



The Impoundment Control Act and 5 C.F.R. Part 550

August 5, 2019

Fiscal Year 2019 Report to Congress



**Homeland
Security**

Office of the General Counsel

Message from the Office of the General Counsel

August 5, 2019

The following report, “The Impoundment Control Act and 5 C.F.R. Part 550,” has been prepared by the Department of Homeland Security’s Office of the General Counsel. This report has been prepared pursuant to Senate Report 115-283, which accompanies the Department of Homeland Security Appropriations Act, 2019, Pub. L. No. 116-6, Div. A.

Pursuant to congressional requirements, this report is being provided to the following Members of Congress:

The Honorable Lucille Roybal-Allard
Chairwoman, House Appropriations Subcommittee on Homeland Security

The Honorable Chuck Fleischmann
Ranking Member, House Appropriations Subcommittee on Homeland Security

The Honorable Shelley Moore Capito
Chairman, Senate Appropriations Subcommittee on Homeland Security

The Honorable Jon Tester
Ranking Member, Senate Appropriations Subcommittee on Homeland Security.

Sincerely,



John M. Mitnick
General Counsel

Executive Summary

This document has been prepared in response to Senate Report 115-283, which accompanies the Department of Homeland Security Appropriations Act, 2019, Pub. L. No. 116-6, Div. A. This report identifies an instance in which the U.S. Coast Guard (USCG) delayed the obligation of funds that had been appropriated for the Tenth National Security Cutter long lead time material. The delay resulted from the time taken to determine the impact of a possible rescission of those funds that had been proposed in a House of Representatives appropriations bill. After thoroughly reviewing the issue, DHS concluded that a delay would violate the Impoundment Control Act (ICA), and USCG promptly obligated the funds. OGC is unaware of any additional alleged violations of the ICA since October 1, 2016. This report also identifies instances in which the Federal Emergency Management Agency (FEMA) and U.S. Immigration and Customs Enforcement violated title 5 Code of Federal Regulations (C.F.R.) Part 550 by paying employees in excess of the applicable pay caps.

In order to strengthen internal controls, DHS will update its Financial Management Policy Manual to address the ICA and has updated this Manual to address the requirements of 5 C.F.R. Part 550. Additionally, FEMA has addressed the requirements of 5 C.F.R. Part 550 through new procedures to monitor and approve time and attendance. Finally, DHS will provide training concerning the ICA, premium pay, and payments during evacuations.



The Impoundment Control Act and 5 C.F.R. Part 550

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I. Legislative Language

This report has been prepared pursuant to the direction in Senate Report 115-283, which accompanies the Department of Homeland Security (DHS) Appropriations Act, 2019, Pub. L. No. 116-6, Div. A:

Budget and Impoundment Control Act.—The Committee directs the Chief Counsel to provide a report, not later than 90 days after enactment of this act, that identifies any instance since October 1, 2016 when the Department violated Section 1012 or Section 1013 of the Budget and Impoundment Control Act of 1974 (2 U.S.C. 684 and 685) or Code of Federal Regulations Part 550. For each instance of violation identified, the report should include the Department’s justification for the violation and specific actions the OGC will take to improve its understanding of the Budget and Impoundment Control Act of 1974. The report shall include a plan for strengthening internal controls necessary to avoid violations of the Budget and Impoundment Control Act of 1974 or regulations included in Code of Federal Regulations Part 550. Further, the Chief Counsel, in cooperation with the Office of Management and Budget and the Government Accountability Office, is directed to develop training on the Budget and Impoundment Control Act of 1974 and regulations included in Code of Federal Regulations Part 550 and to deliver the training annually to the Office of General Counsel, the Office of the Chief Financial Officer, and the Chief Counsel and Chief Financial Officer of each component.

II. Background

The Homeland Security Act of 2002 defines the General Counsel as the “chief legal officer of the Department.”¹ In that role, the General Counsel is ultimately responsible for all of DHS’s (or the Department) legal determinations and for overseeing all of its attorneys. The General Counsel is also the Department’s Regulatory Policy Officer, managing the rulemaking program and ensuring that all DHS regulatory actions comply with applicable law and executive orders.

The Impoundment Control Act (ICA) was enacted as part of the Congressional Budget and Impoundment Control Act of 1974 and governs the authority of federal agencies to impound appropriated funds.² The ICA implements the requirement that an agency must make funds available for obligation unless authorized to withhold funds.³ The ICA authorizes the President to impound, or withhold the obligation of funds, under certain circumstances.⁴ An “impoundment” is an action or inaction by an officer or employee of the United States that delays or precludes the obligation or expenditure of budget authority provided by Congress.⁵ Agencies may withhold budget authority from obligation only if the President has transmitted a special message to Congress.⁶ The ICA prohibits two categories of impoundments: (1) “deferral,” whereby an agency temporarily withholds funds from obligation or expenditure (not beyond the end of the fiscal year);⁷ and (2) “rescission,” which is the cancellation of budget authority.⁸ Rescissions may be accomplished only through legislation.⁹ In order to defer or rescind, the President must submit a “special message” to Congress setting forth the amount, account and program, rationale, and estimated effects of rescission or deferral, and for deferral, the period of time during which the funds are to be deferred.¹⁰ The President may defer only to

¹ 6 U.S.C. § 113(a)(1)(J).

² Pub. L. No. 93-344, Title X, 88 Stat. 297, 332 (July 12, 1974) (codified as amended at 2 U.S.C. §§ 681–688).

³ *Impoundment of the Advanced Research Projects Agency - Energy Appropriation Resulting from Legislative Proposals in the President's Budget Request for Fiscal Year 2018*, B-329092 *1 (Comp. Gen. Dec. 12, 2017).

⁴ *Id.*

⁵ 2 U.S.C. §§ 682(1), 683; Government Accountability Office (GAO), *Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Sep. 2005), at 61.

⁶ B-329092 *1-2 citing 2 U.S.C. §§ 683 (rescission), 684 (deferral).

⁷ 2 U.S.C. §§ 682(1), 684.

⁸ *Id.* at §§ 682(3), 683.

⁹ *Id.*

¹⁰ *Id.* at §§ 683(a), 684(a).

provide for contingencies, to achieve savings made possible by changes in requirements or efficiency, and as specifically provided by law.¹¹

The regulations at title 5 Code of Federal Regulations (C.F.R.) Part 550 govern various types of federal employee pay, including premium pay (e.g., overtime, night pay, Sunday pay, holiday pay, etc.), and payments during an evacuation (e.g., advance payment, evacuation payment, and special allowances).

¹¹ *Id.* at § 684(b).

III. Discussion

Impoundment Control Act

The U.S. Government Accountability Office (GAO) advised in *U.S. Department of Homeland Security - Impoundment Control Act and Appropriations for the Tenth National Security Cutter*, B-329739 (Comp. Gen. Dec. 19, 2018), that the Department failed to comply with the ICA by delaying the obligation of funds appropriated to the U.S. Coast Guard (USCG) for the Tenth National Security Cutter long lead time material (TNSC LLTM) pursuant to the DHS Appropriations Act, 2017, Pub. L. No. 115-31, Div. F, Title II (May 5, 2017).¹² The DHS Office of the General Counsel (OGC) is unaware of any other alleged ICA violations in the Department.

The delay in the obligation of the funds resulted from the time taken by the Department to determine whether a possible rescission of those funds lawfully could support a programmatic delay in the procurement of the TNSC LLTM.¹³ In that context, the Department engaged in a review of the implications of a possible rescission, including performing the analyses necessary to determine the lawful options that were available to the Department in proceeding with the procurement of TNSC LLTM.

The Department did not obligate funds during the review because, when the issue was presented initially, there appeared to be a reasonable, good faith legal argument that such a delay in obligation could be considered programmatic in nature (i.e., not a deferral).¹⁴ After continued review of the matter, the Department ultimately determined that, notwithstanding the potential waste of public funds that might result from a subsequent rescission of the TNSC LLTM, a delay in obligation based upon the facts presented would violate the ICA. Accordingly, the funds were obligated by USCG, but GAO advised that the time taken to complete that action constituted an unauthorized deferral of the obligation of the funds in violation of the ICA. On the basis that the Department obligated the funds, GAO did not transmit a report to Congress under the ICA.

¹² The Act appropriated \$95,000,000 of funds available until September 30, 2021, to the “Coast Guard - Acquisition, Construction and Improvements” account for long lead time materials for the tenth National Security Cutter.

¹³ Specifically, the House of Representatives evidenced an intention to rescind the TNSC LLTM funding through H.R. 3354, the Make America Secure and Prosperous Appropriations Act, 2018, Div. E, Title V, § 531(8). The House Committee on Appropriations specified that “[t]he Committee recommends a rescission of \$95,000,000 in Title V of this bill from funds provided in FY 2017 for long lead time material for a tenth National Security Cutter that was neither requested by the Coast Guard nor is a requirement” (H. Rept. 115-239 (July 21, 2017), at 46). As the Department neared the obligation of funds in December 2017, and because the DHS Appropriations Act, 2018, still had not been enacted, there was uncertainty as to the amount of budget authority that ultimately would be available to carry out that activity.

¹⁴ Moreover, the funds were available for a 5-year period, and no anticipated programmatic impacts were anticipated from briefly not obligating the funds while Congress finalized the DHS Appropriations Act, 2018, which would have resolved the uncertainty. Conversely, the risk of obligating funds through a procurement contract only to terminate that contract to effectuate a rescission would have caused the Department to incur potentially significant contract termination costs.

Violations of 5 C.F.R. Part 550

Federal Emergency Management Agency

The Federal Emergency Management Agency (FEMA) preliminarily has identified 10 employees who exceeded the biweekly and annual premium pay caps in 2016 in violation of 5 C.F.R. §§ 550.105 and 550.106, respectively, since October 1, 2016.¹⁵ FEMA continues to evaluate 2018 payments to determine whether there were any instances of employees exceeding the annual premium pay cap.

U.S. Immigration and Customs Enforcement

U.S. Immigration and Customs Enforcement (ICE) has identified 49 employees who were paid in violation of the regulations governing payments during evacuation at 5 C.F.R. §§ 550.401-409 since October 1, 2016.

Financial Controls

The Department will update its Financial Management Policy Manual (FMPM) to include a section on the ICA, including recent GAO guidance regarding the actions that may and may not constitute acceptable programmatic delays, in order to provide consistent guidance across DHS. The Department estimates that it will complete those revisions by June 30, 2020.

The Department updated the FMPM on April 9, 2018, to include a section on evacuation allowances. That addition to the FMPM provides comprehensive financial policy regarding payments during an evacuation. The Department also added appendices to the FMPM to serve as job aids for evacuation-related payments, including an evacuation order template, a description of typical evacuation scenarios, and the Office of Personnel Management Fact Sheet regarding evacuation payments.

In response to the identified violations of the regulations governing payments during an evacuation at 5 C.F.R. §§ 550.401-409, the ICE Chief Financial Officer (CFO) has added new and revised material to the ICE-dedicated intranet page regarding financial management guidance clarifying the authorities for payments during evacuation. The ICE CFO also created an employee fact sheet regarding special allowances under an evacuation order, instructions for claiming reimbursements, and certification of dependents.

In response to the identified violations of the regulations governing biweekly and annual premium pay caps in 2016 (5 C.F.R. §§ 550.105 and 550.106, respectively), FEMA has taken the following steps to prevent future violations:

¹⁵ In 2017, the provisions of 5 CFR Part 550 were superseded by the DHS Appropriations Act, 2017, Pub. L. No. 115-31, Div. F, Title V § 545 (as added by section 20607 of Title VI of Subdivision 1 of Div. B of the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, as amended by the DHS Appropriations Act, 2018, Pub. L. No. 115-141, Div. F, Title V § 544), which increased the annual cap for employees being reimbursed through the Disaster Relief Fund to \$187,000.

- In January 2018, FEMA notified its timekeepers that they were not authorized to change time and attendance profiles to allow employees to exceed the biweekly salary cap. Reports are run periodically in order to ensure that timekeepers are in compliance.
- Also in January 2018, consistent with DHS guidance regarding work performed subject to the annual pay cap, FEMA adopted the practice of deferring premium pay in excess of the biweekly cap until the end of the year in order to avoid future overpayments.
- The FEMA Office of the Component Chief Human Capital Officer (OCCHCO) has established a process for monitoring employees in jeopardy of exceeding the annual premium pay cap. FEMA's compensation staff use employee biweekly pay and estimated annual earnings to determine when an employee is nearing the annual premium pay cap. Once an employee has been determined to be at risk of exceeding the cap, a notice is provided by mail giving the employee instructions regarding how to manage and record time in order to prevent an overpayment.
- FEMA OCCHCO runs biweekly reports in order to identify employees who are nearing the annual pay cap. FEMA OCCHCO notifies employees regarding how to manage and record their time in order to prevent an overpayment. FEMA OCCHCO provides information to supervisors and managers regarding employees who are at risk of exceeding the biweekly and annual cap in order to enable the responsible supervisors and managers to make effective decisions regarding resource allocations and assignments in accordance with the applicable pay limitations.
- FEMA OCCHCO has added a Premium Pay Calculator to its intranet website as a resource for employees, and it is updating its guidance documents with information regarding how premium pay is calculated.
- On April 3, 2018, a job aid was finalized providing Payroll Branch employees clear guidance regarding "Updating Premium Pay Data for Transferring Employees." The job aid includes instructions for identifying transfers, requesting the earnings data from the employees, calculating the earnings, and updating the National Finance Center (NFC) database so that the earnings are reflected on the NFC reports that are used in the analysis of premium pay data.

Training

OGC plans to complete training modules regarding the following: (1) the ICA; (2) Premium Pay; and (3) Payments During Evacuation. The training modules will be delivered annually to OGC, the DHS Office of the Chief Financial Officer, and the Chief Counsel and CFO of each DHS Component.

IV. Conclusion

In FYs 2017 and 2018, the Department's budgetary resources were approximately \$102 billion and \$154.8 billion, respectively.¹⁶ Those resources must be expended in compliance with all applicable laws and regulations. To that end, among many other similar initiatives, the Department continues to develop guidance, financial controls, and training in its ongoing efforts to ensure compliance with the ICA and the regulations at 5 C.F.R. Part 550.

¹⁶ DHS, *FY 2017 Agency Financial Report* (Nov. 14, 2017), at 28; DHS, *FY 2018 Agency Financial Report* (Nov. 14, 2018), at 30.

Appendix: List of Abbreviations

Abbreviation	Definition
CFO	Chief Financial Officer
CFR	Code of Federal Regulations
DHS	U.S. Department of Homeland Security
FEMA	Federal Emergency Management Agency
FMPM	Financial Management Policy Manual
FY	Fiscal Year
GAO	U.S. Government Accountability Office
ICA	Impoundment Control Act
ICE	U.S. Immigration and Customs Enforcement
NFC	National Finance Center
OCCHCO	Office of the Component Chief Human Capital Officer
OGC	Office of the General Counsel
TNSC LLTM	Tenth National Security Cutter Long Lead Time Material