U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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October 8, 2019

Board of Directors
Federal Deposit Insurance Corporation

Subject: *Federal Deposit Insurance Corporation—Operations of the Office of Inspector General during a Lapse in Appropriations*

GAO recently conducted an audit of the 2018 and 2017 financial statements of the Deposit Insurance Fund (DIF) and of the Federal Savings and Loan Insurance Corporation (FSLIC) Resolution Fund, both of which are administered by the Federal Deposit Insurance Corporation (FDIC). GAO, *Financial Audit: Federal Deposit Insurance Corporation Funds' 2018 and 2017 Financial Statements*, GAO-19-295R (Washington, D.C.: Feb. 14, 2019).[1] In the course of that audit, GAO became aware that the FDIC Office of Inspector General (OIG) continued its normal operations during the most recent lapse in appropriations, notwithstanding that the FDIC OIG had not yet received its annual appropriations for fiscal year (FY) 2019. At issue here is whether FDIC OIG violated the purpose statute and the Antideficiency Act when it continued operations by drawing from the DIF.

As explained below, because FDIC OIG did not have an appropriation, it violated the Antideficiency Act and should report its violations as required by 31 U.S.C. § 1351. We conclude also that FDIC OIG violated the purpose statute when it obligated funds from the DIF while FDIC OIG was subject to a lapse in appropriations. Although FDIC has general authority to incur obligations against the DIF for its necessary expenses, Congress annually has provided FDIC OIG with a separate appropriation available specifically for its activities. *See*, *e.g.*, Financial Services and General Government Appropriations Act, 2019, Pub. L. No. 116-6, div. D, title V, 133 Stat. 13, 166 (Feb. 15, 2019). And, where two appropriations could arguably be

[1] In our audit, GAO found that the financial statements of the DIF and of the FSLIC Resolution Fund as of and for the years ended December 31, 2018, and 2017, were presented fairly, in all material respects, in accordance with U.S. generally accepted accounting principles; that FDIC maintained, in all material respects, effective internal control over financial reporting relevant to the DIF and to the FRF as of December 31, 2018; and with respect to the DIF and to the FRF, no reportable instances of noncompliance for 2018 with provisions of applicable laws, regulations, contracts, and grant agreements we tested. GAO-19-295R at 1.

available for the same purpose, the agency must use the specific appropriation for that expenditure to the exclusion of the more general appropriation.

Our practice when rendering legal opinions and decisions is to obtain factual information and legal views from the relevant agency. 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. We received from FDIC OIG its legal views on whether its actions were consistent with the Antideficiency Act. Letter from General Counsel to the Inspector General, FDIC OIG, to Managing Associate General Counsel, GAO (Sept. 19, 2019) (FDIC OIG Letter). FDIC OIG attached to its letter a 2017 memorandum which, according to the letter, "continues to represent the views of the FDIC OIG." FDIC OIG Letter, at 1; FDIC OIG, Memorandum from General Counsel, *FDIC OIG's Authority to Spend Funds during a Lapse in Appropriations* (Dec. 8, 2017). (FDIC OIG 2017 Memo). We also held an informal meeting with FDIC OIG attorneys. Meeting with General Counsel, FDIC OIG; Deputy General Counsel, FDIC OIG; Managing Associate General Counsel, GAO; Assistant General Counsel for Appropriations Law, GAO; and others (Sept. 23, 2019).

BACKGROUND

FDIC was established to maintain stability and public confidence in the nation's financial system by insuring deposits, examining and supervising financial institutions, and resolving troubled institutions. Federal Deposit Insurance Corporation, *Mission, Vision, and Values, available at* https://www.fdic.gov/about/strategic/strategic/mission.html (last visited July 25, 2019). FDIC is funded through assessments levied on depository institutions insured by the FDIC. *See, e.g.,* 12 U.S.C. § 1817. These amounts assessed are deposited into the DIF. 12 U.S.C. § 1821(a)(4)(D). The DIF is available to FDIC to maintain, administer and to use to "carry out [FDIC]'s insurance purposes." 12 U.S.C. § 1821(a)(4)(A). And, the FDIC Board of Directors is empowered to "determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid." 12 U.S.C. § 1820(a).

The Inspector General Act of 1978, as amended, established FDIC OIG as an independent unit within FDIC. Pub. L. No. 95-452, 92 Stat. 1101 (Oct. 12, 1978), *as amended by* Pub. L. No. 100-504, 102 Stat. 2515 (Oct. 18, 1988), *as also amended by* Pub. L. No. 103-204, 107 Stat. 2369 (Dec. 17, 1993), *classified at* 5 U.S.C. App. 3. FDIC's OIG conducts audits, evaluations, investigations and other reviews of FDIC programs and operations. *Budget of the United States Government for Fiscal Year 2018* at 1163, *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/appendix.pdf (last visited July 24, 2019). The OIG assists FDIC in preventing and detecting fraud, waste, abuse and mismanagement. *Id*.

Between fiscal years 1989 and 1997, FDIC maintained control of the OIG's budget process. FDIC OIG 2017 Memo at 2. Funding was allocated to the OIG from the DIF at FDIC's direction. *Id*. at 1–2. This funding structure changed, however, in FY 1998, when Congress began appropriating specific amounts to the OIG through annual appropriations acts. *Id*. at 3. These appropriations specified that the funds be derived from the DIF and the FSLIC Resolution Fund.[2] *Id*. For example, in FY 2018 FDIC OIG received an annual appropriation "[f]or necessary expenses of the Office of Inspector General in carrying out the provisions of the Inspector General Act of 1978, $39,136,000, to be derived from the Deposit Insurance Fund or, only when appropriate, the FSLIC Resolution Fund." Financial Services and General Government Appropriations Act, 2019, Pub. L. No. 115-141, div. D, title V, 132 Stat. 347, 566 (Mar. 23, 2018). The OIG continues to receive its funding through annual appropriations acts. Pub. L. No. 116-6, 133 Stat. at 66 (FY 2019 appropriation).

During a lapse in appropriations in 2013, FDIC implemented an orderly shutdown. FDIC OIG 2017 Memo, at 5-6. "According to senior OIG officials, the Inspector General at the time implemented a shutdown as a policy decision to follow previous practices of the FDIC OIG and the practices of other government agencies, not in response to a determination that a shutdown was required by law." *Id*. In 2015, FDIC OIG took the position that in the event of a lapse in appropriations, FDIC OIG could continue to obligate amounts against the DIF. FDIC OIG 2017 Memo, at 6. FDIC OIG states that it undertook a thorough legal review prior to arriving at this conclusion. FDIC OIG Letter at 11. FDIC OIG states that its staff communicated with the Office of Management and Budget (OMB) in part by providing a 2015 legal memorandum documenting its conclusion, and that an OMB attorney "ultimately provided OMB's concurrence with the OIG's 2015 memorandum, in writing, on July 20, 2017." *Id*.

In July and August of 2018, the House and Senate each passed bills that would have made appropriations to FDIC OIG for FY 2019. Though the bills would have provided a different amount to FDIC OIG than Congress appropriated in FY 2018, the appropriations language in each bill was otherwise identical to the language Congress enacted in the FY 2018 appropriation. *See* H.R. 6147, 116th Cong., at 223 (passed House July 19, 2018); H.R. 6147, 116th Cong., at 211 (passed Senate

[2]Consistent with the funding structure that once applied to FDIC, early iterations of this statutory language appropriated funds to the OIG from the Bank Insurance Fund (BIF), the Savings Association Insurance Fund (SAIF), and the FSLIC Resolution Fund. *See, e.g.,* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2005, Pub. L. No. 108-447, div. I, title III, 118 Stat. 3285, 3332–33 (Dec. 8, 2004). In 2006, the BIF and SAIF were merged into the new DIF. Federal Deposit Insurance Reform Act of 2005, Pub. L. No. 109-171, § 2102, 120 Stat. 9, 9 (Feb. 8, 2006). For purposes of this opinion, we refer to this funding mechanism as the DIF.

Aug. 1, 2018). However, these bills were not enacted into law.[3] Therefore, between December 22, 2018, and January 25, 2019, FDIC OIG was affected by a lapse in appropriations and did not receive its annual appropriations. In a change that contrasted with its actions in 2013 when a lapse in appropriations occurred, but consistent with the position that it took in memoranda in 2015 and in 2017, the OIG did not conduct an orderly shutdown during this lapse. Instead, it continued normal operations. We have never had occasion to opine on the positions FDIC OIG took in its 2015 and 2017 memoranda.

DISCUSSION

At issue here is whether FDIC OIG violated the purpose statute and the Antideficiency Act when it continued operating during the lapse in appropriations using FDIC's general authority to incur obligations against the DIF. We conclude that it did.

Availability of the DIF for OIG Operating Expenses

The purpose statute, 31 U.S.C. § 1301(a), provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made . . . ." An appropriation available for a particular purpose is also available for any expenses that are reasonably necessary for the accomplishment of that purpose. B-303170, Apr. 22, 2005; 71 Comp. Gen. 527 (1992). We apply a three-step test to determine whether an expenditure is a "necessary expense" of a particular appropriation or funding source. B-303170, Apr. 22, 2005. First, the expenditure must be "reasonably related" to the purposes that Congress intended the appropriation to fulfill; second, the expenditure must not be prohibited by law; and third, the expenditure must not fall within the scope of another appropriation or funding source. *Id.* With regard to the third step, a specific appropriation prevails over a more general appropriation, to the exclusion of the more general appropriation. B-327003, Sept. 29, 2015.

In this case, the use of the DIF for purposes of FDIC OIG's operating expenses meets the first two elements of this test. For the first step, the intended purpose of the DIF is for the FDIC to "use to carry out [FDIC]'s insurance purposes." 12 U.S.C. § 1821(a)(4)(A).[4] The OIG operating expenses are reasonably and logically related to this express purpose, as the OIG's role in preventing and detecting fraud, waste, abuse, and mismanagement ensures that the FDIC most effectively executes its

[3] When Congress did enact appropriations to FDIC OIG for FY 2019, it adopted language that was identical in every respect to the language that the Senate and House had earlier passed for FY 2019. *See* Pub. L. No. 116-6, 133 Stat. at 166.

[4] FDIC has similar authority with respect to the FSLIC Resolution Fund. 12 U.S.C. § 1821a(a)(4).

functions and programs. These expenditures also meet the second step of the analysis, as we are aware of no applicable laws that prohibit the obligation of amounts for the operation of FDIC OIG.

The third step of the purpose analysis requires us to consider whether a more specific appropriation is available to FDIC OIG for this purpose. In every fiscal year since fiscal year 1998, Congress has provided a specific annual appropriation to FDIC OIG to provide for OIG's operating expenses. For example, in FY 2018, FDIC OIG received the following appropriation: "[f]or necessary expenses of the Office of Inspector General in carrying out the provisions of the Inspector General Act of 1978, $39,136,000, to be derived from the Deposit Insurance Fund or, only when appropriate, the FSLIC Resolution Fund." Pub. L. No. 115-141, 132 Stat. at 566. *See also, e.g.,* Financial Services and General Government Appropriations Act, 2009, Pub. L. No. 111-8, div. D, title V, 123 Stat. 630, 658 (Mar. 11, 2009); Pub. L. No. 108-447, 118 Stat. at 3332–33.

It is a well-established principle that, where general and specific appropriations are both available for a given expenditure, the agency must use the specific appropriation for that expenditure to the exclusion of the more general appropriation. B-318426, Nov. 2, 2009. If the funds appropriated in the more specific appropriation become insufficient to cover the agency's needs, the agency is not then permitted to begin charging the general appropriation for that purpose unless Congress has specifically authorized it to do so. *See, e.g.,* B-272191, Nov. 4, 1997. In this case, the FDIC OIG has received a specific annual appropriation every fiscal year since FY 1998 to provide for its necessary expenses and expected a specific appropriation for FY 2019. For example, the House of Representatives passed bills including an annual appropriation for FDIC OIG for fiscal year 2019 during the course of the lapse in appropriations. *See, e.g.*, H.R. 21, 116th Cong. (2019); H.R. 264 116th Cong. (2019). No language within FDIC OIG's annual appropriations since FY 1998, including the most recent FY 2019 appropriation, or the DIF organic legislation authorizes FDIC OIG to obligate funds against both the annual appropriation and FDIC's general DIF authority.

FDIC OIG asserts, however, that during a lapse, FDIC's general authority to obligate amounts from the DIF becomes available for the necessary expenses of OIG. FDIC OIG 2017 Memo, at 5. We disagree. Under these particular facts and circumstances, it is clear that Congress did not intend the result that FDIC OIG suggests. As noted previously, there has been no language in FDIC OIG's annual appropriations or the DIF organic legislation that supports FDIC OIG's assertion. Under long-standing practice, Congress has provided FDIC OIG with a separate appropriation. Consistent with that practice, Congress was considering but had not yet enacted such an appropriation for FY 2019. Consequently, during a lapse in appropriations, FDIC's general authority to incur obligations against the DIF remains unavailable to FDIC OIG, just as such authority has been unavailable to FDIC OIG in every fiscal year since FY 1998.[5] This conclusion is consistent with FDIC OIG's prior, historical practice of conducting an orderly shutdown during a lapse in appropriations. FDIC OIG 2017 Memo, at 5.

Based on the foregoing, we conclude that FDIC's general authority to incur obligations against the DIF was not available to FDIC OIG during the lapse in appropriations. Consequently, FDIC OIG violated the purpose statute when it relied on FDIC's general authority and incurred obligations against the DIF to continue operating during the lapse in its appropriations.

Application of the Antideficiency Act

The Antideficiency Act prohibits agencies from obligating or expending in excess or in advance of an available appropriation unless otherwise authorized by law. 31 U.S.C. § 1341(a); B-330720, Feb. 6, 2019. Accordingly, lapses in appropriations raise issues under the Antideficiency Act with regard to whether an agency can continue operations for a given program. B-330720, Feb. 6, 2019. Certain agencies and programs may continue to operate during a lapse in appropriations without implicating the Antideficiency Act if the agency or program has otherwise available budget authority. The Act is not implicated where an agency permissibly obligated available budget authority, even if other agencies or programs within an agency are concurrently experiencing a lapse in its appropriations. *Id.*

In this case, FDIC OIG violated the purpose statute when it obligated DIF funds to continue its operations during the lapse in its appropriations. As the DIF was not available to the FDIC OIG during the lapse in its appropriations, FDIC OIG could incur obligations only if it properly relied upon an exception to the Antideficiency Act. If FDIC OIG did not properly rely on such an exception, then it violated the Antideficiency Act. The FDIC OIG did not indicate that such an exception applied and we are not aware of any available exception. Therefore, as required by law, FDIC OIG should report the Antideficiency Act violations that it incurred. 31 U.S.C. § 1351.

CONCLUSION

FDIC OIG violated the purpose statute when it obligated funds from the DIF while it was subject to a lapse in its appropriations. Congress for over 20 years has made

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[5] This conclusion applies notwithstanding FDIC's status as a government corporation and the non-appropriated nature of the DIF funds. *See,* 23 Comp. Gen. 83 (1943); B-20892, Dec. 11, 1941; B-214157-O.M., Apr. 2, 1984 (amounts FDIC receives from assessments on insured depository institutions are not appropriated funds). We have previously concluded that appropriations law rules and principles apply to corporate entities generally, even where one of the accounts at issue is considered non-appropriated. B-142011, June 19, 1969.

an appropriation specifically for the operation of FDIC OIG, and an appropriation for FY 2019 was pending at the time of this lapse. Where this specific appropriation was not available due to a temporary, widespread lapse in appropriations, FDIC OIG could not elect to instead record obligations to the DIF. These obligations also violated the Antideficiency Act and FDIC OIG should report the violations as required by 31 U.S.C. § 1351.

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