



Decision

Matter of: Office of Personnel Management—Application of Section 608 of the Financial Services and General Government Appropriations Act, 2020, to the Office of Personnel Management’s Restructuring and Reorganization

File: B-332704

Date: June 30, 2022

DIGEST

The Office of Personnel Management (OPM) eliminated an office, reorganized functions, realigned personnel and funds, and restructured one of its internal organizations without consulting with the House and Senate Committees on Appropriations beforehand. Section 608 of the Financial Services and General Government Appropriations Act, 2020, requires agencies to consult with these Committees before carrying out any significant reorganization, restructuring, or closing of offices. OPM violated section 608 when it failed to consult with the Committees in advance of its significant restructuring and reorganization.

DECISION

This responds to a request for a decision concerning whether the Office of Personnel Management (OPM) violated section 608 of the Financial Services and General Government Appropriations Act, 2020 (FSGGA Act), when it eliminated an office, reorganized functions, realigned personnel and funds, and restructured one of its internal organizations (collectively, restructuring and reorganization).¹ Section 608 requires agencies to consult with the House and Senate Committees on Appropriations (Committees on Appropriations) before undertaking any significant reorganization, restructuring, relocation, or closing of offices, programs, or activities.² Section 608 also requires agencies to obtain the approval of the Committees on

¹ Letter from Chairman, House of Representatives, Subcommittee on Financial Services and General Government, to Comptroller General, GAO (Oct. 28, 2020); Financial Services and General Government Appropriations Act, 2020, Pub. L. No. 116-93, div. C, title VI, 133 Stat. 2434, 2478–2479 (Dec. 20, 2019).

² Pub. L. No. 116-93, § 608.

Appropriations before reprogramming funds to, among other actions, reorganize offices, programs, or activities, and provides that no funds are available for such reprogramming unless prior approval is received.

As explained below, we conclude that OPM violated section 608 when it failed to consult with the Committees on Appropriations before it undertook its significant restructuring and reorganization during fiscal year 2020. OPM also reprogrammed amounts to institute its restructuring and reorganization without obtaining prior approval from the Committees on Appropriations; however, as explained below we conclude that section 608's approval requirement is not legally binding.³

In accordance with our regular practice, we contacted OPM to seek factual information and its legal views on this matter.⁴ In response, OPM provided its explanation of the pertinent facts and its legal analysis.⁵

BACKGROUND

OPM eliminated its Office of Strategy and Innovation (OSI) in May 2020.⁶ OPM reorganized most of the functions, personnel, and funding of OSI, as well as its Office of the Chief Information Officer's (OCIO) Federal Data Solutions (FDS) component, to its Human Resources Line of Business (HRLOB).⁷ OSI's Survey Analysis Group was reorganized under its Employee Services (ES) program office.⁸ OPM subsequently restructured HRLOB and changed its name to Human Capital Data Management and Modernization (HCDMM). HCDMM is the result of the "[consolidation] of human and financial resources that were previously part of Federal Data Solutions (within the Office of the Chief Information Officer), the Office

³ See *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 953–959 (1983)(addressing the constitutionality of legislative veto provisions); B-196854.3, Mar. 19, 1984.

⁴ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/GAO-06-1064SP>; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, OPM (Feb. 16, 2021).

⁵ Letter from General Counsel, OPM, to Assistant General Counsel for Appropriations Law, GAO (Apr. 15, 2021)(OPM Response).

⁶ OPM Response, at 3.

⁷ OPM Response, at 1.

⁸ OPM Response, at 1.

of Strategy and Innovation Data Analysis Group, and the Human Resources Line of Business.”⁹ This decision refers to these actions collectively as OPM’s restructuring and reorganization.

For fiscal year 2020, Congress provided a lump-sum appropriation for “necessary expenses to carry out functions of [OPM].”¹⁰ OPM submitted a financial operating plan to Congress that shows how the agency subdivided its funds within this appropriation.¹¹ Specifically, OPM subdivided its funds by internal organization, and then further subdivided amounts by object class within each internal organization.

DISCUSSION

At issue here is whether OPM complied with the requirements of section 608. Section 608 states in relevant part:

. . . none of the funds provided . . . shall be available for obligation or expenditure through a reprogramming of funds that: (1) creates a new program; (2) eliminates a program, project, or activity; (3) increases funds or personnel for any program, project, or activity for which funds have been denied or restricted by the Congress; (4) proposes to use funds directed for a specific activity by the Committee on Appropriations of either the House of Representatives or the Senate for a different purpose; (5) augments existing programs, projects, or activities in excess of \$5,000,000 or 10 percent, whichever is less; (6) reduces existing programs, projects, or activities by \$5,000,000 or 10 percent, whichever is less; or (7) creates or reorganizes offices, programs, or activities unless prior approval is received from the Committees on Appropriations of the House of Representatives and the Senate: *Provided*, That prior to any significant reorganization, restructuring, relocation, or closing of offices, programs, or activities, each agency or entity funded in this Act shall consult with the

⁹ OPM, Press Release, *OPM Announces New Human Capital Modernization Directorate* (Aug. 4, 2020)(*Press Release*) available at, <https://www.opm.gov/news/releases/2020/08/opm-announces-new-human-capital-modernization-directorate/> (last visited May 18, 2022); OPM Response, at 1.

¹⁰ Pub. L. No. 116-93, 133 Stat. at 2471.

¹¹ OPM Response, at 2. Here, in addition to the approval and consultation requirements, section 608 provides procedures for reprogramming, including a requirement that agencies submit a report to the Committees on Appropriations to establish a baseline for reprogramming for the fiscal year covered by the Act. Pub. L. No. 116-93, 133 Stat. at 2478–2479.

Committees on Appropriations of the House of Representatives and
the Senate

First, we consider whether OPM’s restructuring and reorganization triggered section 608’s consultation provision, which requires agencies to consult with the Committees on Appropriations before undertaking “any significant reorganization, restructuring, relocation, or closing of offices, programs, or activities.”¹² Second, this decision addresses whether OPM reprogrammed funds and section 608’s direction to agencies to seek approval before doing so.

Significant Reorganization or Restructuring

We first consider whether OPM’s actions constituted a significant reorganization or restructuring, as contemplated under section 608, such that consultation with the Committees on Appropriations was required. Section 608 does not define the term “significant”.¹³ Where, as here, the language of the statute is unambiguous, the ordinary meaning of the words in the statute controls.¹⁴ And, when a term is not defined in the legislation itself, a court may turn to the dictionary definition for its common meaning.¹⁵ Applying this rationale, the ordinary meaning of the term “significant” is “having or likely to have influence or effect” or “having meaning.”¹⁶

OPM’s reorganization efforts included the closing of one of the internal organizations reflected in its Operating Plan—OSI—and impacted others, such as HRLOB, OCIO and ES.¹⁷ OPM reorganized most functions under HRLOB to create a new internal organization dubbed HCDMM.¹⁸ Creating a new internal organization to perform functions previously assigned to other internal organizations is significant because it directly affects how OPM allocates its appropriation and other resources between its internal organizations and it has a direct impact on out-year funding needs of these

¹² *Id.*

¹³ Pub. L. No. 116-93, § 608.

¹⁴ *Carciari v. Salazar*, 555 U.S. 379, 387 (2009); B-329603, Apr. 16, 2018.

¹⁵ *Salazar*, 555 U.S. at 387 (2009); B-329603, Apr. 16, 2018.

¹⁶ *Merriam-Webster’s Unabridged Dictionary*, available at <https://unabridged.merriam-webster.com/unabridged/significant> (s.v. Significant) (last visited May 18, 2022).

¹⁷ OPM Response, at 1.

¹⁸ OPM Response, at 1.

internal organizations. In its business case supporting its reorganization efforts, OPM set forth several planned effects, including integrating the reorganized functions with those of the receiving office, leveraging contractor support, consolidating technology needs of the reorganized functions, and changing the paradigm driving the execution of the reorganized functions.¹⁹ Changes such as these are influential and meaningful by design and in their effect.

The elimination of an office, reorganization of functions, realignment of personnel and funds, and restructuring of an internal organization had influence, effect, and meaning within the agency, thus we conclude that OPM's actions constitute a significant restructuring and reorganization of its internal organizations. Accordingly, section 608 required OPM to consult with the Committees on Appropriations before taking on its significant restructuring and reorganization. OPM stated it did not consult with the Committees on Appropriations regarding its restructuring and reorganization efforts before it undertook them. OPM violated section 608's consultation requirement, which had the effect of preventing the Committees on Appropriations from exercising their right to oversee the use of appropriated funds as the provision was intended.

The legislative history reinforces this conclusion. The explanatory statement accompanying the FSGGA Act reiterates the consultation requirement regarding significant reorganizations, explaining that such activities "have the potential to impact funding needs in future years and may conflict with the rationale behind the appropriated levels in the current year; therefore, these actions, particularly those that entail out-year impacts, merit advanced engagement with the Committees."²⁰ Further, the explanatory statement directs that agencies are expected to confer with the Committees on Appropriations if they have questions about the applicability of the provisions of section 608 to a potential agency action or decision.²¹

In addition, a report of the House Committee on Appropriations accompanying the Financial Services and General Government Appropriations Bill, 2020, describes the

¹⁹ OPM Response, Attachment 1.

²⁰ 165 Cong. Rec. at H10990. For example, OPM's fiscal year 2022 congressional budget justification reflected the organizational changes discussed here. Namely, HCDMM was identified as a separate internal organization with its own budget, and OSI was no longer included as an internal organization. OPM, *Fiscal Year 2022 Congressional Budget Justification and Annual Performance Plan* (May 2021), available at <https://www.opm.gov/about-us/budget-performance/budgets/congressional-budget-justification-fy2022.pdf>

²¹ 165 Cong. Rec. at H10990.

Committee's expectations for prior consultation.²² The report provides that prior consultation applies to:

. . . significant reorganizations or restructurings of programs, projects, or activities, even if such a reorganization or restructuring does not involve reprogramming of funding [and] the term 'prior consultation' means a pre-decisional engagement between a relevant [f]ederal agency and the Committee during which the Committee is provided a meaningful opportunity to provide facts and opinions to inform: (1) the use of funds; (2) the development, content, or conduct of a program or activity; or (3) a decision to be taken.²³

As further described in the legislative history accompanying section 608, the consultation requirement gives the Committees on Appropriations an opportunity to consider how changes might impact future funding needs and to share their views and perspectives before the agency executes a significant organizational change. OPM did not fulfill this requirement.

Reprogramming

The second question we address is whether OPM reprogrammed funds to institute its restructuring and reorganization. A reprogramming is the shifting of funds within an appropriation to purposes other than those contemplated at the time of appropriation.²⁴ More specifically, it is the application of appropriations within a particular account to purposes, or in amounts, other than those justified in budget submissions or otherwise considered or indicated by congressional committees in connection with the enactment of appropriations legislation.²⁵ To determine whether a reprogramming occurred, we must first establish Congress' understanding of how an agency would obligate its lump-sum appropriation.²⁶ To do this we look to the

²² H.R. Rep. No. 116-122, at 5–6.

²³ H.R. Rep. No. 116-122, at 6.

²⁴ GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 85; see B-330108, Dec. 23, 2020; B-329964, Oct. 8, 2020; B-323792, Jan. 23, 2013.

²⁵ B-323792, Jan. 23, 2012; B-164912-O.M., Dec. 21, 1977.

²⁶ B-330108, Dec 23, 2020 at 3.

most relevant and authoritative budget documents to ascertain the subdivisions of a lump-sum appropriation among which funds might have been reprogrammed.²⁷

Prior decisions of our office provide examples of how such documents and obligations are interpreted. For example, the Department of Commerce, Office of Inspector General (Commerce OIG) reorganized several functions in order to “more efficiently and effectively achieve” its oversight mission.²⁸ This reorganization included the creation of a Chief of Staff position, as well as the reorganization of the office’s audit, evaluation, and administrative functions.²⁹ Commerce OIG subdivided its appropriation by program and object class. Using Commerce OIG’s congressional budget justification (CBJ) as a baseline we found that Commerce OIG did not shift funds between object classes or the programs identified in its CBJ. Thus, we concluded that Commerce OIG did not reprogram funds.³⁰ By contrast, the U.S. Secret Service reprogrammed funds when it shifted funds from one program, project, or activity (PPA) identified in the explanatory statement accompanying the relevant appropriation act to another PPA.³¹

To determine whether OPM reprogrammed funds, we look to the documents that would inform Congress’ understanding of how OPM would obligate its lump-sum appropriation.³² In accordance with section 608, OPM submitted a financial operating plan to the Committees on Appropriations to establish a baseline for determining whether the agency has reprogrammed funds.³³ The financial operating plan shows that OPM allocated funds by internal organization, and it further

²⁷ See B-319009, Apr. 27, 2010 (referring to an itemization in a joint explanatory statement); see *also* B-323792, Jan. 23, 2013 (referring to an agency’s budget request and the President’s budget).

²⁸ B-330108, Dec. 23, 2020 (citation omitted).

²⁹ B-330108, Dec. 23, 2020.

³⁰ B-330108, Dec. 23, 2020; see *also* B-323792, Jan. 23, 2013 (concluding that the Commodity Futures Trading Commission did not reprogram funds when it eliminated a position from one of its offices and contracted for the service previously rendered by the staff in that position. The office continued to perform the same functions and the agency did not reallocate the funds it saved by eliminating the position for a different purpose).

³¹ B-319009, Apr. 27, 2010.

³² See *e.g.*, B-323792, Jan. 23, 2013.

³³ Pub. L. No. 116-93, § 608.

subdivided funds within each internal organization by object class.³⁴ Here, a reprogramming would occur if OPM were to shift funds between its internal organizations or the object classes identified in the financial operating plan.

While OPM did not shift funds between object classes, OPM did shift funds between the internal organizations identified in its financial operating plan to institute its reorganization efforts.³⁵ Specifically, OPM shifted amounts from OSI to HCDMM and ES, and it shifted amounts from OCIO to HCDMM.³⁶ OPM did not seek approval or engage with the Committees on Appropriations in any manner about its reorganization efforts.³⁷ Accordingly, OPM's reprogramming did not comply with the approval requirement set forth in section 608.

While OPM's reprogramming did not comply with the approval requirement of section 608, we do recognize that the approval requirement raises issues with constitutional precedent.³⁸ We note that it is not our role or our practice to opine on the constitutionality of duly enacted statutes, and we will generally adopt a heavy

³⁴ OPM Response, at 2.

³⁵ OPM Response, at 2–3. OPM explained that the purpose of the restructuring and reorganization, which took effect on August 2, 2020, was to “unite related programs, previously spread over several internal offices, into a more coherent set of activities, housed in a single program office.” OPM Response, at 1. To do this, OPM stated that it shifted \$1,146,556 between its internal organizations to follow realigned employees performing the same duties. OPM Response at 2–3.

³⁶ OPM Response, at 3.

³⁷ OPM Response, at 3.

³⁸ Notwithstanding the issue of the whether section 608's approval requirement can withstand constitutional scrutiny, a statutory provision is presumed severable if what remains after severance is fully operative as law. *Chadha*, 462 U.S. at 931–936. *See also Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)(“Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”)(citation omitted); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984)(plurality opinion). The provisions that remain after the approval requirement is excised are fully operative laws that employ workable Congressional oversight mechanisms within Congress' power. *See Chadha*, 462 U.S. at 952 (*citing* S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897))(noting that only those actions of Congress that are legislative in their character and effect require bicameralism and presentment).

presumption in favor of constitutionality.³⁹ However, the Supreme Court has addressed this issue and as we have done in our prior case law, we must apply that precedent in considering whether section 608's approval requirement is binding.⁴⁰

In *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 953–959 (1983), the Supreme Court found a one-house legislative veto provision unconstitutional, determining that it was an exercise of legislative power that circumvented the procedures of bicameralism and presentment.⁴¹ Applying this precedent, in B-196854.3, Mar. 19, 1984, we examined whether committee approval or veto over reprogramming of lump-sum appropriations would be permissible, and concluded that it would not. We explained that this sort of requirement would amount to an attempt to reserve to the Congress the authority to overturn a reprogramming decision made pursuant to the delegation of authority in the lump-sum appropriation without use of the constitutionally-mandated legislative procedure.⁴²

We contrast this with reprogramming notification and consultation requirements. For example, section 514(a) of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017⁴³ required the Social Security Administration (SSA) to notify and consult with the Committees on Appropriations if funds were reprogrammed for certain purposes.⁴⁴ We concluded that the Act required SSA to notify and consult with the Committees on Appropriations if SSA's reorganization resulted in a reprogramming of funds that resulted in certain outcomes.⁴⁵

³⁹ See e.g., B-326013, Aug. 21, 2014; B-323449, Aug. 14, 2012.

⁴⁰ See GAO, *Procedures and Practices for Legal Decisions and Opinions*, at 5, 8–9, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/GAO-06-1064SP> (noting GAO will question the constitutionality of an act of Congress where the Supreme Court has directly addressed the precise issue raised by the act of Congress at issue, and avoidance of the issue is not possible).

⁴¹ *Chadha*, 462 U.S. at 953–959.

⁴² *Id.*

⁴³ Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017, Pub. L. No. 115-31, div. H, title V, § 514(a), 131 Stat. 502, 563–64 (May 5, 2017).

⁴⁴ B-329964, Oct. 8, 2020.

⁴⁵ *Id.*

Notification requirements embody a compromise between the agency flexibility that lump-sum appropriations afford and the congressional control of explicit statutory restrictions.⁴⁶ This allows agencies to adapt their budget execution to respond to changed circumstances, as long as resulting obligations remain consistent with law, while also requiring agencies to notify Congress if the resulting obligations will differ from Congress' understanding of how the agency would obligate its lump-sum appropriation.⁴⁷ Section 608 reserves power within the Committees on Appropriations to approve or veto executive action made pursuant to authority delegated in the lump-sum appropriation, as we reasoned is impermissible in B-196854.3, Mar. 19, 1984. As such, we conclude that the approval provision under section 608 is not legally binding here.⁴⁸

Nevertheless, while section 608's approval requirement may not be binding as a matter of law, we have cautioned that agencies ignore such expressions of intent at the peril of strained relations with Congress.⁴⁹ In pertinent part, section 608 requires agencies to seek approval from the Committees on Appropriations prior to a

⁴⁶ *Id.* at 4.

⁴⁷ *Id.*

⁴⁸ Under the Antideficiency Act, an agency may not obligate in excess of the amount available. 31 U.S.C. § 1341(a). We have concluded that where Congress conditions the availability of funds on an agency's compliance with a notification requirement, amounts are not legally available without such notification, and the agency violates the Antideficiency Act if it incurs an obligation before satisfying a notification requirement. See *e.g.*, B-329603, April 16, 2018; B-327432, June 30, 2016; B-319009, Apr. 27, 2010. For example, in B-329603, we concluded the Environmental Protection Agency (EPA) violated the Antideficiency Act when it reprogrammed funds without notifying the Committees on Appropriation as required by the Financial Services and General Government Appropriations Act, 2017. B-329603, April 16, 2018; see Pub. L. No. 115-31, div. E, title VII, § 710, 131 Stat. 135, 379 (May 5, 2017). Congress had conditioned the availability of funds on the agency's compliance with the notification requirement and, because EPA had failed to notify the Committees on Appropriations of its proposed obligation, its funds were not legally available for reprogramming. B-329603, April 16, 2018 at 7. Here, section 608 conditions the availability of funds for certain reprogrammings on an agency obtaining approval from the Committees on Appropriations, and OPM reprogrammed amounts to institute its restructuring and reorganization without obtaining this approval. While this would ostensibly result in an obligation in excess of amounts available, as explained *infra*, section 608's approval provision is not legally binding.

⁴⁹ B-330862, Sept. 5, 2019.

reprogramming that results in certain enumerated outcomes, to consult with the Committees on Appropriations prior to any significant reorganization or restructuring, and to submit a financial report to establish a baseline for reprogramming.⁵⁰ The explanatory statement provides that section 608, “authorizes the reprogramming of funds and specifies the reprogramming procedures for agencies funded by [the] Act.”⁵¹ The legislative history also notes that section 608 provides procedures or responsibilities agencies must carry out before they can reprogram funds.⁵² In several places throughout the legislative history the House reiterates that section 608 provides notification, consultation, or approval requirements.⁵³ It also explains that these requirements are to ensure appropriate congressional oversight of funds.⁵⁴ And the legislative history further explains that the purpose of the financial report required under section 608 is to provide a baseline for reprogramming notification.⁵⁵ It is clear that the agency was expected to engage with the committees on these issues.

We note that the Executive Branch has developed mechanisms for engaging in meaningful communications with committees on these types of actions. Specifically, the Executive Branch has opined on the effect of approval provisions and concluded that approval provisions will be construed as requiring agencies to provide notice.⁵⁶ Also, based on the procedures outlined in section 608 and the reiteration of their significance in the corresponding explanatory statement and legislative history, the Committees on Appropriations expressed their intent to provide oversight mechanisms over reprogrammings by requiring agencies to engage with them and to follow reprogramming procedures.⁵⁷ Recognizing Congress’ appropriations and oversight authority, agencies may abide by informal (i.e., non-statutory) limitations

⁵⁰ Pub. L. No. 116-93, § 608.

⁵¹ 165 Cong. Rec. H10613, H10990 (daily ed. Dec. 17, 2019).

⁵² S. Rep. No. 116-122, at 5–6; H.R. Rep. No. 116-122, at 5–7, 38, 93, 129.

⁵³ H.R. Rep. No. 116-122, at 5–7, 38, 93, 129.

⁵⁴ H.R. Rep. No. 116-122, at 38.

⁵⁵ H.R. Rep. No. 116-122, at 5–6.

⁵⁶ 31 U.S. Op. Off. Legal Counsel 23, 25 (2007).

⁵⁷ Pub. L. No. 116-93, § 608; 165 Cong. Rec. H10613, H10990 (daily ed. Dec. 17, 2019); S. Rep. No. 116-111, at 5–6 (2019); H.R. Rep. No. 116-122, at 5–7 (2019).

and some even incorporate them into regulations or internal guidance.⁵⁸ OPM's failure to engage with the Committees on Appropriations in any manner represents a departure from this type of practice.

CONCLUSION

OPM violated section 608 of the FSGGA Act when it failed to consult with the Committees on Appropriations before it engaged in a significant restructuring and reorganization of its internal organizations. We also conclude that OPM reprogrammed funds between its internal organizations, but do not apply section 608's approval requirement to OPM's reprogramming.



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⁵⁸ For example, the Department of Defense (DoD) has incorporated informal agreements regarding reprogramming in its regulations. DOD Financial Management Regulation 7000.14-R, vol. 3, ch. 6, *Reprogramming of DOD Appropriated Funds* (Sept. 2015). In another example, Department of Energy (DOE) internal guidance provides that "for changes in program execution or unforeseen events that do not warrant formal or internal/limited reprogramming procedures and for areas known to be of interest or concern to Congress, DOE intends to notify congressional committees promptly to ensure they are fully informed" DOE, Office of the Chief Financial Officer, *Budget Execution—Funds Distribution and Control Manual* (January 1, 2006) at V-1, available at, <https://www.directives.doe.gov/directives-documents/100-series/0135.1-DManual-1a> (last visited June 16, 2022).