries in the leased space.[15] None of these indemnity provisions capped, or otherwise limited, the amount CFTC would potentially owe its landlord.

DISCUSSION

In this decision, we address provisions in the four leases whereby CFTC agreed to two types of liabilities, the amounts of which were out of CFTC's control: (1) uncontrolled and unlimited liabilities and (2) uncontrolled but limited liabilities. At issue here is whether CFTC, in incurring these two types of liabilities, complied with the Antideficiency Act and the recording statute.

CFTC's Uncontrolled and Unlimited Liabilities

The Antideficiency Act bars federal employees from creating or authorizing an obligation in excess of, or in advance of, an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1). As a result, unless an agency has an indefinite appropriation, it cannot enter into a liability that is both uncontrolled and not subject to a fixed, ascertainable limit, as it would not have sufficient funds to cover the government's potentially boundless financial exposure. *Hercules Inc. v. United States*, 516 U.S. 417 (1996); 62 Comp. Gen. 361, 366 (1983). Accordingly, it is well settled that the Antideficiency Act prohibits agencies with definite appropriations from entering into uncontrolled liabilities that have no fixed, ascertainable limit. Cases applying this principle are numerous. *See Shell Oil Co. v. United States*, 751 F.3d 1282, 1299 (Fed. Cir. 2014); *E.I. DuPont De Nemours & Co. v. United States*, 365 F.3d 1367, 1369–70 (Fed. Cir. 2004); *Frank v. United States*, 797 F.2d 724, 727 (9th Cir. 1986); *California-Pacific Utilities Co. v. United States*, 194 Ct. Cl. 703, 715 (1971); B-321387, Mar. 30, 2011; 63 Comp. Gen. 145 (1984); 62 Comp. Gen. 361; 7 Comp. Gen. 507 (1982); 59 Comp. Gen. 369 (1980); 16 Comp. Gen. 803 (1937); 35 Comp. Gen. 85 (1955); 20 Comp. Gen. 95 (1940);

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[13] New York Sublease, at 186-190.

[14] Washington Third Amendment, at 32.

[15] Chicago Lease, at 44.

B-242146, Aug. 16, 1991; B-197583, Jan. 19, 1981; A-95749, Oct. 14, 1938 (1928).[16]

Many previous decisions specifically concerned indemnification clauses that had no limit on the government's possible liability (which are often known as open-ended indemnification clauses). For instance, a particular contract clause would have required the government to reimburse the contractor for any property damage or bodily injury, with no limit on the government's total possible liability. We concluded that the government could not enter into a contract containing the clause as it would have violated the Antideficiency Act. B-201072, May 3, 1982; *aff'd upon reconsideration*, B-201072, May 12, 1983.

The Supreme Court has also examined this issue. *Hercules Inc. v. United States*, 516 U.S. 417 (1996), concerned a suit by chemical companies that contracted with the Department of Defense to manufacture Agent Orange, a defoliant used extensively in the Vietnam War. Years after the conflict ended, many veterans and their families sued the chemical companies to recover for injuries suffered from exposure to a toxic ingredient in the defoliant. After settling hundreds of claims, the chemical companies sued the government, arguing, among other things, that the circumstances surrounding formation of the contracts between the chemical companies and the Department of Defense gave rise to an implied-in-fact indemnification agreement, in favor of the chemical companies, for any and all damages resulting from the use of the defoliant.

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[16] In a rare exception to this general principle, we concluded that the General Services Administration could procure electric power from local government agencies under a contract requiring the customer—the federal government—to indemnify the utility against any liability arising from delivery of the power. 59 Comp. Gen. 705 (1980). We based our conclusion on the fact that liability under the clause was remote and that there was "little purpose to be served by a rule which prevents the United States from procuring a vital commodity under the same restrictions as other customers are subject to under the tariff if the utility insists that the restrictions are non-negotiable." *Id*. at 707. This was a narrow exception that subsequent decisions have declined to extend. *See* 62 Comp. Gen. 361; B-242146.

Of course, the Antideficiency Act is not violated where Congress has specifically authorized an open-ended obligation. *See, e.g.,* 42 U.S.C. § 9619(c) (authorizing the President to enter into open-ended liabilities for certain Superfund cleanup contractors against negligence); 51 U.S.C. § 20138 (authorizing the Administrator of the National Aeronautics and Space Administration (NASA) to indemnify users of NASA space vehicles against any and all third party claims that are not covered by insurance).

The Supreme Court refused the petitioners' claim on the basis that the government could not have entered into such an indemnification clause, as it would have violated the Antideficiency Act. The Court provided:

> "There is also reason to think that a contracting officer would not agree to the open-ended indemnification alleged here. The Anti-Deficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation. Ordinarily no federal appropriation covers contractors' payments to third-party tort claimants in these circumstances, and the Comptroller General has repeatedly ruled that Government procurement agencies may not enter into the type of open-ended indemnity for third-party liability that [petitioner] claims to have implicitly received under the Agent Orange contracts. We view the Anti-Deficiency Act, and the contracting officer's presumed knowledge of its prohibition, as strong evidence that the officer would not have provided, in fact, the contractual indemnification [petitioner] claims."

Hercules, at 426–28.

More broadly, other cases concerned contractual clauses that, though they may not have been in the nature of indemnification, nevertheless subjected the government to other forms of unlimited liability that were outside of the government's control. For example, in 2009, the Chemical Safety and Hazard Investigation Board (CSB) asked whether it could enter into an interagency agreement with the General Services Administration (GSA) for identification credentials and related services, even though the proposed agreement did not specify a period of performance or a price for products and services that GSA would provide. We concluded that the proposed agreement exposed CSB to an "unknown and unlimited liability" and that the proposed agreement was not permissible under the Antideficiency Act. B-318425, Dec. 8, 2009, at 6. *See also* 3 Comp. Gen. 117, 118 (1923) (noting that "no officer of the Government has a right to make a contract on its behalf involving the payment of an indefinite and uncertain sum that may exceed the appropriation, and *which is not capable of definite ascertainment by the terms of the contract*, but is wholly dependent upon the happening of some contingency the consequence of which cannot be defined by the contract") (emphasis added).

As identified above, several of the leases require CFTC to pay sums beyond base rent where the additional amount is not controlled by CFTC, is indeterminable at the time the lease is executed, and is not subject to a fixed limit.[17] Some of these

[17] Some other lease clauses required CFTC to pay additional uncontrolled and indeterminable amounts; however, these other clauses were subject to a fixed limit that CFTC could ascertain when it executed the lease. We address these lease clauses below.

clauses required CFTC to indemnify its landlords. After agreeing to the clauses, CFTC controlled neither the ultimate occurrence of the events that would give rise to additional payments nor did it control the ultimate amount of any such payments. Other clauses required CFTC to make additional payments for things such as the landlord's real estate taxes, repair, maintenance, and administration costs. As with the indemnity clauses, CFTC was not in control of the amount of these additional payments. The leases did not specify an ascertainable, fixed limit on these liabilities. We are not aware of any statutory authorization that would permit CFTC to enter into lease provisions of this nature, and CFTC has not identified for us any such statutory authorization. Therefore, CFTC violated the Antideficiency Act, 31 U.S.C. § 1341, when it agreed to these lease provisions.

To comply with the Antideficiency Act, CFTC should have included a fixed, ascertainable limit in these lease clauses that was within its available budget authority. Below we address the proper treatment under the recording statute, 31 U.S.C. § 1501, of provisions that properly place a fixed, ascertainable limit on the government's liability.

<u>CFTC's Uncontrolled but Limited Liabilities</u>

Next, we consider liabilities whose final amount CFTC did not control but where the liability was subject to a fixed limit that CFTC could ascertain when it executed the lease.

We have previously addressed situations in which agencies agreed to liabilities of this nature. For example, the Corporation for National and Community Service (CNCS) made grants for educational benefits for individuals who completed the AmeriCorps national service program. B-300480, Apr. 9, 2003. In its grant awards, CNCS approved the enrollment of a specified number of new program participants, who were entitled to a number of defined and enumerated benefits if, and only if, those participants completed the program's requirements. Historically, CNCS had been recording obligations for the benefits on an outlay basis; that is, it would record an obligation at the time the grantee made a payment to an AmeriCorps participant who fulfilled the terms of service. In fiscal year 2002, CNCS projected that an unexpectedly high rate of participants would complete the program's requirements, and therefore, CNCS lacked sufficient budget authority to record new obligations for the necessary payments to the program participants. We noted that CNCS incurred an obligation for those benefits when the grant was awarded because the participants' actions, not CNCS's conduct, would determine CNCS's liability. Accordingly, we concluded that CNCS should have recorded an obligation for the full amount of education benefits when it signed the agreement, since it was at that point when CNCS relinquished control over the extent of the government's liability.

We drew a similar conclusion in 2014 when we examined the Department of Defense's (DOD) obligation practices for bonuses under military service agreements. B-325526, July 16, 2014. DOD offered recruiting and retention bonuses to prospective and current servicemembers for a term of military service. DOD would record obligations as the bonuses were paid, rather than when the service agreement was initially signed. We disagreed with this approach, concluding that DOD incurred an obligation for the full bonus amount when it entered into the agreement. Much like in the CNCS decision, the definition of "obligation" underpinned our analysis:

> "[W]hen DOD enters into the agreement, it has taken an action that can mature into a legal liability if the servicemember upholds his or her end of the agreement. DOD, like CNCS, has entered into an agreement to incentivize an individual to accept a time commitment. DOD has accepted a fiscal liability, which is fully payable should the servicemember satisfy the time commitment. In our view, because DOD has ceded control of its fiscal exposure to the servicemember, DOD incurs an obligation for the bonus at the time it signs the agreement."

Id., at 4. We have applied a similar rule to obligating the ceiling amount for cost-reimbursement contracts, as well as to contracts containing early termination cost clauses. *See* B-322455, Aug. 16, 2013; B-320091, July 23, 2010; B-317139, June 1, 2009; B-238581, Oct. 31, 1990.

As these previous decisions illustrate, in some instances, agencies agree to liabilities whose final amount cannot be known with certainty at the time the agreement is executed. In these situations, to determine the extent of the obligation and the proper amount to record, an agency must first ascertain who controls the total amount of financial exposure—the agency or another party. When the government's ultimate or maximum liability is not determinable at the time the agreement is executed, and the agency does not control the amount of financial exposure, the agency should record an obligation for its maximum potential liability. In this situation, the definition of "obligation" is instructive: "[a] legal duty on the part of the United States . . . which could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States . . ." GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 70. Ergo, an agency incurs an obligation when it agrees to accept a liability, and the Antideficiency Act forbids the agency from making the obligation if it would exceed the available appropriation. Where an agency relinquishes control over the amount of its liability under an agreement, it must record the maximum amount as an obligation.

Many of our older decisions considered similar facts to the above referenced CNCS and DOD decisions: liabilities whose total amount was outside of the government's control, yet, was subject to an ascertainable, fixed limit. However, these decisions drew a different conclusion: rather than holding that the agency in such situations was required to record an obligation for the maximum amount of the government's liability, they instead concluded that the agency should record an obligation for a lesser amount, or that the agency should record no obligation at all.

In one 1995 decision, we considered a situation in which the Air Force exercised a contract option for the production of cruise missiles. B-255831, July 7, 1995. The contract stated that the option's "target price" was $231.7 million and the "ceiling price" was $261.9 million. *Id*., at 2. We explained that "the ceiling price established the government's maximum liability." *Id*. However, the Air Force recorded an obligation for the target price, not the ceiling price. *Id*., at 3. This practice was in accord with our decisions at the time. *Id*., at 5; *see, e.g.*, 55 Comp. Gen 812, 824 (1976); 34 Comp. Gen. 418, 420–21 (1955).

Other prior decisions concluded that the recording statute barred agencies from recording obligations for liabilities arising from closed-ended indemnity agreements—that is, indemnity agreements where the maximum liability to the government is a fixed, ascertainable sum. One such decision arose in 1963 when we considered a proposed contract of the Federal Aviation Agency (FAA). 42 Comp. Gen. 708 (1963). The agency leased privately owned aircraft. Typically, the aircraft's owner would carry insurance to cover the damage or destruction of the aircraft, and thus, the lease rates reflected the considerable expense of this insurance. FAA proposed that it agree to return rented aircraft to the owner in as good condition as when received and that FAA would assume the risk of loss resulting not only from FAA's actions, but also from "acts of God."[18] *Id.*, at 711. FAA's assumption of this risk would allow the aircraft owners to drop their insurance coverage, allowing the owner to charge the FAA lower lease rates.

We concluded that the Antideficiency Act did not forbid FAA from entering into the agreement because the government's maximum liability was limited to a fixed, ascertainable sum: the fair market value of the aircraft. *Id.*, at 712. We also stated that loss of the aircraft was a contingent liability that, by definition, lacks the certainty that is essential to the concept of an obligation. *Id.*, at 712–13.[19] Therefore, we concluded that FAA was legally barred from recording an obligation for the liability related to the potential loss of the aircraft. *Id.* Instead, FAA could record an obligation for the amount of the liability only if an aircraft was actually lost or damaged.[20] *Id.*

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[18] Without such an agreement, FAA would have been liable only for damages resulting from its negligence. 42 Comp. Gen. at 711.

[19] *See* B-305484, June 2, 2006, at 10; GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 35.

[20] Our previous decisions discuss whether agencies should take steps to administratively reserve funds. *See*, *e.g.*, 42 Comp. Gen. at 712–13; B-198161, Nov. 25, 1980. Though reservation of funds can be an essential component of an

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In a similar line of decisions, we concluded that an agency may, consistent with the Antideficiency Act, agree to a liability that is limited to the amount available in an agency's appropriation (whatever that amount may be) if and when some future event occurs. *See, e.g.*, 54 Comp. Gen. 824 (1975); B-242146, Aug. 16, 1991. These decisions typically involved an agency agreeing to indemnify another party against future loss or damage. Under similar reasoning as in the FAA decision, referenced above, we concluded that an agency should record an obligation not when it enters into the agreement to pay but, instead, upon occurrence of the specified future event. *Id*.

These older decisions conflict with our more recent decisions in which we concluded that an agency must record an obligation when it assumes a liability whose final amount is out of the agency's control but is subject to a fixed, ascertainable limit.[21] Upon considering the breadth of our case law, it is our more recent decisions and opinions that apply the Antideficiency Act and the recording statute in a manner that is consistent with both their text and their purpose. The aims of the Antideficiency Act and obligational accounting are to protect the government's fisc and Congress's power of the purse, and also to prevent coercive deficiencies—that is, where a private entity pressures an agency to seek additional funds from Congress. *See* B-300480, June 6, 2003, at 3. To achieve these aims, an agency must either control the amount of its liabilities or ensure that the amount is capped and ascertainable within the terms of its contracts. Our more recent decisions recognize that the Antideficiency Act is a cornerstone of federal funds control, and that the recording statute, properly applied, ensures that agencies do not violate the Antideficiency Act. An agency that records obligations in a manner consistent with our more recent decisions provides itself, and Congress, with the necessary assurance that the agency will not violate the Antideficiency Act. In addition, the agency's obligational accounting records will properly reflect the extent of the government's outstanding legal liabilities.

As we noted above, an obligation is a legal duty on the part of the United States that "could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States." GAO, *A Glossary of Terms Used in the Federal Budget Process*, at 70. Some liabilities are contingent; that is, they lack the certainty that is essential to the concept of an obligation. Such a liability cannot be recorded as an obligation. For example, pending litigation, generally, is a contingent

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agency's funds control system, such reservations do not satisfy the requirements of the recording statute.

[21] As discussed above, the Antideficiency Act prohibits agencies with definite appropriations from entering into uncontrolled liabilities that have no fixed, ascertainable limit.

liability. B-238201, Apr. 15, 1991. In that decision, GSA was engaged in litigation concerning the constitutionality of an Illinois statute that authorized the taxation of government property purchased under an installment contract. We noted that until the litigation was resolved, "the underlying legal liability of the Government has yet to be established." *Id.* GSA had not agreed to assume liability for the taxes; instead, any liability would arise only after a court ruled against the government. Accordingly, we concluded that GSA could not record an obligation for the tax payment, as "the potential tax liability . . . is not sufficiently definite to be recorded as an obligation." *Id.* On the other hand, where the government has agreed in writing to assume a liability, the government has created an obligation that is subject both to the Antideficiency Act and to the requirement that it be properly recorded under 31 U.S.C. § 1501.[22]

Several of CFTC's leases contain clauses requiring the payment of amounts whose final sum was outside of CFTC's control, yet whose maximum amount was fixed and ascertainable at the time CFTC entered into the agreement. For example, the Washington lease provided that CFTC would pay an amount that varied with changes to the Consumer Price Index, but the total amount of potential liability could not exceed a contractually-provided maximum. Similarly, CFTC's total liability under the Kansas City lease was fixed because, as stated in the lease, CFTC's total financial exposure could not exceed 5 percent of the total base rent for each lease year. These provisions do not constitute open-ended liabilities, and thus, are not impermissible under the Antideficiency Act, provided that CFTC had sufficient budget authority to record a corresponding obligation when it agreed to the lease provisions. CFTC should have recorded an obligation for the maximum amount of the government's liability when the lease was signed, adjusting the amount of the obligation as it definitizes the final amount for which the agency is ultimately liable. This course of action would be in compliance with the funds control objectives of the Antideficiency Act and the recording statute.

CONCLUSION

Except as authorized by Congress, an agency violates the Antideficiency Act when it enters into an uncontrolled liability that has no fixed, ascertainable limit. Where an agency enters into a legal liability whose total amount is outside of the agency's

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[22] As mentioned above, we previously concluded that an agency could enter into an agreement where the government agrees to a liability that is limited to the amount available in an agency's appropriation, if and when some future event occurs. *See, e.g.*, 54 Comp. Gen. 824; B-242146. Theoretically, an agency could record an obligation against the entire amount of its appropriation. However, this usually would preclude the agency from carrying out any further operations under the appropriation. Such an action would be untenable as a practical matter. Accordingly, our conclusion in this opinion precludes agencies from entering into agreements of this nature.

control, but where there is a fixed limit on the government's liability that is ascertainable at the time the agency enters into the liability, the agency must record an obligation for the amount of that limit. Prior decisions inconsistent with this rule are overturned. CFTC should ensure that its future obligational practices are consistent with this opinion.

CFTC violated the Antideficiency Act when it agreed to uncontrolled liabilities that had no fixed limit that it could ascertain upon execution of the agreement. CFTC should report violations of the Antideficiency Act as required by 31 U.S.C. § 1351.

If you have any questions, please contact Julie Matta, Managing Associate General Counsel, at (202) 512-4023, or Omari Norman, Assistant General Counsel for Appropriations Law, at (202) 512-8272.

Sincerely,

Thomas H. Armstrong
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