



B-327242

February 4, 2016

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 John Boozman
Chairman
Subcommittee on Financial Services and General Government
Committee on Appropriations
United States Senate

Subject: *Commodity Futures Trading Commission—Recording of Obligations for Multiple-Year Leases*

You requested that GAO examine the Commodity Futures Trading Commission's (CFTC) use of its authority to lease real property.¹ As part of this examination, you asked GAO whether CFTC properly recorded obligations for four leases. *Id.*

As explained below, we conclude that CFTC had authority to enter into multiple-year contracts to lease real property. However, when CFTC entered into multiple-year leases, it failed to record an obligation equal to the government's total liability. While CFTC included availability of funds clauses in the leases in an attempt to manage its liability, these clauses were not worded or exercised properly and were therefore ineffective. Accordingly, we conclude that CFTC has violated the recording statute, 31 U.S.C. § 1501(a)(1).

CFTC should determine whether the failure to properly record these obligations has resulted in the obligation of funds in excess of appropriations in violation of the

¹ Letter from Chairman, Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, Committee on Appropriations, House of Representatives, to Comptroller General (Feb. 9, 2015). You asked a number of questions in the letter. This opinion only addresses CFTC's obligational recording practices; GAO is conducting an audit engagement to address your other questions.

Antideficiency Act. If so, CFTC should report any violations in accordance with the law. CFTC should also determine whether it properly provided written notice to its contractors to begin performance before accepting services. If it failed to do so, it should report a violation of the voluntary services prohibition of the Antideficiency Act.

During the course of GAO's audit engagement on CFTC's leasing practices for the period from fiscal year 2008 to 2015, CFTC provided GAO copies of its leases for the CFTC offices in Washington, D.C., New York, Chicago, and Kansas City. Consistent with our practice for legal opinions, we contacted CFTC to obtain additional factual information and its legal views on this matter. 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 information and its legal views. Letter from General Counsel, CFTC, to Assistant General Counsel for Appropriations Law, GAO (Sept. 28, 2015) (CFTC Letter); Email from Assistant General Counsel, CFTC, to Assistant General Counsel for Appropriations Law, GAO (Nov. 9, 2015) (CFTC Email).

BACKGROUND

CFTC currently has leases for real property in four cities: Washington, D.C., New York, Chicago, and Kansas City. Because there are some differences in the terms of the leases at issue here, the facts and circumstances of each lease, as well as CFTC's known obligations for each lease, are explained below.² Although CFTC entered into the Washington lease in 1994, and the New York and Chicago leases in 2001, CFTC has provided obligation data only from fiscal year (FY) 2007 forward. CFTC Letter, at 8, n.16. CFTC entered into the Kansas City lease in 2010.

CFTC was unable to locate obligation records or other documents identifying the obligations that CFTC recorded at the time CFTC entered into the leases for the Washington, New York, and Chicago offices. CFTC Letter, at 13. However, available obligation documents establish a practice of CFTC obligating the funds needed to cover rental payments for these three leases in increments of days, weeks, months, or quarters. CFTC concluded that it did not obligate sufficient funds to cover its legal liability for the full lease term when it entered into the initial lease for the Washington office space in 1994 or when it entered into the initial leases for the New York and Chicago office spaces in 2001. *Id.*, at 13. CFTC did provide obligation records for the Kansas City lease, which establish that CFTC did not obligate sufficient funds to cover its legal liability for the full lease term when it

² The leases and amendments discussed below also include other payments due by CFTC, as well as a number of other legal provisions. This opinion does not contain an exhaustive list of all of the payments due by CFTC, nor do we opine on the legality of all provisions contained within the leases.

entered into the lease in 2010. *Id.* CFTC obligated funds needed to cover rental payments for the Kansas City lease in increments of days, weeks, months, or quarters as well. *Id.*, at 14.

Washington Lease

On December 30, 1994, CFTC signed a contract to lease office space in Washington. Lease Agreement Between Landlord and CFTC (Washington Lease). The initial term of the Washington lease was 10 years. Washington Lease, at 2–3. The lease provides for an annual base rent, due in monthly installments, of \$4,407,198.96 for the first through the fifth lease years, and \$4,671,504.00 for the sixth lease year through the end of the term, as adjusted by the Consumer Price Index Increase. *Id.*, at 10–11.

Article IV of the Washington lease states that the landlord and CFTC each “[have] a reasonable basis to believe that this Lease, consistent with the leasing authority of the CFTC as set out in 7 U.S.C. § 16(b)(3) . . . is binding on each of the parties for the entire Term of the Lease in accordance with its terms and is not subject to the [Antideficiency] Act, 31 U.S.C. [§] 1341.”³ *Id.*, at 50–51. The lease states that each party “reached this conclusion independently after consultation with its own outside counsel” and further provides that the provisions of Federal Acquisition Regulation (FAR) § 52.232-18 will be incorporated into the lease, but only under particular circumstances. *Id.*, at 51.

FAR § 52.232-18, Availability of Funds, provides that the government’s obligation is contingent upon the availability of appropriated funds and, importantly, establishes that no legal liability arises on the part of the government until the contractor receives affirmative notice from the contracting officer of the availability of funds for that contract. By the terms of the lease, FAR § 52.232-18 is incorporated “to the extent (1) required by applicable Federal legal requirements or (2) in the event that Tenant is required to allocate or attribute for budgetary or accounting purposes, funds in respect of this Lease in any given fiscal period in excess of the aggregate regular monthly installments of Minimum Annual rent and Additional rent on account of Operating Expense Adjustments and Tax Adjustments, which would otherwise be due for such period.”

³ CFTC states that it has no contemporaneous records that analyze the statement regarding the applicability of the Antideficiency Act. CFTC Letter, at 17. CFTC provided a 2001 memorandum suggesting that CFTC consulted a private attorney in connection with the negotiation of the Washington Lease. *Id.*, Attachment I. The 2001 memorandum notes that CFTC could not be sure that GAO or a court would agree that the Washington lease was not subject to the Antideficiency Act. *Id.*, at 8, n.15.

Through a 2009 amendment, the parties extended the term of the lease through September 30, 2025. Fifth Amendment to Washington Lease (Aug. 14, 2009), at 5. The amendment also contained a section entitled “Termination by Tenant for Lack of Appropriations.” *Id.*, at 24. This section states that each of the parties “acknowledges that CFTC is funded through annual appropriations by Congress” and provides that so long as CFTC is funded through annual appropriations, the Washington lease is “subject to the provisions of [FAR § 52.232-18]” and “Tenant shall have the right to terminate this Lease, if and only if Congress makes no funds available to the CFTC from which payments for the purposes of leasing space can be made.” *Id.* Finally, a termination will trigger an “Appropriations Termination Payment” to be paid by or through “any available sources at Tenant’s disposal (including, without limitation, other than appropriated funds or accessing the Federal Judgment Fund to the extent permitted by law).” *Id.* Subsequent amendments modified the “Appropriations Termination Payment” to include additional amounts.

New York Lease

On November 16, 2001, CFTC signed a contract to lease office space in New York. Sublease Between Sublandlord and CFTC (New York Lease). The initial term of the lease was “for just over [10] years” and contains five one-year options. CFTC Letter, at 7. The lease provides for a fixed annual rent, due in monthly installments, of \$2,046,876 for the first five years, and \$2,243,691 for the remainder of the lease term.⁴ New York Lease, at 4.

Exhibit C to the New York lease contains an availability of funds clause incorporating FAR § 52.232-18. New York Lease, Exhibit C, at 15. The clause provides that funds were not presently available for the contract at the time of execution, that the government’s obligation under the contract was contingent upon the availability of appropriated funds, and that no legal liability would arise until the landlord received written notice from the contracting officer. *Id.* It is not clear from the documents provided by CFTC if or when any such notice was given.

Chicago Lease

On December 12, 2001, CFTC signed a contract to lease office space in Chicago. Lease Between Landlord and CFTC (Chicago Lease); CFTC Letter, at 7. The lease provides for a fixed rent of \$937,250 per year, payable in monthly installments, for the first year and sets forth the fixed amounts for the remainder of the lease. Chicago Lease, at 2–3.

⁴ The parties amended the lease on September 2, 2011, to extend the lease term to April 30, 2022.

The initial term of the lease was 10 years and gave CFTC the right to extend the lease for two additional five-year terms.⁵ CFTC Letter, at 7; Chicago Lease, at 2, 63. The lease contains an availability of funds clause providing that CFTC's obligation under the lease was contingent upon the availability of appropriated funds and that no legal liability would arise until the landlord receives written notice from the contracting officer of the availability of the funds. Chicago Lease, at 63. It is not clear from the documents provided by CFTC if or when any such notice was given.

Kansas City Lease

On September 20, 2010, CFTC signed a contract to lease office space in Kansas City. Lease Between Landlord and CFTC (Kansas City Lease). The initial term of the lease was 10 years with two five-year options to extend the lease. Kansas City Lease, at 4.

The lease contains an availability of funds clause providing that CFTC's obligation under the lease was contingent upon the availability of appropriated funds and that no legal liability would arise until the "funds are made available to the Contracting Officer . . . and the Contracting Officer receives notice of such availability, to be confirmed in writing by the Contracting Officer." *Id.*, at 23. The clause further provides:

"Funds are not available for performance under this Lease beyond September 30 of each year. The obligations of Tenant under this Lease beyond September 30 of each year are contingent upon the availability of appropriated funds for which contract payments can be made. No legal liability of the part of the United States of America as Tenant under this Lease may arise beyond September 30 each year until funds are made available to the Contracting Officer for this Lease and the Contracting Officer receives notice of such availability, to be confirmed in writing by the Contracting Officer."

Id., at 23.

The lease provides for an annual base rent, payable in monthly installments. *Id.*, at 6. The total rent due for the initial 10-year lease term was approximately \$5.3 million.

DISCUSSION

At issue here is the proper recording of CFTC's obligations under the leases. As a threshold matter, we first consider whether CFTC had legal authority to enter into

⁵ The parties amended the lease in 2009, extending the lease term to June 30, 2022.

these multiple-year leases. We then consider whether CFTC properly recorded the obligations it incurred when it signed the lease contracts for the Washington, New York, Chicago, and Kansas City offices. Lastly, we consider whether CFTC properly managed its obligations in its exercise of the “subject to availability of funds” clauses in its leases.

Authority to Enter Into Multiple-Year Lease Contracts

An agency may enter into real property leases only if it has statutory authority to do so. B-309181, Aug. 17, 2007. Generally, the General Services Administration (GSA) has the authority to lease real property for federal agencies. *Cf.* B-322160, Oct. 3, 2011; B-309181; B-202206, June 16, 1981 (without specific statutory authority or absent GSA’s delegation of authority, a federal agency may not enter into a real property lease.) However, in some cases, Congress has authorized a federal agency to lease real property independent of GSA. CFTC has such statutory authority to enter into leases for real property:

“The Commission shall also have authority to make and enter into contracts with respect to all matters which in the judgment of the Commission are necessary and appropriate to effectuate the purposes and provisions of this chapter, including, but not limited to, the rental of necessary space at the seat of Government and elsewhere.”

7 U.S.C. § 16(b)(3). Further, Congress has specifically authorized CFTC to enter into multiple-year lease contracts. *See, e.g.,* Pub. L. No. 113-235, 128 Stat. 2130, 2357 (Dec. 16, 2014) (making appropriations for necessary expenses of CFTC, including “the rental of space (to include multiple year leases) in the District of Columbia and elsewhere”). Thus, CFTC is not required to obtain its space through GSA and may enter into multiple-year lease contracts.

Recording Obligations for Multiple-Year Leases

The recording statute, 31 U.S.C. § 1501(a)(1), requires an agency to record the full amount of its contractual liability against funds available at the time the contract was executed.⁶ *See, e.g.,* B-322160; B-305484, June 2, 2006. The authority to enter into multiple-year leases does not obviate the need to obligate the full amount of the government’s legal liability when it enters into the lease. Because it did not have

⁶ We also note that the Antideficiency Act, 31 U.S.C. §1341(a)(1)(A), prohibits agencies from obligating funds in excess of the amount available in an appropriation for that obligation. The Supreme Court views a lease as a “contract or other obligation” that is subject to the Antideficiency Act. *Leiter v. United States*, 271 U.S. 204, 206-07 (1926). *See also* *FDIC v. Mahoney*, 141 F.3d 913, 915 (9th Cir. 1998); *Cupey Bajo Nursing Home v. United States*, 36 Fed. Cl. 122 (1996); B-316860, Apr. 29, 2009.

specific statutory authority to do otherwise, CFTC should have recorded the full amount of the government's legal liability at the time it entered into the leases, consistent with the recording statute.

Standard for Recording Obligations for Multiple-Year Leases

We have previously opined on an agency's responsibility to record an obligation for a multiple-year lease. In B-322160, we examined whether the Securities and Exchange Commission (SEC) properly recorded the obligation it incurred when it signed a multiple-year lease contract. Although SEC had the authority to enter into multiple-year leases, we found that SEC lacked statutory authority to obligate an amount less than the government's total liability under the lease. Accordingly, we held that SEC should have recorded its total obligation for the duration of the lease at the time it signed the lease agreement. We stated that "the fact that Congress, without more, authorized SEC to enter into multiple-year leases does not, by itself, exempt SEC from the recording statute or otherwise authorize SEC to deviate from the obligating standards established therein." B-322160. As explained in the SEC decision, any authorization to record an obligation for an amount less than the full amount of the government's contractual obligation must be explicit. *Id.* Similarly, we held in B-195260, July 11, 1979, that although the Federal Emergency Management Agency had authority to enter into multiple-year leases, it was required to obligate the rental charges for the full term of the lease because it lacked statutory authority to do otherwise.

Exception for Space Leased by GSA

As discussed above, when entering into a multiple-year lease, an agency is generally required to obligate the entire amount of the lease for the full lease term when the contract is signed. B-322160. One notable exception involves GSA. GSA has two compatible authorities. First, GSA has the authority to enter into leases of real property for periods of up to 20 years. 40 U.S.C. § 585. Second, GSA has the authority to record obligations for these multiple-year leases on a year-by-year basis.⁷ *Id.* Although CFTC has the authority to enter into multiple-year leases, it does not have the authority to record obligations for multiple-year leases on a

⁷ GSA may delegate this authority to other agencies. 40 U.S.C. § 121(d); 41 C.F.R. pt. 102-72. Prior to FY 1981, although CFTC had leasing authority independent of GSA, its appropriation did not explicitly provide that appropriations were available for multiple-year leases. CFTC sought a delegation of leasing authority from GSA for leases longer than one year, and, in 1979, GSA gave CFTC a delegation to enter into multiple-year leases for the Washington office. CFTC Letter, at 4. This delegation was to expire on April 3, 1986. *Id.* In FY 1981, Congress added the explicit authority to enter into multiple-year leases to CFTC's appropriation. Pub. L. No. 96-528, 94 Stat. 3095, 3116 (Dec. 15, 1980).

year-by-year basis. CFTC does not have same statutory authority that GSA has, nor has GSA delegated such authority to CFTC. CFTC Letter, at 4, n.3. We are not aware, and CFTC does not contend, that it has any authorization to obligate multiple-year leases on a year-by-year basis. CFTC concedes that its authority to enter into multiple-year leases alone does not provide this authorization. CFTC Letter, at 12. Further, CFTC indicates that it is not aware of a statutory exception that would permit CFTC to record obligations in a manner contrary to the recording statute. *Id.*, at 13. We conclude, and CFTC concedes, that CFTC's authority to enter into multiple-year leases does not render the recording statute or the Antideficiency Act inapplicable.⁸ *Id.*, at 12.

Obligating No-Year Funds for Multiple-Year Lease Contracts

We note that from FY 1994 until FY 2001, funds appropriated to CFTC for rental payments were no-year funds.⁹ The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1994 appropriated a lump sum of \$47,485,000 for necessary expenses of the CFTC, including "the rental of space (to include multiple year leases) in the District of Columbia and elsewhere." Pub. L. No. 103-111, 107 Stat. 1046, 1077 (Oct. 21, 1993). A general provision provided that "funds appropriated for rental payments" to CFTC would remain available until expended. *Id.* at § 706, 107 Stat. at 1078. The provision making funds appropriated to CFTC for rental payments available until expended appeared in the annual appropriations acts until FY 2001.¹⁰ Thus, from FY 1994 through FY 2001, CFTC had both the authority to lease real property and no-year funds.

The *bona fide* needs rule, which is discussed more fully below, does not apply to no-year funds. B-326945, Sept. 28, 2015. An agency with leasing authority could therefore enter into multiple-year lease contracts and use no-year funds for its

⁸ In B-322160, we found that language authorizing SEC to enter directly into leases for real property "[n]otwithstanding any other provision of law" was not enough to establish an exception to the Antideficiency Act. Exceptions to the Antideficiency Act must be explicit, and there is no language in this case that explicitly exempts CFTC's leases from the Antideficiency Act. See B-322160.

⁹ A no-year appropriation is an appropriation that is available for an unlimited period of time. These funds are available until expended and available for the needs of any fiscal year. B-326945.

¹⁰ See, e.g., Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-330, § 705, 108 Stat. 2435, 2466-67 (Sept. 30, 1994); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-387, § 705, 114 Stat. 1549, 1549A-29 (Oct. 28, 2000).

obligations without specific authority to enter into a multiple-year lease. However, the existence of no-year funds does not permit an agency to record its obligations on a year-by-year basis or exempt it from the requirements of the recording statute. In B-322160, we noted that although SEC had both specific statutory authority to enter into real property leases and funds that remained available until expended, SEC was still required to record the total obligation for the duration of the lease at the time it signed the lease agreement.

Obligating Fiscal Year Appropriations for Multiple-Year Lease Contracts

Congress changed the time availability of CFTC appropriations beginning in FY 2002. The annual appropriations acts from FY 2002 onward provided fiscal year appropriations to CFTC and no longer made funds for rental payments available until expended.¹¹ See, e.g., Pub. L. No. 113-235, 128 Stat. at 2357. Accordingly, funds appropriated to CFTC for this purpose were available to CFTC on a fiscal year basis, and the *bona fide* needs rule would apply absent a statutory exception. Under the *bona fide* needs rule, without statutory authority to the contrary, CFTC would not be permitted to use fiscal year appropriations for the needs of some time period subsequent to the expiration of its period of availability. 31 U.S.C. § 1502(a); B-317636.

The *bona fide* needs rule provides that an appropriation limited to obligation for a definite period may be obligated only to meet a legitimate or *bona fide* need arising during the period of availability of the appropriation. 31 U.S.C. § 1502(a); B-317636, Apr. 21, 2009. This rule is derived from 31 U.S.C. § 1502(a), which provides that “an appropriation . . . limited . . . to a definite period is available only for payment of expenses properly incurred during the period of availability.” The *bona fide* needs rule only applies to appropriations limited to a definite period; no-year funds are not so limited. B-326945. We have opined that office space is generally a *bona fide* need of the fiscal year in which an agency occupies the office space. B-207215, Mar. 1, 1983. Thus, without specific authority, an agency with time-limited appropriations may only enter into a lease for the time period covered by the appropriation. CFTC is funded only with fiscal year appropriations available for the *bona fide* needs of the current fiscal year only.

An agency with statutory authority to enter into real property leases does have some flexibility when recording obligations for leasing space even if it has only fiscal year appropriations available. CFTC’s leases, however, did not take advantage of any of those flexibilities. An agency with fiscal year appropriations may use the Federal

¹¹ Unless language in an appropriations act itself expressly provides otherwise, the period of availability of any appropriation contained in the act expires at the end of the fiscal year for which the appropriation act was provided. 71 Comp. Gen. 39 (1991).

Acquisition Streamlining Act (FASA), codified at 41 U.S.C. § 3903, as the authority for obligating its fiscal year appropriations on a year-by-year basis to fund multiple-year real property leases. B-316860, Apr. 29, 2009. FASA permits civilian executive agencies to obligate either an amount equal to the full period of the contract or an amount equal to costs of the first fiscal year of contract performance plus estimated termination costs. However, this authority is available only for contracts up to five years in duration, and was therefore unavailable here because the CFTC leases in question were for terms longer than five years. 41 U.S.C. § 3903(a).

Alternatively, an agency with fiscal year appropriations could enter into a one-year lease contract with a series of options to extend. See *Leiter v. United States*, 271 U.S. 204 (1926). In *Leiter*, an agency with fiscal year appropriations entered into a long-term lease for office space. The Supreme Court held that the lease was binding on the government only for one fiscal year and that it would take affirmative action on the part of the government to create a new obligation for subsequent fiscal years. Under *Leiter*, the government has no legal liability unless it takes affirmative written action to renew the lease and thus create the new obligation.

The *bona fide* needs rule provides that a fixed-term appropriation is available only “to complete contracts properly made within that period of availability.” See 31 U.S.C. § 1502(a). A multiple-year lease contract would be considered “properly made” if an agency has statutory authority to obligate its fiscal year funds for a contract that is for multiple years. Appropriations for CFTC beginning in FY 2002 still contained the language appropriating a lump sum to CFTC for purposes including “the rental of spaces (to include multiple year leases)”; that language continued to appear annually through the FY 2015 appropriations act. See, e.g., Pub. L. No. 113-235, 128 Stat. at 2357. Although the funds were only available to CFTC on a fiscal year basis, the plain meaning of this language clearly indicates that Congress intended to provide CFTC with the authority to enter into multiple-year lease contracts. See *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (where the statutory text is plain and unambiguous, the Court must apply the statute according to its terms). This language, however, did not authorize CFTC to record obligations for those multiple-year leases on a year-by-year basis.

CFTC’s Recording Practices

As discussed above, at the time of the initial execution of the Washington lease in FY 1995, the New York and Chicago leases in FY 2002, the Kansas City lease in FY 2010, and all amendments to those leases, CFTC had the authority to enter into multiple-year leases for the rental of space. However, because it lacked statutory authority to obligate an amount less than the government’s total liability, CFTC should have recorded its total obligation for the full term of each lease at the time it entered into the lease contract.

We now consider whether CFTC properly recorded the obligations it incurred when it signed the lease contracts for the Washington, New York, Chicago, and Kansas City offices. As discussed more fully below, CFTC did not record its total obligation for the full term of the Washington, New York, Chicago, and Kansas City leases at the time that it signed each lease agreement. CFTC acknowledges that its recording practices for all four leases were inconsistent with the recording statute and GAO's decision in B-322160. CFTC Letter, at 13.

Recording of Washington Lease Obligations

For the Washington lease, the obligational data provided by CFTC demonstrates a practice of obligating funds in various amounts in increments of days, weeks, months, or quarters, rather than obligating the full cost of the lease when it became a legal liability. See, e.g., CFTC Letter, Attachment J-1 (first obligating document indicating that the total estimated value of the lease for FY 2007 was \$7,219,997, obligating \$580,000, and stating that “[a]t this time, appropriated funds are not available to fund the entire year. This document will be modified to add funding if and when such funds are available”); *id.* (obligating document dated March 7, 2007, increasing the obligated amount by \$4,269,997 to \$7,219,997 and stating that “this Modification is to fully fund the FY 2007 obligation for the lease”).¹² Therefore, we conclude that CFTC did not record the full cost of the Washington lease against funds available when the lease was signed in FY 1995 and has not complied with the recording statute.

In addition, an agreement that binds an agency to pay particular termination costs may create a legal liability that must be recorded at the time the agreement is signed. B-320091, July 23, 2010; B-238581, Oct. 31, 1990. The 2009 amendment to the Washington lease contained language providing that a termination would trigger an “Appropriations Termination Payment” to be paid by or through “any available sources at Tenant’s disposal (including, without limitation, other than appropriated funds or accessing the Federal Judgment Fund to the extent permitted by law).” Fifth Amendment to Washington Lease, at 24. The execution of the amendment to the Washington lease and the inclusion of the “Appropriations Termination Payment” created a legal liability that would be triggered if CFTC did not have appropriations available for leasing space. That legal liability should have been recorded when the document was executed. CFTC has also concluded that the amendment to the Washington lease created a legal liability at the time it was

¹² For each fiscal year, there were a number of modifications, obligating additional funds to the Washington lease. Often, the costs of the full lease year were not obligated until several months after the beginning of the fiscal year. CFTC Letter, Attachment J. For example, on March 7, 2007, the obligating document for a fifth modification stated that “this modification is to fully fund the FY 2007 obligation for the lease” and that “this modification increases the obligated amount by \$4,269,997.00 to \$7,219,997.” *Id.*

executed. CFTC Letter, at 20. The obligation documents provided by CFTC indicate that there was no obligation recorded at the time the amendment to the Washington lease was executed on August 14, 2009. CFTC concedes that it did not record the termination costs as required. CFTC Letter, Attachment J-3; *Id.*, at 20.

Finally, we also note that the 2009 amendment acknowledges that CFTC is funded through fiscal year appropriations and provides that CFTC has the right to terminate the lease “if and only if Congress makes no funds available to the CFTC from which payments for the purposes of leasing space can be made.” Fifth Amendment to Washington Lease, at 24. Although this clause appears to be an attempt to limit CFTC’s liability, this clause is ineffective and plainly inconsistent with the Supreme Court’s decision in *Leiter*. In *Leiter*, the Court specifically rejected an agency’s attempt to tie its future liability solely to the availability of appropriations. See *Leiter*, 271 U.S. 204.

Recording of New York Lease Obligations

For the New York lease, the obligational data provided by CFTC also demonstrates a practice of obligating funds in increments of days, weeks, months, or quarters rather than obligating the full cost of the lease when it became a legal liability. With the exception of FY 2010, CFTC did not obligate the full cost of the lease at the beginning of a given fiscal year. See, e.g. CFTC Letter, Attachment L-5 (first obligating document for FY 2011 obligates \$418,923 in FY 2011 funds and states that “[f]unding is expected to cover the first two months of the fiscal year”).

We note that the New York lease contained an availability of funds clause providing that funds were not presently available for the contract, that the government’s obligation under the contract was contingent upon the availability of appropriated funds, and that no legal liability would arise *until the landlord received written notice from the contracting officer*. New York Lease, Exhibit C, at 15 (incorporating FAR § 52.232-18). The inclusion of this clause means that CFTC’s liability did not arise immediately upon signing of the lease. However, upon written notice to the landlord by the contracting officer, the contract would become a legal liability and CFTC would be required to record an obligation for the full 10-year term of the lease at that time.¹³ CFTC concedes that it did not do so. CFTC Letter, at 13. Therefore, we conclude that CFTC did not record the full cost of the New York lease against funds available when it became a legal liability and has not complied with the recording statute.

¹³ CFTC did not provide us with a copy of any written notice to the landlord.

Recording of Chicago Lease Obligations

For the Chicago lease, the obligational data provided by CFTC also demonstrates a practice of obligating funds in increments of days, weeks, months, or quarters rather than obligating the full cost of the lease when it became a legal liability. See, e.g., CFTC Letter, Attachment K-7 (first obligating document for FY 2013 obligating \$550,250 and stating that “[f]unding is expected to cover the 1st quarter of FY 2013”; subsequent document dated June 24, 2013, increasing FY 2013 funds obligated by \$475,000 to \$20,095,500). Therefore, we conclude that CFTC did not record the full cost of the Chicago lease against funds available when it became a legal liability and has not complied with the recording statute.

We note that, like the New York lease, the Chicago lease contained an availability of funds clause. The clause in the Chicago lease contains language that is almost identical to the provision set forth in FAR § 52.232-18. Similarly, the inclusion of this clause in the Chicago lease means that CFTC’s liability did not arise immediately upon signing of the lease. However, upon written notice to the landlord by the contracting officer, the contract would become a legal liability and CFTC would be required to record an obligation for the full 10-year term of the lease at that time.¹⁴ CFTC concedes that it did not do so. CFTC Letter, at 13. Therefore, we conclude that CFTC did not record the full cost of the Chicago lease against funds available when it became a legal liability and has not complied with the recording statute.

Recording of Kansas City Lease Obligations

For the Kansas City lease, CFTC asserts that it obligated funds to cover rental payments on a fiscal year basis rather than obligating the full cost of the lease when it became a legal liability. CFTC Letter, at 13. As with the Washington, New York, and Chicago leases, however, the obligational data provided by CFTC reveal a practice of obligating funds in increments of days, weeks, months, or quarters. See e.g., CFTC Letter, Attachment M-3 (for the first few months of FY 2014 alone, CFTC obligated \$168,177 for FY 2014 on October 23, 2013; deobligated \$117,424.78 on November 9, 2013; and obligated \$43,601 in additional FY 2014 funds on January 24, 2014).

Although the total rent due for the 10-year lease term was approximately \$5.3 million, CFTC did not record any obligation against FY 2010 funds when it entered into the lease on September 20, 2010. CFTC Letter, at 13–14. Because no rental payment was due from CFTC until October 15, 2011, CFTC also did not record an obligation in FY 2011. *Id.*, at 14. CFTC asserts that it recorded obligations for FYs 2012 to 2015 as follows:

¹⁴ CFTC did not provide us with a copy of any written notice to the landlord.

- FY 2012 - \$479,560.83
- FY 2013 - \$450,678.46
- FY 2014 - \$443,166.64
- FY 2015 - \$578,155.00

CFTC Letter, at 14-15.

The availability of funds clause included in the Kansas City lease is structured differently from the clauses appearing in the New York and Chicago leases. The availability of funds clause in the Kansas City lease appears to be an attempt to permit CFTC to obligate funds on a year-by-year basis, providing that “[f]unds are not available for performance under this Lease beyond September 30 of each year.” See Kansas City Lease, at 23. The clause attempts to make the government’s liability after September 30 of each year contingent upon the availability of appropriated funds and states that “[n]o legal liability on the part of the United States of America as Tenant under this Lease may arise beyond September 30 each year until funds are made available to the Contracting Officer for this Lease and *the Contracting Officer* receives notice of such availability, to be confirmed in writing by the Contracting Officer.” See Kansas City Lease, at 23 (emphasis added).

This clause, however, is ineffective and does not permit CFTC to record its obligations on a year-by-year basis. The notification required by this clause is not consistent with what is expected by the Supreme Court and our case law, which the FAR has adopted, in a significant way: Under FAR § 52.232-18, no legal liability on the part of the government may arise until funds are made available to the Contracting Office for the contract and “until *the Contractor* receives notice of such availability, to be confirmed in writing by the Contracting Officer” (emphasis added).¹⁵ The Kansas City lease, however, is drafted to require only notice to the Contracting Officer, and does not appear to require affirmative written notice to the landlord.¹⁶

¹⁵ The notification in the Kansas City lease also differs from FAR § 52.232-19, Availability of Funds for the Next Fiscal Year, which provides that funds are not presently available for performance under a contract beyond a certain date and, similar to FAR § 52-232.18, establishes that no legal liability arises on the part of the government until the contractor receives affirmative notice from the contracting officer of the availability of funds for that contract.

¹⁶ The Kansas City lease also contains an availability of funds clause related to the beginning of the lease; however, this clause similarly requires only notice to the Contracting Officer rather than affirmative written notice to the landlord. Kansas City Lease, at 23.

The language in the Kansas City lease appears to be an attempt to enter into a one-year lease contract with the option for CFTC to extend annually. This clause, however, did not enable CFTC to record these obligations on a fiscal year basis. In order to create a situation under which CFTC's liability for the lease would arise on a fiscal year basis, CFTC would need to include language requiring it to affirmatively renew the lease for each new fiscal year. *See, e.g. Leiter, 271 U.S. at 207.* The clause included in the Kansas City lease does not appear to include such affirmative notification *to the landlord*.¹⁷

The obligational data provided by CFTC also demonstrates a practice of obligating funds in increments of days, weeks, months, or quarters rather than obligating the full cost of the lease when it became a legal liability. Therefore, we conclude that CFTC did not record the full cost of the Kansas City lease against funds available when it became a legal liability and has not complied with the recording statute.

Acceptance of Voluntary Services

During our review of the facts in this case, we identified an additional issue involving the availability of funds clauses in the New York and Chicago leases. The availability of funds clauses in these leases provide that no liability would arise until the landlord received written notice from the contracting officer. CFTC did not provide us with copies of any written notice given to the landlord for the New York or Chicago office space. CFTC should examine its records to determine whether such notice was given to the landlords and whether it has accepted voluntary services in violation of the Antideficiency Act.

Although an availability of funds clause provides that the agency does not incur a legal liability until written notice is given, we also note that agencies are not permitted to accept services without a contract in place. The Antideficiency Act provides that an agency "may not accept voluntary services." 31 U.S.C. § 1342. The purpose of this prohibition is to preclude situations that might generate later claims for compensation that might exceed an agency's available funds. B-324214, Jan. 27, 2014; B-308968, Nov. 27, 2007. This prohibition bars agencies from accepting voluntary services from government contractors. *See PCL Construction Services, Inc. v. United States*, 41 Fed. Cl. 242, 257-260 (1998). The prohibition bars arrangements in which government contracting officers solicit or permit—tacitly or otherwise—a contractor to continue performance on a "temporarily unfunded" basis while the agency seeks additional appropriations. In 55 Comp. Gen. 768 (1976), we questioned the Army's proposal to "leave existing contracts in effect, at least tacitly encourage continued performance, receive the benefits of performance,

¹⁷ Even had the clause been drafted to require affirmative written notice to the landlord to renew the lease for each fiscal year, CFTC's practice of recording obligations in increments of days, weeks, months, or quarters still would not have complied with the requirements of the recording statute.

but at the same time require contractors to assume the risk of nonpayment” subject to subsequent availability of funds. There, we noted that “[i]t has been held generally . . . that when the government takes and uses contract-generated material or services it is obligated to pay for them.”

CONCLUSION

When CFTC entered into multiple-year leases, it was required to record an obligation equal to the government’s total liability over the term of each lease.¹⁸ Because it did not do so, CFTC has violated the recording statute, 31 U.S.C. § 1501(a)(1). CFTC should determine whether the failure to properly record these obligations has resulted in the obligation of funds in excess of appropriations in violation of the Antideficiency Act. If so, CFTC should report any violations in accordance with the law. CFTC should also determine whether it properly provided written notice to its contractors to begin performance before accepting services. If it failed to do so, it should report a violation of the voluntary services prohibition of the Antideficiency Act. CFTC should report any violations of the Antideficiency Act in accordance with 31 U.S.C. § 1351.

¹⁸ In FY 2016, Congress enacted two new provisos in the appropriation for CFTC to relieve CFTC of some of the limits imposed by the account closing law, 31 U.S.C. § 1553, to use currently available appropriations to liquidate obligations that should have been recorded against closed appropriations accounts. One of these provisos directly addresses CFTC’s ability to make any such lease payments due in FY 2016. Pub. L. No.114-113, 129 Stat. 2242, ____ (Dec. 18, 2015). The language permits CFTC to use FY 2016 funds to liquidate obligations equal to current year payments on leases entered into prior to the enactment date of the FY 2016 appropriation without regard to the limitations set forth in the account closing law. The language also permits CFTC to reopen closed appropriation accounts solely for the purpose of recording obligations against closed appropriations accounts to correct violations of the recording statute. The balances in any account reopened to correct such violations are not available to liquidate any outstanding obligations. The provisos do not provide an exception to the recording statute for any future lease obligations. Without such an exception, CFTC must record an obligation for the full amount of its liability under any future lease.

If you have any questions, please contact Edda Emmanuelli Perez, Managing Associate General Counsel, at (202) 512-2853 or Julie Matta, Assistant General Counsel, at (202) 512-4023.

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

Susan A. Poling
General Counsel