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Description of document: Federal Deposit Insurance Corporation (FDIC) Memos Regarding FDIC Operating Status During a Lapse in Appropriations 2017-2020

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FOIA/Privacy Act Group, Legal Division
550 17th Street, NW
Washington, DC 20429-9990
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Federal Deposit Insurance Corporation

550 17th Street, NW, Washington, DC 20429-9990

Legal Division

August 11, 2021

RE: FDIC FOIA Log Number 21-0001-REF

Reference is made to your Freedom of Information Act (FOIA) request submitted to the National Labor Relations Board (NLRB), in which you requested “each email in the account of Alice B. Stock that contains the word ROBB [and] . . . each email in the email account of Peter B. Robb that contains the word STOCK, during the time period January 10 to January 21, 2021, based on an electronic search.”

Following its records search, the NLRB located records (totaling 31 pages) that originated with the FDIC. The NLRB referred these records to the FDIC for our disclosure review and direct response to you.

We have completed our review of the records that were referred to the FDIC, and have determined that some information may be disclosed to you, but that some information is exempt from disclosure pursuant to FOIA Exemption 6, 5 U.S.C. §552(b)(6). I have enclosed a copy of the redacted version of these records. Exemption 6 permits the withholding of files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as personnel and medical files.

You may contact me at 703-562-2067, or our FOIA Public Liaison, FDIC Ombudsman M. Anthony Lowe, by email at MLowe@fdic.gov or telephone at 312-382-7552, for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the FDIC’s General Counsel. Your appeal must be postmarked or electronically transmitted within 90 days of the date of the response to your request. Your appeal should be addressed to the FOIA/PA Group, Legal Division, FDIC, 550 17th Street, NW, Washington, D.C. 20429. Please refer to the log number and include any additional information that you would like the General Counsel to consider.

Sincerely,

Natasha Smith
Government Information Specialist
FOIA/Privacy Act Group

Enclosures



March 13, 2020

The Honorable Gene Dodaro
Comptroller General
Government Accountability Office
441 G Street, NW
Washington, D.C. 20548

Dear Mr. Dodaro:

In an opinion dated October 8, 2019, GAO alleged that the Federal Deposit Insurance Corporation (FDIC) Office of Inspector General (OIG) violated the Antideficiency Act (ADA) (31 U.S.C. § 1341) when it incurred obligations from the Deposit Insurance Fund (DIF) pursuant to the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. § 1821, during a lapse in appropriations.

The Offices of General Counsel for the FDIC OIG and the Office of Management and Budget (OMB) have thoroughly examined the matter and determined that the FDIC OIG did not violate the ADA. In 2017, the FDIC OIG General Counsel determined that the FDIC had statutory authority under the FDI Act to fund its operations from the DIF in the absence of a more specific appropriation. The Office of Management and Budget concurred with our view. Accordingly, during a lapse in appropriations beginning December 22, 2018, the FDIC OIG continued normal operations pursuant to this legal authority, as did all other components of the FDIC.

In a letter to GAO dated September 19, 2019, the FDIC OIG further articulated the legal basis for this determination. After reviewing the GAO opinion, the FDIC OIG General Counsel has concluded that the GAO opinion is flawed in its legal reasoning, deficient in its analysis, and incorrect in its conclusion, and that the FDIC OIG did not violate the ADA. The analysis from the FDIC OIG General Counsel is attached.

Identical reports are being submitted to the President of the United States, the President of the Senate, and the Speaker of the House of Representatives.

Respectfully,

Jay N. Lerner
Inspector General

Enclosure

(b)(6)



DATE: March 12, 2020

MEMORANDUM TO: Jay N. Lerner
Inspector General

(b)(6)

FROM: Michael T. McCarthy
General Counsel

SUBJECT: GAO Opinion Regarding FDIC OIG Appropriations

Summary

In a legal opinion issued on December 8, 2017, the Federal Deposit Insurance Corporation (FDIC), Office of Inspector General (OIG), Office of General Counsel (OGC) determined that the FDIC OIG has authority to spend funds and continue operations in the absence of appropriations. This determination was based upon another legal spending authority, the Federal Deposit Insurance Act (FDI Act), which authorizes the FDIC to fund its operations from the Deposit Insurance Fund (DIF) without further appropriation. This was precisely the same legal authority used to fund the FDIC OIG for eight years (1989 to 1997, during which time Congress had not enacted appropriations language related to the OIG); the relevant authority has not been modified or amended since that time. The Office of Management and Budget (OMB) Office of General Counsel (OGC) concurred with this determination. In addition, the FDIC OIG OGC had consulted with the Managing Associate General Counsel at the Government Accountability Office (GAO), who raised no objections or concerns about the determination or analysis.

Accordingly, during a lapse in appropriations from December 22, 2018 to January 25, 2019, the FDIC OIG continued regular operations in the same manner as all other components of the FDIC, pursuant to the legal authority of the FDI Act.

In an opinion dated October 8, 2019, the GAO General Counsel alleged that the FDIC OIG's use of the DIF during the lapse in appropriations violated the Purpose Act, 31 U.S.C. § 1301(a), and therefore violated the Antideficiency Act, 31 U.S.C. § 1341(a) (ADA). GAO concurred with the FDIC OIG's determination that the text of the FDI Act authorizes the use of the DIF to fund OIG operations. However, in a confusing and muddled opinion, GAO then opined that the FDIC OIG could not use this authority.

We have thoroughly reviewed the GAO opinion and have concluded that it is flawed in its legal reasoning, deficient in its analysis, and erroneous in its conclusion. The FDIC OIG did not violate the Purpose Act or the ADA. OMB OGC concurs in our views.

As detailed below in this Memorandum, the GAO opinion misinterpreted the law by ignoring key legal issues and disregarding the legal analysis provided by the FDIC OIG OGC. GAO had previously acknowledged that it had no authority to review the unique corporate non-appropriated funding authorities that Congress provided to the FDIC. Nevertheless, the GAO opinion mistakenly applied its own non-statutory rules regarding appropriations to the FDIC OIG, a component of a non-appropriated agency. The GAO opinion compounded these errors by adopting an inaccurate view that the statute establishing the FDIC as an independent corporation with funding autonomy had been implicitly

repealed (in part) by a bill that Congress had not even enacted. The GAO's conclusion appears to call into question the organic authority of the FDIC to independently allocate funds from the DIF to one of its components, and the GAO opinion does not provide a basis for doing so, and does not even attempt to reconcile the law.

After introducing these legal errors, the GAO opinion incorrectly asserted that an appropriation for the FDIC OIG was simultaneously "available" and "not available" during the government shutdown. The GAO opinion did not attempt to reconcile this obvious inconsistency and impossibility. The GAO opinion further disregarded the authorities granted under the FDI Act and the Inspector General Act, as well as ignored the Supreme Court precedent applying canons of statutory interpretation, GAO's own prior opinions, and Congressional intent.

The erroneous GAO opinion may be the result of the inadequacies in GAO's processes for issuing such opinions, and its failure to follow its own inadequate policies in reaching its decision regarding the FDIC OIG. The legal and logical errors in the GAO opinion, along with irregularities in GAO's process for issuing opinions, raise questions about GAO's fairness, credibility, and reliability.

Analysis

After reviewing the GAO opinion, we conclude that it is flawed in its legal reasoning, deficient in its analysis, and erroneous in its conclusion, and therefore, the FDIC OIG did not violate the Purpose Act or the ADA. We did not identify any errors in the conclusion that the FDIC has authority to spend its corporate funds to continue OIG operations in the absence of appropriations language to the contrary. As we had previously determined, the Federal Deposit Insurance Act (FDI Act) authorizes the FDIC to fund all of its operations from the Deposit Insurance Fund (DIF) without further appropriation. The GAO opinion that this funding mechanism is unavailable to the FDIC OIG is substantively incorrect, and its conclusions failed to consider and incorporate the legal materials and support provided by the FDIC OIG OGC.

I. The GAO conclusion is a reversal of GAO's prior position and is at odds with the consensus of legal experts.

In 2015 and again in 2017, the FDIC OIG OGC determined that the FDI Act authorized the funding of OIG operations from the DIF, in the absence of any specific appropriations restrictions. This determination was based on a review of the relevant statutory provisions, as well as GAO precedents stating that the FDI Act funding for the FDIC was not an appropriation and that FDIC spending from the DIF was exempt from various appropriations requirements. The Office of Management and Budget, Office of General Counsel, concurred with this determination. The FDIC OIG also discussed the determination with the Office of Legal Counsel (OLC) at the Department of Justice, which presented no objections to the analysis.

Prior to issuing its legal opinion, in December 2017, FDIC OIG OGC discussed its determination with the Managing Associate General Counsel at GAO. GAO raised no objections to the FDIC OIG OGC analysis which was based on GAO's prior decisions. If GAO had raised concerns or had indicated that its prior decisions were unreliable, FDIC OIG would have taken a different course of action. Due to the consensus among OMB, OLC, and GAO, the FDIC OIG published on its website its shutdown plan indicating that it would continue operations during any lapse in appropriations based on the legal

funding authority of the FDI Act. At no time prior to the issuance of the GAO opinion (October 2019) did anyone express disagreement with the analysis.

Ignoring its previous decisions, the GAO opinion reversed course after the government shutdown and issued an opinion that the FDIC OIG was prohibited from using the funding authority in the FDI Act without an additional appropriation. According to GAO, only the FDIC OIG would be required to shut down, while the rest of the FDIC continued to operate. As discussed below, this reversal by GAO is illogical and at odds with legal doctrine and principles and the consensus view of other legal experts.

II. The GAO opinion is legally incorrect.

The FDI Act provides the FDIC with permanent indefinite budget authority to fund all FDIC operations, including the FDIC OIG, from the DIF without appropriation or apportionment.¹ The Inspector General Act of 1978, as amended, (IG Act) created an Office of Inspector General within the FDIC subject to the general supervision of the Chairman of the Board of Directors.² The GAO opinion agrees that OIG operating expenses are “necessary expenses” of the FDIC, and therefore the permanent indefinite budget authority provided by the FDI Act is available to fund the operations of the FDIC OIG as a component of the FDIC.

Based on the text of the FDI Act and the IG Act, GAO’s analysis should have ended there.

However, GAO has admitted that it is not an independent arbiter and that it perceives its role as “ensuring respect for and allegiance to Congress’ constitutional power of the purse.”³ The remainder of GAO’s opinion appears to be an attempt to manufacture an infringement of that power, overlooking the straightforward legal analysis. To do so, the GAO opinion neglected to consider:

- That Congress enacted a statute establishing the FDIC as an independent, non-appropriated corporation;
- Its own prior GAO decisions recognizing FDIC’s independence;
- The plain language of the statute that GAO purports to apply;
- Canons of statutory construction and Supreme Court precedent;
- Its own prior opinions on appropriations law; and
- Congressional intent.

Even after disregarding the law, GAO can still only allege a violation by illogically stating that an appropriation for the FDIC OIG is simultaneously “available” and “not available” during a lapse.

A. GAO ignored the FDIC’s statutory independence and non-appropriated status.

The FDI Act creates the DIF and grants the FDIC a broad authority to use the DIF to carry out its purpose of providing insurance with respect to insured depository institutions.⁴ The DIF is funded by assessments against insured depository institutions by the FDIC and income earned on investments in

¹ 12 U.S.C. §1820(a); 12 U.S.C. § 1819; 12 U.S.C. § 1817(d)

² 5 U.S.C. App. §§ 2, 8C, 12(2).

³ Principles of Appropriations Law, Vol. I, p.1-16 (2016) (GAO is an “agent of Congress”); B-331564 (Jan. 16, 2020).

⁴ 12 U.S.C. § 1821(a)(4).

government securities, not appropriations.⁵ The FDIC is authorized to spend funds held in the DIF without further authorization from Congress and the President.⁶ These statutory provisions in the FDI Act provide permanent indefinite budget authority to fund the operations of the FDIC from the DIF, including the FDIC OIG.

These statutory provisions provide the FDIC with independence from the annual appropriations cycle, precisely to ensure that the FDIC can pursue its mission – to maintain stability and public confidence in the nation's financial system – without interruption. GAO had acknowledged as much in its prior opinions, stating that GAO lacked authority to review FDIC expenditures, because Congress had granted it a “considerable amount of autonomy.”⁷ GAO had also previously opined that FDIC funds are not an appropriation,⁸ and that FDIC has statutory authority to determine the character and necessity of its expenditures without regard to limitations on appropriations.

In purporting to limit the FDIC's autonomy under the FDI Act, the GAO opinion ignored the text and legislative history of the FDI Act and its own prior legal opinions. The GAO opinion attempts to incorrectly subject the FDIC's independence to rules that the GAO itself created without legal basis.

The GAO opinion also disregards the history of FDIC funding its OIG without further appropriation. It is undisputed that the FDI Act provided funding authority for the FDIC OIG for eight years, from 1989 to 1997, other years in which Congress did not enact an appropriation for the OIG. The relevant authorities in the FDI Act and the IG Act have not expired or been modified since that time. GAO does not even attempt to explain how or why the absence of appropriations during a government-wide shutdown differs from the previous time periods when Congress similarly had not enacted an appropriation for the OIG.

B. The restrictions that the GAO opinion purported to impose are not grounded in the language of the Purpose Act.

After ignoring the unique independent funding authority of the FDI Act and its own precedents, the GAO opinion goes on to apply an appropriations statute, the Purpose Act, 31 U.S.C. § 1301(a), which provides that: “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” Simply applying the plain text of the statute, the undisputed finding that OIG expenses are a proper and necessary object of the FDI Act funding authority should end the inquiry.

However, the GAO opinion then supplemented the plain text of the statute with its own additional “test” that it created – that the expenditure must not fall within the scope of another available appropriation or funding source. This requirement is not grounded in the text of the statute.

⁵ 12 U.S.C. § 1821(a)(4)

⁶ 12 U.S.C. § 1820(a) (the FDIC Board of Directors “shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid”); 12 U.S.C. § 1819 (FDIC “shall have power ... [t]o exercise by its Board of Directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this chapter, and such incidental powers as shall be necessary to carry out the powers so granted”); 12 U.S.C. § 1817(d) (assessments and other amounts received “shall not be subject to apportionment for the purposes of chapter 15 of title 31 or under any other authority”).

⁷ B-210496 (Feb. 1, 1983) (GAO has no authority to adjust and settle the accounts of the FDIC)

⁸ B-36005 (Aug. 4, 1943)

C. The GAO opinion misapplied and disregarded canons of statutory construction and Supreme Court precedent.

The GAO opinion appears to be based on a view that, during the lapse, the current, valid permanent FDI Act funding authority was superseded by an appropriations bill that Congress was considering, but had not enacted. According to GAO, the authority of the FDI Act for FDIC OIG operations was implicitly repealed by legislative history. The GAO opinion did not reference or cite to any statutes or caselaw precedent to support this proposition, nor did it provide any legal analysis or reasoning to reach such a conclusion.

The Supreme Court has ruled directly contrary to GAO's erroneous proposition. In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Court held that the allocation of funds from a lump-sum appropriation was committed to agency discretion, in the absence of more specific direction in the statute itself. The Court was clear that specific limitations on general funding are only legally binding if they appear in the enacted statute, and that specific direction in the legislative history does not limit the agency's discretion to spend its general funding on permissible statutory objectives. In contrast, the GAO opinion strained to rely upon a *pending* appropriation, rather than the *enactment* of an actual appropriation, in order to restrict the permanent general funding authority.

While the GAO opinion fails to state its rationale for why a pending bill would restrict the enacted FDI Act authority, it seems as if GAO considered the enactment of an annual appropriation in prior years to be an implicit repeal of the permanent FDIC spending authority in relation to the OIG. Such a conclusion is also erroneous based on Supreme Court and GAO precedent.

Repeals by implication are strongly disfavored.⁹ As GAO has previously held:

We do not presume that the Congress intends to repeal existing law in the absence of expressed intent to do so. Thus, to the greatest extent possible, provisions of an appropriation act should be read in concert with the provisions of a related authorization act.¹⁰

We have not identified any expression of Congressional intent that the annual OIG appropriation repealed the permanent funding provisions of the FDI Act. And the GAO opinion provided no citation, reference, or analysis to support such a conclusion.

Based upon prior precedent, Congress certainly knows how to amend an authorizing statute in order to condition the funding on appropriations -- but has never done so for the FDIC or the FDIC OIG. For example, when Congress first enacted an appropriation for the United States Postal Service (USPS) OIG, Congress also amended the statutory authority of the USPS to spend from the Postal Service Fund so that all spending on the USPS OIG was subject to appropriations. But over the years, Congress has declined to amend the statutory spending authority of the FDIC to subject OIG operations solely to the appropriations process. This is a key distinction. GAO should be well aware of this distinction, since it has issued two opinions interpreting the funding mechanism for USPS OIG, and FDIC OIG OGC cited these opinions in our submissions to GAO (September 2019). Yet the current GAO opinion on the FDIC OIG does not even acknowledge its prior opinions on this matter, and reaches a conclusion that reads

⁹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978); B-307720, Sept. 27, 2007; B-303268, Jan. 3, 2005.

¹⁰ B-226389, Nov. 14, 1988; B-193282, Dec. 21, 1978." B-328237, Dec. 15, 2016.

into the statute a provision that simply does not exist – as if Congress amended the FDI Act to make OIG funding subject to appropriations. This is not the case.

D. The GAO opinion disregards Congressional intent.

The GAO opinion also asserted that Congress intended to shut down the operations of the FDIC OIG through the appropriations process, while all other components of the FDIC continued to operate and stayed open. The GAO opinion provides no support or evidence for this conclusion, and it is directly opposite of the GAO's contrary conclusion on Congressional intent in a prior opinion for another OIG. In an opinion regarding an appropriation for the OIG at the Commodity Futures Trading Commission (CFTC), GAO found that Congressional intent in enacting an OIG appropriation was for a "protective purpose" to ensure that OIG operations would be funded on the same basis as the parent agency.

Yet in considering the FDIC, GAO reversed course without any explanation and asserted that the Congressional purpose of a proposed separate appropriation for the FDIC OIG was to restrict OIG operations and to prohibit the FDIC from funding its OIG. GAO did not consider that Congress has repeatedly stated in report language that the purpose of a separate FDIC OIG appropriation is to "protect the independence" of the OIG, and that Congress has legislated in recent years to protect OIG budgets against cuts from agency management.

Both statutory text and legislative history indicate that the intent of Congress regarding Inspectors General is clearly to support their independence and ensure the sufficiency of their funding, not constrain access to budgetary resources. The Inspector General Reform Act of 2008 added provisions to the IG Act that require Inspectors General to develop and submit their own budget requests, for the President to transmit OIG budget requests to Congress as part of the President's budget submission, and for the President's budget submission to include comments from an Inspector General if the Inspector General concludes that the President's request would substantially inhibit the Inspector General from performing the duties of the office.¹¹ The Congressional intent of this provision was that "[e]nsuring adequate funding of the Office of the Inspector General in each agency through the current budget process is essential to ensuring the independence of the Inspectors General."¹²

More recently, Congress reemphasized its intent that OIGs have sufficient resources and authorities to conduct timely oversight by enacting the Inspector General Empowerment Act of 2016.¹³ The Act required that OIGs report to Congress "a detailed description of any attempt by the establishment to interfere with the independence of the Office [of Inspector General], including ... with budget constraints designed to limit the capabilities of the Office."¹⁴ Congress' intent, as recently expressed, could not be clearer – elimination or reduction of budget authority for OIGs is a threat to OIG independence and is of immediate concern to Congress.

Ignoring these indicators of Congressional intent, the GAO opinion instead concluded, without any evidence or discussion, that Congress actually wanted the FDIC OIG to shut down and discontinue its oversight operations, even though the parent agency was authorized to continue funding the OIG.

¹¹ Pub. L. No. 110-409 § 8, 122 Stat. 4302, 4313 (Oct. 14, 2008).

¹² S. Rept. 110-262 (Feb. 22, 2008).

¹³ Pub. L. No. 114-317, 130 Stat. 1595 (Dec. 16, 2016).

¹⁴ Pub. L. No. 114-317 § 4(c), 130 Stat. 1595, 1601 (Dec. 16, 2016).

E. The GAO opinion is internally inconsistent.

Ultimately, the conclusion in the GAO opinion rests on an assertion that the FDIC could not fund its OIG under the FDI Act, because a separate appropriation for the OIG was “available.” Yet the GAO opinion subsequently stated in the very same opinion that a separate appropriation for the OIG was “not available.” It is impossible to reconcile these two views, and the GAO opinion does not do so.

The GAO opinion stated 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.” [Emphasis added.] The GAO opinion also stated that during the relevant time period, the FDI Act authority was available, but a “specific [OIG] appropriation was **not available** due to a temporary, widespread lapse.” [Emphasis added.]

Applying GAO’s own stated principle, the general FDI Act appropriation and a specific appropriation for the FDIC OIG were not “both available” during the lapse in appropriations. Only the general authority – the FDI Act authority – was available at that time. Therefore, use of the FDI Act authority for OIG expenditures would be permitted, because the expenditures did not fall within the scope of another available appropriation.

Yet GAO inexplicably held that the expired specific appropriation prohibited the use of the permanent general appropriation. GAO’s opinion seems to rely on an incoherent view that during a lapse in appropriations, a specific appropriation for FDIC OIG is simultaneously both unavailable and available – unavailable because no specific appropriation had been enacted, but available to preclude use of the general FDIC authority. In reality, a specific appropriation is either available or unavailable at any given time, and GAO’s attempt to have it both ways undermines the logical validity of its opinion.

III. GAO opinions and its processes have proven to be flawed.

GAO’s procedures for issuing opinions do not require GAO to obtain input or comment from the agency and do not provide for any appeal or independent review. This lack of due process, GAO’s conduct in issuing the current opinion, and irregularities in other recent opinions call into question GAO’s fairness, credibility and reliability.

As previously discussed, the GAO opinion was a reversal from its prior views and published opinions. Indeed, in 2017, FDIC OIG OGC discussed its conclusions with a senior GAO attorney (Managing Associate General Counsel), who expressed no concerns or objections with our legal analysis.

In January 2019, during the ongoing government shutdown, FDIC OIG OGC again had another discussion with two GAO attorneys. Since this discussion occurred when the lapse in appropriations was ongoing, FDIC OIG counsel asked whether it was the view of the GAO attorneys that FDIC OIG should discontinue its operations during the government shutdown. Both GAO attorneys clearly and definitively stated that they were not advising FDIC OIG to implement a shutdown.

During this discussion in January 2019, GAO said that it was reviewing FDIC OIG operations during the shutdown, and that GAO would issue a letter to the FDIC OIG within approximately two weeks (by mid-February 2019) specifying the scope of the review and providing specific questions for FDIC OIG to address. In March 2019, FDIC OIG counsel again contacted a GAO attorney to check on the status of the matter, because the FDIC OIG OGC had not yet received a letter or questions from GAO soliciting the

agency's views, as GAO had previously represented. The GAO attorney stated that the FDIC OIG project was on hold, and that GAO would contact FDIC OIG when it became active again. FDIC OIG received no further communications from GAO until September 2019.

On September 4, 2019, a GAO attorney contacted the FDIC OIG and stated that GAO would be issuing a legal opinion about the FDIC OIG the next day. FDIC OIG counsel immediately contacted the GAO attorney to ask why GAO had never communicated any questions to the FDIC OIG or afforded the FDIC OIG an opportunity to submit agency views. The GAO attorney stated that GAO had changed its mind, breached its prior representations without informing the FDIC OIG, and decided not to issue a letter or questions soliciting the agency's views.

On September 5, 2019, FDIC OIG OGC and GAO attorneys held a conference call to discuss the pending GAO decision and FDIC OIG's concerns about GAO's process. On that day, FDIC OIG OGC learned that the GAO attorney with whom FDIC OIG had previously spoken in January and March 2019, was no longer assigned to the matter, and that the GAO opinion was being prepared by a different attorney who had no contact or communications with the FDIC OIG OGC. The FDIC OIG OGC stated that it had not been afforded an opportunity to submit the views of the agency, in accordance with GAO's usual processes, and the GAO attorneys agreed to provide the FDIC OIG with two weeks to submit the agency's views.

In its *Procedures and Practices for Legal Decisions and Opinions* (September 2006), the GAO clearly states that it "strives to produce thorough, well-researched, and well-reasoned decisions and opinions, informed by agency explanation of pertinent facts and its views on the law." To become informed, GAO "typically solicits agency views of the facts and the law through development letters. ... Either on its own initiative or at the request of the requestor(s) or other interested person(s) or entity(ies), whether governmental or not, OGC may hold informal meetings or conferences to discuss and clarify the facts and issues presented by a request." Unfortunately, the GAO did not follow these procedures in the present matter.

In preparing its decision on the FDIC OIG, GAO took a different approach. GAO attorneys were adamant that all of the procedures that it specified were "optional," so that it could pick and choose which of them to apply in any given case. After the FDIC OIG presented his concerns with this position directly to the Comptroller General, GAO attorneys relented. On September 23, 2019, GAO held an informal meeting with FDIC OIG attorneys. However, the GAO attorneys simply listened passively and did not engage in any discussion or dialogue of the underlying legal and factual issues. GAO stated that even this meeting to listen to the views of the agency was unprecedented. And GAO repeatedly stated that it would not provide the FDIC OIG with any advanced notice of its conclusions or an opportunity to review, respond, or provide further comments.

The regrettable result was that the GAO opinion contained legal and logical errors, as detailed above.¹⁵ There is no indication in the GAO opinion that GAO even considered the legal arguments that the FDIC OIG OGC presented in detail in its written submission, which is attached.

¹⁵ GAO's irregularities in issuing opinions do not appear to be isolated to the FDIC OIG. Recently, GAO issued an erroneous decision that incorrectly applied appropriations law to prohibit employee transit benefits for GAO employees – and subsequently, it was forced to withdraw the opinion. Although the GAO General Counsel asserted that his rulings were unreviewable and unappealable, GAO's Personnel Appeals Board rejected that proposition and found that GAO had committed an Unfair Labor Practice in its misapplication of appropriations

Conclusion

FDIC OIG OGC concludes that the GAO opinion is flawed in its legal reasoning, deficient in its analysis, and erroneous in its conclusion, and that the FDIC OIG did not violate the Purpose Act or the ADA. We did not identify any errors in our original conclusion that the FDIC has authority to spend its corporate funds to continue OIG operations in the absence of appropriations language to the contrary. As we had previously determined, the FDI Act authorizes the FDIC to fund all of its operations from the DIF without further appropriation. The GAO opinion that this funding mechanism is unavailable to the FDIC OIG is incorrect, and its conclusions failed to consider and incorporate the legal materials and support provided by the FDIC OIG OGC.

law. The Board imposed sanctions on GAO for its “blatant disregard for the statutory scheme established by Congress.”



September 19, 2019

Shirley Jones, Esq.
Managing Associate General Counsel
U.S. Government Accountability Office
441 G St., NW
Washington, DC 20548

Re: Federal Deposit Insurance Corporation Office of Inspector General

Dear Ms. Jones:

The Federal Deposit Insurance Corporation, Office of Inspector General (FDIC OIG) is submitting additional support for our legal analysis and conclusion that the FDIC OIG's continued operations during a lapse in appropriations between December 22, 2018 and January 25, 2019 did not violate the Antideficiency Act, 31 U.S.C. § 1341(a). In response to a request from Government Accountability Office (GAO) auditors during their routine audit of the FDIC's financial statement, we provided GAO with our summary analysis of this issue dated December 8, 2017. This memorandum, which continues to represent the views of the FDIC OIG, is included as Attachment A. To supplement the record for GAO's consideration of this matter, in addition to the legal authorities cited in the original memorandum, we have identified additional authorities, including GAO appropriations law decisions and other statutes that support our analysis and conclusions.

Executive Summary

The Federal Deposit Insurance Act (FDI Act) provides the FDIC, including the FDIC OIG, with permanent indefinite budget authority to fund all FDIC operations from the Deposit Insurance Fund (DIF) without appropriation or apportionment. Since fiscal year 1998, Congress has enacted annual appropriations that specify an amount for the FDIC to allocate to the FDIC OIG from the DIF for a particular fiscal year. Under Supreme Court and GAO precedent, these authorities are read together, with the DIF providing a permanent budget authority and the appropriation providing a condition for a particular year. Because Congress has never amended or repealed the FDI Act authority, and the FDIC OIG is a component of the FDIC, the DIF remains available to fund the FDIC OIG in the absence of any appropriations conditions for a particular time period. Therefore, a lapse in annual appropriations does not prohibit the FDIC from funding the FDIC OIG pursuant to the FDI Act budget authority, and doing so did not violate the Antideficiency Act.

A GAO appropriations decision regarding funding for the United States Postal Service Office of Inspector General (USPS OIG) supports this legal conclusion, as does Congressional enactment in 2010 of additional non-appropriated budget authority for certain FDIC OIG operations. Congressional practice further establishes that separate appropriations are not an exclusive or required source of funding for OIGs. The FDIC OIG legal conclusion, while grounded in the statutes, is also consistent with clear Congressional intent that OIGs receive sufficient funding to oversee the operations of their agencies.

The Federal Deposit Insurance Act Provides the FDIC, Including the FDIC OIG, With Permanent Indefinite Budget Authority.

The Federal Deposit Insurance Act creates the Deposit Insurance Fund and grants the FDIC a broad authority to use the DIF to carry out its corporate purpose of providing insurance with respect to insured depository institutions.¹ 12 U.S.C. § 1821(a)(4). The DIF is funded by assessments against insured depository institutions by the FDIC and income earned on investments in government securities, not appropriations. 12 U.S.C. § 1821(a)(4). The FDIC is authorized to spend funds held in the DIF without further authorization from Congress and the President. 12 U.S.C. § 1820(a) (the FDIC Board of Directors “shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid”); 12 U.S.C. § 1819 (FDIC “shall have power ... [t]o exercise by its Board of Directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this chapter, and such incidental powers as shall be necessary to carry out the powers so granted”); 12 U.S.C. § 1817(d) (assessments and other amounts received “shall not be subject to apportionment for the purposes of chapter 15 of title 31 or under any other authority”). These statutory provisions in the FDI Act provide permanent indefinite budget authority to fund the operations of the FDIC from the DIF, including the FDIC OIG.

The Inspector General Act of 1978, as amended, (IG Act) created an Office of Inspector General within the FDIC subject to the general supervision of the Chairman of the Board of Directors. 5 U.S.C. App. §§ 2, 8C, 12(2). Section 8C of the IG Act provides that the FDIC OIG “may select, appoint, and employ such officers and employees as may be necessary ... subject to the applicable laws and regulations that govern such selections, appointments, and employment ... within the Federal Deposit Insurance Corporation.” 5 U.S.C. App. § 8C. Accordingly, the FDIC OIG employs personnel under the statutory authority of the FDI Act for the FDIC Board of Directors to appoint officers and employees and fix their compensation and to pay all expenses of the Corporation, including employee salaries, from the DIF. As GAO has held in an appropriations decision, OIGs created by the IG Act are “clearly” a component of the agency, “albeit with significant independence.” B-317022, Sept. 25, 2008. Therefore, the permanent indefinite budget authority provided by the FDI Act is available to fund the operations of the FDIC OIG, as a component of the Corporation.

From its establishment in 1989 until fiscal year 1998, the FDIC OIG received its funding exclusively pursuant to the permanent indefinite budget authority of the FDI Act, because Congress never enacted any appropriations related to the FDIC or the FDIC OIG during that time. During that time, FDIC allotted funding from the DIF to the FDIC OIG, pursuant to the FDI Act authority for the FDIC to fund all FDIC operations.

Annual Appropriations Have Set Conditions on Funding for the FDIC OIG on a Year-by-Year Basis, But Do Not Repeal or Replace the FDIC’s Permanent Indefinite Budget Authority.

Beginning in fiscal year 1998, for the stated purpose of ensuring that OIGs would have sufficient resources from their agency budgets to accomplish their mission, Congress expanded a

¹ The predecessors to the DIF were the Bank Insurance Fund and the Savings Association Insurance Fund, which were merged into the DIF in 2006. Because the FDI Act budget authorities applicable to all these funds have been consistent, this memo refers to the DIF throughout for the sake of simplicity.

practice of setting funding levels for OIGs in annual appropriations and first enacted an appropriation for the FDIC OIG. *Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998*, Pub. L. No. 105-65, 111 Stat. 1344, 1375 (Oct. 27, 1997); S. Rept. 105-53 (July 17, 1997); H. Rept. 105-175 (July 11, 1997). Because these were annual appropriations, they specified the amount to be provided for a particular fiscal year, and had no effect beyond that fiscal year. For the FDIC OIG, rather than providing funding directly, the appropriation has specified the amount for OIG operations to be derived from the DIF. Under this practice, Congress has annually fixed an amount that the FDIC must allot to the FDIC OIG from the DIF for a particular fiscal year. However, Congress has never amended or repealed the provisions of the FDI Act granting the FDIC permanent indefinite budget authority to fund all operations of the FDIC.

Accordingly, funding for the FDIC OIG is governed by two independent legal funding authorities: the permanent indefinite budget authority of the FDI Act to fund all FDIC operations from the DIF, and an appropriation from the DIF for the FDIC OIG for a particular fiscal year. To understand how these two sources of funding authority interact, we look to two canons of statutory construction that GAO has consistently cited in its appropriations decisions: statutes should be read in harmony, and repeals by implication are disfavored. *Morton v. Mancari*, 417 U.S. 535, 537 (1974).

Earlier this year, GAO held that “[i]t is our duty to construe statutes harmoniously.” B-330935, May 10, 2019; *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). “When two laws appear to potentially conflict, the Supreme Court strives to harmonize the laws to give the maximum possible effect to both. ... We do not presume that the Congress intends to repeal existing law in the absence of expressed intent to do so. Thus, to the greatest extent possible, provisions of an appropriation act should be read in concert with the provisions of a related authorization act. B-226389, Nov. 14, 1988; B-193282, Dec. 21, 1978.” B-328237, Dec. 15, 2016.

In a decision considering the appropriation of funding for the United States Postal Service Office of Inspector General (USPS OIG) from the Postal Service Fund, GAO held that the enactment of an appropriation did not repeal an existing statute exempting USPS from the Antideficiency Act:

Repeals by implication are strongly disfavored. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978); B-307720, Sept. 27, 2007. Such a repeal “will not be presumed unless the legislature’s intention ‘to repeal is clear and manifest.’” *National Ass’n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S. Ct. 2518, 2523 (2007) quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981); B-303268, Jan. 3, 2005. If Congress intended that section 603 of the Postal Accountability and Enhancement Act would repeal 39 U.S.C. § 410 by directly appropriating funds for OIG, it would have said so. Neither in the legislation, nor in the legislative history, does any congressional intent to enact such a repeal exist, let alone be clear and manifest. B-317022, Sept. 25, 2008.

Applying these canons that GAO has repeatedly cited, the two legal funding authorities for the FDIC OIG do not conflict and can be readily construed in harmony. Congress, through annual appropriations for a particular fiscal year, may set additional temporary requirements related to the FDIC OIG on the FDIC’s permanent indefinite budget authority under the FDI Act. In doing so, there is no indication in the legislation or legislative history of any intent, let alone a clear and manifest intent, that Congress sought to permanently repeal the authority in the FDI Act for the FDIC to spend the DIF to fund all operations of the agency.

GAO's Appropriations Decision Regarding Another OIG Supports the FDIC OIG Position That DIF Budget Authority Is Not Subject to Appropriations

As noted above, in 2009, GAO issued a decision regarding newly enacted appropriations provisions for the United States Postal Service Office of Inspector General (USPS OIG). B-317022, Sept. 25, 2008. In addition to deciding that the USPS OIG was a component of USPS and was exempt from the Antideficiency Act, GAO considered the interaction between the statute governing the Postal Service Fund and the enactment of appropriations for the USPS OIG. Prior to the enactment of any appropriations provisions, the USPS OIG had been funded directly by the USPS from the Postal Service Fund, pursuant to a statute making the fund available to pay all expenses of the USPS. 39 U.S.C. § 2003(a). This statute was analogous to the FDI Act, which makes the DIF available to fund all expenses of the FDIC. In 2006, Congress amended the statute governing the Postal Service Fund to add a different provision regarding funding for the USPS OIG, specifying that the fund is available to pay "all expenses" of the USPS OIG "subject to the availability of amounts appropriated," beginning in fiscal year 2009. *Postal Accountability and Enhancement Act*, Pub. L. No. 109-435, § 603(c) (Dec. 20, 2006), *codified at* 39 U.S.C. § 2003(e)(1). The amendment of the Postal Service Fund statute by Congress distinguishes the USPS OIG from the FDIC OIG, since Congress has never amended the FDI Act to condition the FDIC's authority to fund the OIG from the DIF on the availability of appropriations. After Congress amended the statute governing the Postal Service Fund, USPS OIG requested a formal opinion from GAO as to whether USPS could continue to fund USPS OIG from the Postal Service Fund if Congress had not yet enacted an appropriation at the beginning of fiscal year 2009.

Despite Congress' action to amend the Postal Service Fund statute to make USPS OIG funding subject to appropriations effective at the beginning of FY 2009, GAO declined to definitively state that USPS could not continue to fund the USPS OIG in the absence of an enacted appropriation. Rather, GAO stated that the phrase "subject to the availability of amounts appropriated" is "*susceptible* to a construction requiring an enacted appropriation," that the situation "*may* undermine continuing OIG operations," and "*it would appear* that OIG *may* not have any funds." B-317022, Sept. 25, 2008 (emphasis added). GAO urged USPS OIG to seek clarifying language in a continuing resolution to resolve the apparent ambiguity. *Id.* Notably, GAO did not find that the mere enactment – or absence – of an appropriation for the USPS OIG would have any effect on the statutory authority for the USPS OIG to draw funding from the Postal Service Fund. Instead, GAO focused solely on Congress' explicit amendment of the statute governing the Postal Service Fund to make all funding for the USPS OIG subject to appropriation, while otherwise continuing to grant USPS authority to fund all of its other operations from the Postal Service Fund without appropriation. *Id.*

As noted above, the history of the FDIC OIG's funding mechanism is similar to the history of the USPS OIG's funding mechanism, but with one significant and critical distinction – Congress has never amended the FDI Act statute governing the DIF to add a requirement that funding for the FDIC OIG is subject to appropriations. Like the USPS OIG, the OIG derives its funding from an account over which its agency has broad statutory authority to spend without further appropriation. Like the USPS OIG, the FDIC OIG was for several years funded directly by its agency based on that statutory authority, and exempt from the appropriations process. Like the USPS OIG, at a certain time, Congress began a practice of enacting annual appropriations specifying the amount that its agency must allot for the operations of the OIG from the account that the agency controls. However, this is where the similarity ends.

When it began providing annual appropriations for the USPS OIG, Congress also amended the statutory authority of the USPS to spend from the Postal Service Fund so that all spending on the USPS OIG was subject to appropriations. In contrast, Congress has never amended the statutory authority of the FDIC to spend from the DIF to make the funding of FDIC OIG operations subject to appropriations. This is a key distinction. GAO questioned whether USPS may fund the USPS OIG from the Postal Service Fund in the absence of appropriations, because Congress enacted specific language prohibiting it from doing so.

Congress has never enacted language limiting the permanent authority of the FDIC to fund all of its operations, including the FDIC OIG, from the DIF. Therefore, in the absence of any specific appropriation setting a funding level for the FDIC OIG for a particular time period, the FDIC retains its general budget authority to fund FDIC OIG activities at whatever funding level the FDIC considers sufficient to accomplish the missions of the FDIC and FDIC OIG.

The GAO decision on the USPS OIG also considered the issue of augmentation, explaining that augmentation only occurs when an agency obtains funding “without statutory authority,” and importantly, if an appropriation by Congress “limits that agency’s operations to a particular dollar amount.” B-317022, Sept. 25, 2008. Because the amendments to the Postal Service Fund statute required that “all expenses” of the USPS OIG be funded “subject to the availability of amounts appropriated,” GAO held that any supplementation of the USPS OIG’s budget beyond an appropriation would be an impermissible augmentation, because the “all expenses” language precludes any other source of funding for the USPS OIG. *Id.*

GAO’s reasoning supports a conclusion that FDIC funding of the FDIC OIG would not be an augmentation during a lapse in appropriations, because the FDI Act provides other statutory authority, and a lapse in appropriations means, by definition, that Congress has not enacted any appropriation that limits an agency’s operations to a particular dollar amount. In addition, as we will discuss below, Congress does not consider appropriations to be the exclusive source of funding for the FDIC OIG, because it enacted additional statutory authority in 2010 providing another non-appropriated statutory funding mechanism for certain FDIC OIG operations.

Because the text of the authorizing statute for the Postal Service Fund includes language that the USPS OIG is subject to appropriations, while the authorizing statute for the DIF contains no such language, a decision by GAO that the FDIC OIG and USPS OIG are similarly situated would contravene the canon of statutory construction that the words enacted by Congress in statute should be interpreted to be given meaning and not treated as surplusage. Just last year, GAO reiterated this canon in appropriations law decision B-329603:

In analyzing statutory language, we must assume that each word has meaning and that Congress was aware of such meaning when it included each term in the legislation. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995) (noting the Court’s reluctance to treat any statutory language as surplusage); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (citing *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882)); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Disabled in Action v. SEPTA*, 539 F.3d 199, 210 (3rd Cir. 2008). Accordingly, we construe statutes “such that no word is left without operative effect.” *Vargas-Duran*, 356 F.3d at 602. These canons of statutory interpretation are to be applied in conjunction with the longstanding rule that “distinct words have distinct meanings.” *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 358 (2005). B-329603, Apr. 16, 2018.

Based on this authority, an interpretation by GAO that funding from the DIF for FDIC OIG is only available subject to appropriations, even though the FDI Act includes no such language, would necessarily mean that the words "subject to the availability of amounts appropriated" in the statute governing the Postal Service Fund have no meaning and are mere surplusage. Such a construction would contravene Supreme Court precedent, as adopted and cited by GAO in its own appropriations decisions. The interpretation that is consistent with the canons of statutory construction is that spending on the USPS OIG from the Postal Service Fund is subject to appropriations only because Congress enacted language that imposed that requirement. For that language to have any effect and not be mere surplusage, the absence of that language in other statutes, such as the FDI Act, necessarily means that Congress has not imposed such a requirement, and has chosen not to place limits on the permanent indefinite budget authority of the FDI Act.

Congress Has Added Statutory Authorities Other Than Appropriations to Fund FDIC OIG Activities

The fact that Congress has continued to enact legislation providing the FDIC OIG with additional funding mechanisms outside the appropriations process is further indication of Congressional intent that annual appropriations are not the sole or exclusive budget authority for the FDIC OIG.

Even after beginning a regular practice of specifying in annual appropriations an amount that the FDIC is required to make available to the FDIC OIG from the DIF, Congress has enacted an additional non-appropriated statutory budget authority for the FDIC OIG which is analogous to the FDI Act non-appropriated budget authority. In Title II of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, 124 Stat. 1376 (Jul. 21, 2010) (Dodd-Frank Act), Congress provided the FDIC with orderly liquidation authority to operate and liquidate a covered financial company as a receiver. The Dodd-Frank Act establishes an Orderly Liquidation Fund, which "shall be available to the Corporation to carry out the authorities contained in this title, for the cost of actions authorized by this title, including the orderly liquidation of covered financial companies, payment of administrative expenses, the payment of principal and interest by the Corporation on obligations issued under paragraph (5), and the exercise of the authorities of the Corporation under this title." Pub. L. No. 111-203 § 210(n)(1), *codified at* 12 U.S.C. § 5390. The legislation specifies that the Orderly Liquidation Fund is separate from the DIF, and that nothing in the bill shall be construed to affect the FDIC's existing authorities to manage the DIF. Pub. L. No. 111-203 § 210(n)(8), *codified at* 12 U.S.C. § 5390.

Therefore, the Dodd-Frank Act provides the FDIC with legal budget authorities in addition to the budget authorities already existing in the FDI Act. Moreover, the provisions establishing the Orderly Liquidation Fund and authorizing the FDIC to fund certain expenses from it include no language indicating that spending from the fund is subject to appropriations. Other sections of the Dodd-Frank Act provide for authorization of appropriations to carry out other provisions of the Act. Pub. L. No. 111-203 § 1208 (funding for investor advisory committee), § 1208 (grants to establish loan loss reserve funds), §§ 1443(a)(4)(C), 1444 (housing counseling); § 1498 (foreclosure-related legal assistance). The decision by Congress not to make the Orderly Liquidation Fund subject to appropriation reflects its intentions.

Section 211(d) of the Dodd-Frank Act imposes a mandate on the FDIC OIG to “conduct, supervise, and coordinate audits and investigations of the liquidation of any covered financial company by the Corporation as receiver under this title.” Pub. L. No. 111-203 § 211(d), *codified at* 12 U.S.C. 5391(d). The actions required of the FDIC OIG are extensive, including collecting and summarizing the actions taken by the Corporation as receiver and describing all material transactions of the receivership; evaluating the adequacy of FDIC receivership policies, liquidation plans, utilization of the private sector, and conflict-of-interest reviews; and evaluating overall performance of the FDIC including administrative costs, timeliness of liquidation process, and impact on the financial system. *Id.* The FDIC OIG is required to complete all of this work within six months of the appointment of the FDIC as receiver. *Id.* So that the FDIC OIG might accomplish this, Section 211(d) provides funding authority. Specifically, the FDIC is to initially fund the OIG’s work as an administrative expense of the receivership. Pub. L. No. 111-203 § 211(d)(4)(A). If the amounts available to the FDIC as receiver are insufficient to enable the Inspector General to carry out the required duties, “the Corporation shall pay such additional amounts from assessments imposed under Section 210.” Pub. L. No. 111-203 § 211(d)(4)(B).

The statutory funding authority for the FDIC OIG in the Dodd-Frank Act is plainly separate from and not subject to appropriations. First, Congress enacted no language stating that the funding is subject to appropriations, although it provided for appropriations in other sections of the same law, as noted above. GAO has held that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983).” B-308010, Apr. 20, 2007. Second, the required duties and required deadlines are plainly incompatible with the appropriations process. Under Section 211(d), Congress required the FDIC OIG to complete an extensive review of any FDIC receivership within six months of the initiation of that receivership, and made funding available to do so. Since Congress generally appropriates funds annually, the requirement that work be initiated and completed within six months clearly indicates that Congress does not expect the funding of the project to await the next annual appropriations cycle.

The fact that Congress provided additional statutory funding authority for the FDIC OIG outside the appropriations process, more than a decade after beginning a practice of specifying in annual appropriations an amount to be made available to the OIG, refutes any argument that Congress considered the practice of specifying an annual appropriation to be incompatible with, or to repeal, other statutory budget authorities for the FDIC OIG. The Dodd-Frank Act is a clear indication of Congressional intent that annual appropriations are not the sole or exclusive legal source of budget authority for the FDIC OIG.

Congressional Practice Establishes That Separate Appropriations Are Not An Exclusive or Required Source of Funding for OIGs

In 1983, Congress amended 31 U.S.C. § 1105, the statute specifying the information that the President should provide to Congress in making a budget request, to add subsection (a)25 specifying that the budget must propose separate appropriations accounts for OIGs. Pub. L. No. 97-452, 96 Stat. 2467 (Jan. 12, 1983). Congress further amended this subsection in 1988 to limit the requirement to “establishment” OIGs: “a separate appropriation account for appropriations for each Office of Inspector General of an establishment defined under section 11(2) of the Inspector General Act of 1978.” Pub. L. No. 100-504 § 108, 102 Stat. 2515, 2529 (Oct. 18, 1988). This section of the Code simply imposes a reporting requirement on the President to include certain information in the budget proposal transmitted to Congress. It does

not actually enact any appropriations, or specify that such proposed accounts are to be the exclusive source of budget authority for OIGs, repealing substantive statutory budget authority provided in other titles of the Code.

In fact, for years after Congress provided for the concept of OIGs to receive separate appropriations, it did not actually enact such appropriations for all OIGs. Instead, some OIGs received their funding through other statutory budget authority. The FDIC OIG is an example. After being established by statute in 1989, FDIC OIG did not receive an appropriation, but received its funding through the FDIC's statutory authority to spend from the DIF to support all its operations, despite the statutory provision requiring that the President propose separate appropriations accounts for OIGs. Other financial regulatory OIGs similarly do not receive appropriations. Neither the OIG for the Board of Governors of the Federal Reserve and the Consumer Financial Protection Bureau nor the National Credit Union Administration OIG receive appropriations. Instead, each is funded by their agency using the agency's non-appropriated budget authority, and therefore both stayed open during the shutdown. This practice indicates that Congress does not consider enactment of separate appropriations to be necessary for OIGs to operate, if other budget authorities exist. Instead, the practice supports the view that Congress could choose to set funding levels for OIGs in any particular year, but need not do so if other budget authority is available.

The Absence of Appropriations Does Not Prohibit the FDIC from Funding the FDIC OIG Pursuant to the FDI Act Budget Authority

Having established that the recent practice of enacting annual appropriations does not conflict with or repeal the permanent indefinite budget authority for the FDIC provided by the FDI Act, we can now consider the effect of a failure by Congress to enact *any* appropriation applicable to the FDIC OIG for a particular time period. The effect of a lapse in appropriations on the FDIC is quite simple – the permanent indefinite budget authority of the FDI Act becomes the relevant spending authority applicable to the FDIC OIG during the lapse. The situation during a lapse in appropriations is the same as the situation between 1989 and the beginning of fiscal year 1998, when Congress had not enacted any appropriations language regarding the FDIC OIG, and the FDIC OIG was funded under the budget authority of the FDI Act.

If there is a view that a failure to enact a new appropriation, after a pattern of enacting annual appropriations for a number of years, is equivalent to Congress withdrawing all budget authority, we have identified no support for such a position in statute or GAO precedent. The expiration of a previous appropriation is not equivalent to an affirmative act of appropriating an amount of zero for a particular time period. Rather, the failure of Congress to enact any new appropriation after a previous appropriation has expired simply means that Congress has stopped providing specific conditions on how any permanent indefinite budget authority must be implemented, so that the agency may exercise the discretion granted by the permanent authority.

To be sure, for agencies that have no legal budget authority other than an expired appropriation, the agency would be without current legal authority to spend funds. But as the Attorney General has stated, agencies frequently have budget authority other than an annual appropriation: "Such authority, in some form, is not uncommon in the Government. For example, notwithstanding the lapse of regular appropriations, an agency may continue to have available to it particular funds that are subject to a multi-year or no-year appropriation. A lapse in authority to spend funds under a one-year appropriation would not affect such other authorities." 43 Op. Att'y Gen. 293, 5 Op. Off. Legal Counsel 1 (1981). For agencies like FDIC with other

valid statutory budget authorities, the failure of Congress to enact *any* appropriation applicable to a particular time period simply leaves the agency free to implement its existing budget authority without further restriction by Congress.

A simple analogy may help to illustrate the point. A bank provides a borrower with a home improvement loan on October 1 and authorizes the funds to be used by the borrower to repair the home's foundation, remodel the bathroom, and upgrade the kitchen. For the first three months, the borrower uses the funds to begin work on each of the three components of the project but primarily spends the funds on the kitchen and bathroom improvements, rather than the foundation repairs. At the end of the year, the bank adds a rule requiring that, for the next month, January, a specific amount of the funds expended must be for the foundation repair. At the end of January, the bank renews that rule for the month of February. But at the end of February, the bank takes no action to renew the rule to apply to March. On the first day of March, the borrower uses funds toward foundation repairs. Do the rules of the loan permit this? Of course. The loan terms have always allowed the borrower to expend funds on foundation repairs, although the condition requiring a specific amount to be applied toward foundation repairs has expired. An interpretation that the borrower is now prohibited from using loan proceeds for foundation repairs in March, because the bank had not renewed the rule requiring it to apply a specific amount toward that category of improvements would be without any legal or logical basis. Yet that would be the effect of a decision that the FDIC was prohibited from providing funding to the FDIC OIG merely because the rule requiring it to do so had expired.

Congress Has Consistently Legislated to Enhance the Ability of OIGs to Conduct Timely Oversight

The FDIC OIG legal analysis has focused on the text of the relevant statutes and appropriations laws that Congress has enacted, since statutory interpretation must begin with the plain language of the law. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); B-329603, Apr. 16, 2018. While the plain language supports the position of the FDIC OIG, we recognize that GAO also looks to legislative purpose in its appropriations decisions. B-329199, Sept. 25, 2018. Accordingly, in addition to our legal analysis grounded in the language of the law, we are also providing authorities and analysis to establish that Congress has consistently legislated to enhance the abilities of OIGs to conduct timely oversight of agencies, and there is no indication that Congress has ever intended that an agency should be compelled to shut down its OIG – and only its OIG – when there is a statutory legal basis to provide funding to the OIG and while the rest of the agency continues to operate.

As discussed above, the Congressional purpose of setting funding levels for OIGs by appropriation is to ensure that OIGs have sufficient resources to conduct effective oversight and to limit the ability of agencies to thwart oversight or compromise the independence of OIGs by restricting their funding. A conclusion that the enactment of appropriations for OIGs actually required the opposite result – to deprive OIGs of funding and limit their ability to conduct oversight as agencies continue to operate – would be inconsistent with the policy of the legislation. As GAO has held:

Where giving effect to the plain meaning of the words in a statute would lead to an absurd result that is clearly unintended and is at variance with the policy of the legislation as a whole, we will follow the purpose of the statute rather than its literal words. B-287158, Oct. 10, 2002 (*citing Auburn Housing Authority v. Martinez*, 277 F.3d 138, 144 (2nd Cir. 2002) (“Statutory construction . . . is a holistic endeavor. . . . The

preferred meaning of a statutory provision is one that is consonant with the rest of the statute.”)). B-329199, Sept. 25, 2018.

Both statutory text and legislative history indicate that the intent of Congress regarding Inspectors General is clearly to support their independence and ensure the sufficiency of their funding, not constrain their access to budgetary resources. The Inspector General Reform Act of 2008 added provisions to the IG Act that require Inspectors General to develop and submit their own budget requests, for the President to transmit OIG budget requests to Congress as part of the President’s budget submission, and for the President’s budget submission to include comments from an Inspector General if the Inspector General concludes that the President’s request would substantially inhibit the Inspector General from performing the duties of the office. Pub. L. No. 110-409 § 8, 122 Stat. 4302, 4313 (Oct. 14, 2008). The Congressional intent of this provision was that “[e]nsuring adequate funding of the Office of the Inspector General in each agency through the current budget process is essential to ensuring the independence of the Inspectors General.” S. Rept. 110-262 (Feb. 22, 2008).

More recently, Congress reemphasized its intent that OIGs have sufficient resources and authorities to conduct timely oversight by enacting the Inspector General Empowerment Act of 2016. Pub. L. No. 114-317, 130 Stat. 1595 (Dec. 16, 2016). The Act required that OIGs report to Congress “a detailed description of any attempt by the establishment to interfere with the independence of the Office [of Inspector General], including ... with budget constraints designed to limit the capabilities of the Office.” Pub. L. No. 114-317 § 4(c), 130 Stat. 1595, 1601 (Dec. 16, 2016). Congress’ recently expressed intent could not be clearer – any elimination or reduction of budget authority for OIGs is a threat to OIG independence and is of immediate concern to Congress.

To respect Congress’ repeated and consistent intent to enhance the ability of OIGs to conduct oversight, especially through protection of OIG funding, GAO should avoid an abstruse interpretation of the law that would require an agency to shutter the operations of its OIG while the rest of the agency continues to operate without oversight. Such an interpretation, in addition to being contrary to the statutory language and GAO’s prior decisions, also would contravene Congressional intent.

Spending Pursuant to the FDI Act Budget Authority Complies with the Antideficiency Act

The Antideficiency Act prohibits all officers and employees of the federal government from entering into obligations in advance of appropriations and prohibits employing federal personnel in the absence of appropriations except in emergencies, unless otherwise authorized by law. 31 U.S.C. §§ 1341 *et seq.*

As GAO stated in Congressional testimony earlier this year:

[C]ertain agencies and programs may continue to operate without implicating the Antideficiency Act if the agency or program has available budget authority. Such authority may derive from ... otherwise available balances from other authorities, such as from fee income that Congress made available for obligation. The source of these available balances can be ... from permanent authority made available outside of the annual appropriations process. The Antideficiency Act is not implicated where an agency permissibly obligates available budget authority... B-330720, Feb. 6, 2019.

We have set out above that the allotment of funding to the FDIC OIG in the absence of appropriations is derived from permanent authority made available outside the appropriations process – the FDI Act authority to fund all FDIC operations from the DIF. Applying the language of the Antideficiency Act, FDIC OIG may continue to enter into obligations and employ personnel because the FDI Act satisfies the “unless authorized by law” (31 U.S.C. § 1341(a)(1)(A)) and “unless otherwise allowed by law” (31 U.S.C. § 1341(a)(1)(B)) exceptions to the Antideficiency Act. Therefore, the FDIC’s funding of the FDIC OIG from the DIF in the absence of a current appropriation does not violate the Antideficiency Act.

The FDIC OIG Shutdown Plan Was Based on a Transparent, Consultative, and Thorough Legal Analysis In Advance of Any Lapse in Appropriations

The FDIC OIG conclusion that it was legally authorized to continue operations during a potential lapse in appropriations was thoroughly researched and developed by several experienced career attorneys in advance of a lapse, including consultation with GAO and approval from OMB.

In 2015, OIG leadership reviewed OIG planning and policies governing lapses in appropriations. OIG management and counsel identified significant differences in the manner and source of the OIG’s funding compared with other Executive Branch agencies and analyzed the legal implications of the OIG funding mechanism in a potential lapse in appropriations. OIG counsel concluded that the FDI Act provided legal spending authority for the OIG in the absence of a current appropriation and prepared a memorandum documenting this conclusion.

Beginning on September 1, 2015, OIG staff engaged with the OIG’s OMB examiner to request guidance with regard to the OIG’s unique funding situation. The OIG continued to discuss its funding situation with the OMB examiner throughout September in preparation for a potential government shutdown. On September 25, 2015, OIG staff spoke directly with OMB’s Assistant General Counsel regarding its proposed continuation of activity in the event of a lapse in appropriations.

The OIG provided the memorandum described above to OMB, and OMB’s Assistant General Counsel affirmed that because the OIG received funding from a source that was still available in the event of a lapse of appropriations, the OIG could remain open. Similar discussions occurred between OIG staff and OMB examiners in 2016 and OMB’s Assistant General Counsel ultimately provided OMB’s concurrence with the OIG’s 2015 memorandum, in writing, on July 20, 2017.

In the fall of 2017, FDIC OIG continued its comprehensive review of this issue by consulting with additional experts. OIG counsel consulted with a Special Counsel in the Department of Justice’s Office of Legal Counsel (OLC) on September 12, 2017 and with a Managing Associate General Counsel for the GAO on December 6, 2017. The OLC and GAO attorneys did not present any objections to the FDIC OIG’s legal analysis and conclusions and did not identify any questions or concerns for further consideration. Had there been any indication of issues or concerns raised, we would have pursued further guidance.

Based on a review of all the prior work of FDIC OIG attorneys, his own legal research and analysis, the concurrence from OMB, the consultation with experts from OLC and GAO, and his expertise as former General Counsel for the House Committee on Oversight and Government

Reform, the General Counsel to the FDIC Inspector General issued his final legal opinion on the matter. See Attachment A.

FDIC OIG has been transparent about its decision and analysis regarding the intent to continue operations during any lapse in appropriations. We have communicated our analysis and shutdown plan to both the Senate and House Appropriations Committees, and neither Committee has indicated any questions or concerns with the FDIC OIG position. The FDIC OIG shutdown plan indicating that FDIC OIG will remain open and funded through the DIF during any appropriation lapse was posted on the OIG Website and posted on an OMB Website compiling all shutdown plans. All of the FDIC OIG's decisions, analysis, and communications regarding the operating plan for a lapse were completed well before the 2018-19 government shutdown, precluding any inference that the decisions were improper at the time of the shutdown.

In January 2019, in the course of GAO's ongoing audit of the FDIC's 2017 and 2018 financial statements, a GAO auditor contacted FDIC OIG stating that a "question came up regarding FDIC's OIG budget authority to be open during lapses in appropriation," and requesting "any documentation or information that you could provide." Continuing the practice of transparency, FDIC OIG provided the aforementioned legal memorandum in response.

Later in January 2019, GAO appropriations law attorneys informed FDIC OIG that they would be preparing and issuing a GAO legal decision on this topic. During that discussion, which occurred while the lapse in appropriations was ongoing, the GAO attorneys did not specify the scope of this review or identify any specific questions about or concerns with the FDIC OIG legal memorandum. The GAO attorneys stated that the GAO process involved soliciting the views of the agency, and that GAO would issue a letter to the FDIC OIG within approximately two weeks (by mid-February 2019) specifying the scope of the review and providing specific questions for FDIC OIG to address.

Since this discussion occurred when the lapse in appropriations was ongoing, FDIC OIG counsel asked whether it was the view of the GAO attorneys that FDIC OIG should change course and discontinue its operations during the government shutdown. Both GAO attorneys definitively stated that they had not reached such a conclusion and that they were not advising FDIC OIG to implement a shutdown.

In March 2019, FDIC OIG counsel contacted a GAO attorney to check on the status of the matter, because FDIC OIG had not yet received a letter or questions from GAO soliciting the agency's views. The GAO attorney stated that GAO had received several Congressional requests for appropriations opinions related to the government shutdown, that the FDIC OIG project was on hold, and that GAO would contact FDIC OIG when it became active again. FDIC OIG received no further communications from GAO until September 2019.

On September 4, 2019, a GAO attorney contacted the FDIC OIG and stated that GAO would be issuing a legal opinion on the FDIC OIG matter the next day. FDIC OIG counsel immediately contacted the GAO attorney to ask why GAO had never communicated any questions to the FDIC OIG or afforded the FDIC OIG an opportunity to submit agency views. The GAO attorney stated that GAO had decided not to issue a letter or questions soliciting the agency's views.

On September 5, 2019, FDIC OIG and GAO attorneys held a conference call to discuss the pending GAO decision and FDIC OIG's concerns about GAO's process. On that day, FDIC OIG learned that the GAO attorney originally assigned to the opinion, with whom FDIC OIG had

spoken in January and March 2019, was no longer assigned to the matter, and that it had been prepared by a different attorney with whom FDIC OIG had no communication. In response to concerns from the FDIC OIG that it had not been afforded the opportunity to fully submit the views of the agency, in accordance with GAO's usual processes, the GAO attorneys agreed to hold the release of the GAO opinion and provide the FDIC OIG with two weeks to submit the agency's views. During the call, and confirmed in a follow-up email, the GAO attorneys shared that the scope of the opinion was "whether FDIC OIG violated the Antideficiency Act when it continued operations by drawing from the DIF." The GAO attorneys declined to identify any more particular questions or issues.

In its *Procedures and Practices for Legal Decisions and Opinions* (September 2006), GAO states that it "strives to produce thorough, well-researched, and well-reasoned decisions and opinions, informed by agency explanation of pertinent facts and its views on the law..." To become informed, GAO "typically solicits agency views of the facts and the law through development letters. ... Either on its own initiative or at the request of the requestor(s) or other interested person(s) or entity(ies), whether governmental or not, OGC may hold informal meetings or conferences to discuss and clarify the facts and issues presented by a request." Our review of other GAO appropriations decisions indicates that GAO generally follows the process outlined above. The decisions typically cite exchanges of letters between GAO and the agency, and frequently also cite follow-up e-mail exchanges to obtain additional facts or clarify issues.

We appreciate that, in accordance with GAO's published procedures, FDIC OIG is now being afforded an opportunity to submit this document, and that we have now scheduled a meeting "to discuss and clarify the facts and issues presented."

We hope that the detailed analysis provided in this document demonstrates that the legal arguments in favor of the FDIC OIG position are legally sound and consistent with GAO's prior appropriations decisions. We further hope that GAO will engage with the FDIC OIG to identify specific questions or areas of concern for clarification, and will provide FDIC OIG with a sufficient opportunity to address them.

(b)(6)

Sincerely,



Michael T. McCarthy
General Counsel to the Inspector General

Attachment

Cc: Thomas Armstrong, Esq.
Omari Norman, Esq.
Ann Marie Cortez, Esq.

Attachment A



Federal Deposit Insurance Corporation
3501 Fairfax Drive, Arlington, VA 22226-3500

Office of Inspector General
Counsel to the Inspector General

DATE: December 8, 2017

MEMORANDUM TO: Jay N. Lerner
Inspector General

FROM: Michael T. McCarthy
General Counsel

SUBJECT: FDIC OIG's Authority to Spend Funds During a Lapse in Appropriations

Summary Opinion

The Federal Deposit Insurance Corporation (FDIC) Office of Inspector General (OIG) has authority to spend funds and continue operations during a lapse in appropriations because it has another legal spending authority, the Federal Deposit Insurance Act (FDI Act), which authorizes the FDIC to fund its operations from the Deposit Insurance Fund (DIF) without further appropriation.

The FDIC OIG derives its spending authority from two sources: the FDI Act and annual appropriations acts. The FDI Act provides permanent authority for the FDIC to fund its operations from the DIF without further appropriation, and this was the sole authority for OIG funding from its establishment in 1989 through fiscal year (FY) 1997. Beginning in FY 1998, in order to promote the independence of the OIG, Congress has specified in annual appropriations acts the amount from the DIF that is to be allocated to the OIG for the OIG's exclusive use. Although the amount of funding is specified in the appropriations act, the acts have also specified that the source of the funding remains the DIF created by the FDI Act, not the Treasury.¹ Through its annual budget process as authorized by the FDI Act, at the beginning of each calendar year the FDIC allocates from the DIF to the OIG an amount calculated by estimating the amount to be specified in appropriations, and later adjusts that allocation if enacted appropriations specify an amount different than the estimate.

When Congress provides uninterrupted appropriations through timely enactment of annual appropriations acts or continuing resolutions, the two spending authorities for the FDIC OIG are read in harmony: the FDI Act provides the Corporation (including the OIG) with permanent authority to spend funds from the DIF to support operations, and the appropriation specifies the amount to be allocated from the DIF to the OIG for a particular time period.

¹ In FY 1998, the appropriation specified that the funds were to be derived from the Bank Insurance Fund, the Savings Association Insurance Fund, and the FSLIC Resolution Fund. Since the Bank Insurance Fund and Savings Association Insurance Fund were merged into the Deposit Insurance Fund in 1999, the appropriation has specified that the funds were to be derived from the Deposit Insurance Fund or, only when appropriate, the FSLIC Resolution Fund. For the sake of simplicity, this memo refers to the funding mechanism as the DIF.

From time to time, most recently in 2013, appropriations have expired without Congress enacting new appropriations. In that circumstance, agencies whose sole legal spending authority is derived from appropriations are no longer authorized to spend funds and must commence an orderly shutdown, with certain exceptions for emergency functions. Yet even in the absence of current appropriations, it is not uncommon for agencies to have other legal spending authorities, including unexpired multi-year or no-year appropriations, or authority to spend funds not drawn from the Treasury, so they are not required to shut down. The FDIC is such an agency with legal authority to spend funds outside of appropriations – the FDI Act authority to fund FDIC operations from the DIF without further appropriation – and therefore does not shut down if there is a lapse in appropriations.

As a component of the FDIC, the FDIC OIG retains legal authority pursuant to the FDI Act to spend DIF funds to support its operations. Since FY 1998, Congress has enacted additional legislation through annual appropriations acts to specify how that general authority is to be executed with regard to the FDIC OIG for a specified time period. But in doing so, Congress has not repealed or permanently modified the statutory spending authority for the FDIC and its components provided by the FDI Act, and therefore this spending authority remains available to the OIG after the expiration of, or in the absence of, more specific authority provided in an appropriation. In the absence of appropriations, the FDIC OIG retains authority to spend funds from the DIF as authorized by the FDI Act, and is not required to shut down. The Office of Management and Budget (OMB) Office of General Counsel concurs with this analysis that FDIC OIG is authorized to continue operations despite a lapse in appropriations.

The Antideficiency Act places constraints on agencies operating in the absence of appropriations. However, the language of the statute, and guidance from the Office of Legal Counsel, specify that the prohibitions of the Antideficiency Act do not apply when an agency's spending is otherwise authorized by law. Because the FDI Act authorizes spending by the FDIC OIG, operating during a lapse in appropriations complies with the Antideficiency Act.

Historical Background

The OIG was established as an independent entity within the FDIC in 1989, pursuant to amendments to the Inspector General Act of 1978. While the OIG was an independent unit within the Corporation, the FDIC maintained control of the OIG's budget processes and scrutinized its staffing numbers, organizational structure, and other workload indicators. In 1997, the FDIC proposed a funding level for the OIG that the OIG considered insufficient to accomplish the OIG mission. Concurrently, Congress became concerned over impediments to independence in a number of Inspector Generals' (IGs) offices, and resolved the issue through independence in funding for IGs in fiscal year (FY) 1998. The Veterans Affairs, Housing and Urban Development, and Independent Agencies Appropriations Act of 1998 specified the amount of funding to be provided to the FDIC OIG for its operations, because the Congress believed that control over budgeting was a vital component of the OIG's independence. Both the House and Senate committee reports stated that the purpose of the appropriation was to ensure the "independence of the OIG." S. Rept. 105-53 (July 17, 1997); H. Rept. 105-75 (July 11,

1997). However, the funding source for the OIG remained the same as the FDIC's, which is the DIF, and not the general Treasury. The conference report specifically stated that "[f]unds for this account are derived from the [DIF], and are therefore not reflected in either the budget authority or budget outlay totals" which refer to funding appropriated from the Treasury. H. Rept. 105-297 (Oct. 6, 1997).

The Budget and Funding Processes for the OIG

The FDIC budgets on a calendar year basis and allocates funds from the DIF to its divisions on January 1 of each year for the period of operations running through the full calendar year (until December 31). Since FY 1998, Congress has specified an amount to be allocated from the DIF to the OIG in annual appropriations acts for the federal fiscal year, which runs from October 1 through September 30. The FDIC's Division of Finance (DOF) reconciles the FDIC calendar year budget with the fiscal year appropriation for the OIG by calculating an amount that includes $\frac{3}{4}$ of the enacted OIG fiscal year appropriation to cover the $\frac{3}{4}$ of the calendar year running from January 1 to September 30, and $\frac{1}{4}$ of the expected OIG appropriation for the next fiscal year beginning October 1 to cover the $\frac{1}{4}$ of the calendar year running from October 1 to December 31. In this manner, the FDIC authorizes in its annual budget approved by the Board of Directors an allocation from the DIF to the OIG for the calendar year. If an appropriation enacted after the FDIC calendar year budget is finalized specifies a different amount to be allocated from the DIF to the OIG, the FDIC readjusts the OIG's allocated amount.

Funding for the FDIC and its Status during Lapses in Appropriations

OMB has issued guidance in the form of "Basic Principles of Agency Operations During a Lapse in Appropriations,"² which state that an agency may not incur obligations when the funding source for the obligation is an appropriation that has lapsed. However, the guidance recognizes that it is not uncommon for agencies to have sources of funds and spending authority other than current year appropriations, such as multi-year or indefinite appropriations, or non-Treasury funds such as corporate or revolving funds. Opinions from the Office of Legal Counsel reiterate this point: "Not all government functions are funded with annual appropriations. Some operate under multi-year appropriations and others operate under indefinite appropriations provisions that do not require passage of annual appropriations legislation."³

The FDIC is an entity with access to funds that are available notwithstanding annual appropriations: the DIF. Congress authorized the FDIC to expend funds held in the DIF in

² OMB has issued similar guidance in various formats over the past several years. See, e.g., Memorandum from Sylvia A. Burwell, Director, OMB to Heads of Executive Departments and Agencies, *Planning for Agency Operations During a Potential Lapse in Appropriations*, M-13-22 (Sept. 17, 2013).

³ In the 2013 shutdown, OMB estimated that roughly 40 percent of federal civilian employees were furloughed. Those employees that were not furloughed were retained either because they were performing activities that are "excepted" under the applicable legal requirements (such as activities necessary to maintain the safety of life or the protection of property), or because funding remained available to pay their salaries and expenses during the lapse from sources other than annual appropriations. See Office of Management and Budget, *Impacts and Costs of the October 2013 Federal Government Shutdown* (November 2013).

accordance with its statutory authority under the FDI Act without further direction. This is because FDIC is funded through assessments, not appropriations, and amounts received by the FDIC are not subject to apportionment under any authority. 12 U.S.C. § 1817(b) and (d). The FDIC is authorized to spend funds held in the DIF without further authorization from Congress and the President. 12 U.S.C. §1820(a) (the FDIC Board of Directors shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid).

Decisions by the Comptroller General support the FDIC's position. The GAO has opined that assessments levied on insured banks by the FDIC and used to pay the FDIC's operating expenses are not regarded as "appropriated funds." 23 Comp. Gen 83 (1943); *see also* A-91137, April 11, 1938, GAO-01-179SP Appropriations Law-Vol. 1, p. 17-136, (FDIC's assessment derived funds, while not an appropriation, are under its control and provide funds for the payment of all necessary expenses.)

Therefore, during government shutdowns or lapses in appropriations, the FDIC continues to carry out its operational activities and statutory responsibilities.⁴ The FDIC, its activities, and its ability to expend funds are not affected by a government shutdown. When a government shutdown has occurred, the FDIC has continued to carry out its responsibilities to protect insured depositors in the event of bank failures and its other statutory responsibilities. During a lapse in appropriations in 2013 that caused a partial government shutdown, the FDIC did not shut down.

Funding for the FDIC OIG and its Status During Lapses in Appropriations

As a component of the FDIC, the FDIC OIG has legal authority pursuant to the FDI Act to spend funds from the DIF to carry out its statutory responsibilities. Prior to FY 1998, this was the sole spending authority for the FDIC OIG, and funding was allocated to the FDIC OIG by FDIC management as part of an internal budget process. Since FY 1998, Congress has also enacted an annual appropriation setting a funding level for the FDIC OIG. The appropriations have always specified the DIF as the source of funding for the FDIC OIG. The legal issue presented is how these two legal authorities interact.

According to canons of statutory construction, statutes should be read in harmony, and repeals by implication are disfavored. *Morton v. Mancari*, 417 U.S. 535, 537 (1974). When Congress provides uninterrupted appropriations through timely enactment of annual appropriations acts or continuing resolutions, the two spending authorities for the FDIC OIG can be read in harmony: the FDI Act provides the Corporation (including the OIG) with general authority to spend funds from the DIF to support operations, and the appropriation specifies the amount to be allocated from the DIF to the OIG for a particular time period. There is no indication that the recent practice of enacting an appropriation for the FDIC OIG was intended to repeal the spending authority provided by the FDI Act. We have not identified any statement to this effect, either in

⁴ Henry R. Griffin, Assistant General Counsel for FDIC, File Memorandum Regarding FDIC funding in the Event of Government Shutdown, March 23, 2011.

statutory language or legislative history. To the contrary, Congress has consistently provided in the appropriation that the funding for the FDIC OIG is to be derived from the DIF, not the Treasury, and stated that the purpose of providing an appropriation was to ensure the independence of the OIG. Accordingly, the FDI Act has not been repealed or amended to exclude the FDIC OIG and continues to provide general spending authority for the FDIC OIG as a component of the Corporation.

When a lapse in appropriations occurs because a prior appropriation has expired and Congress has not enacted a new appropriation or continuing resolution, the FDI Act remains in effect and provides general spending authority for the FDIC OIG. Although the general spending authority of the FDI Act may be limited by an appropriation through which Congress specifies a funding level for a given time period, if that time period has expired and Congress has not provided any new specifications, the FDI Act stands alone as the legal spending authority for the OIG. Since the FDI Act provides broad authority to the FDIC to fund its operations from the DIF without further direction, funding that the FDIC has provided to the OIG from the DIF through its calendar year budget process remains available to the OIG in the absence of Congressional action.

This has been the position of the FDIC OIG since 2015, with the concurrence of OMB. Prior to 2015, the OIG's approach to lapses in appropriations had been based on historical practice held over following the 1995 merger of the Resolution Trust Corporation (RTC) OIG and the FDIC OIG. As an appropriated agency, the RTC (along with the RTC OIG) closed during the 1995 lapse in appropriations, and we have not identified updates to the legal analysis regarding shutdowns after the merger of the RTC OIG and FDIC OIG. In 2011, in anticipation of a potential lapse in appropriations, the IG sent an email message that stated: "Because the FDIC is not funded through an appropriation, its operations will not be impacted by a government shutdown. However, as an independent appropriated entity within the FDIC, the OIG's situation is different. In the event of a funding lapse, the FDIC OIG could be required to phase down all activities other than those authorized by law." This statement correctly identified that the FDIC OIG is in a different situation than the rest of the FDIC, but did not explore this distinction further. We are not aware of any legal analysis that explored or resolved the question left open by the statement that the OIG "could" be required to shut down, or which of its activities might be authorized by law during a funding lapse.

In 2013, a lapse in appropriations occurred, and FDIC OIG implemented a shutdown. We have not identified any legal analysis by the OIG regarding the 2013 shutdown.⁵ According to senior

⁵ We have identified an unsigned, undated draft memorandum reportedly prepared by a contracting attorney within the FDIC's Legal Division in 2013. This memo states: "[w]hile FDIC has budgeted funds on behalf of the OIG through the end of calendar year 2013, only those funds through September 30, 2013, have actually been appropriated – or authorized for official use by – FDIC's OIG. This means that absent an affirmative appropriation for FDIC's OIG prior to October 1, 2013, the OIG is not authorized to *spend* any of the moneys [sic] budgeted by FDIC for the remainder of calendar year 2013 – leaving a classic funding gap." (emphasis in original) This memorandum did not consider whether the FDI Act provides authority to spend funds, the interaction between the FDI Act and appropriations acts, the legislative history of either, or the history of OIG funding. Further, it did not

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. The 2013 shutdown lasted two-and-a-half weeks, and the OIG furloughed the majority of its management and staff; however, nineteen OIG employees were excepted and worked during the furlough. The closure of the FDIC OIG created a situation in which the FDIC continued its normal operations for a period of time during which the OIG was unable to perform oversight consistent with its responsibilities under the IG Act.

In 2015, drawing upon the experience of the 2013 shutdown and in meetings and calls with OMB to prepare for another potential shutdown, new OIG leadership revisited OIG planning and policies governing lapses in appropriations. OIG management and counsel identified significant differences in the manner and source of the OIG's funding compared with other Executive Branch agencies and analyzed the legal implications of the OIG funding mechanism in a potential lapse in appropriations. OIG counsel concluded that the FDI Act provided legal spending authority for the OIG in the absence of a current appropriation and prepared a memorandum documenting this conclusion. Beginning September 1, 2015, OIG staff engaged with the OIG's OMB examiner to request guidance with regard to the OIG's unique funding situation. The OIG continued to discuss its funding situation with the OMB examiner throughout September in preparation for a potential government shutdown. On September 25, 2015, OIG staff spoke directly with OMB's Assistant General Counsel regarding its proposed continuation of activity in the event of a lapse in appropriations. The OIG provided the memorandum described above to OMB, and OMB's Assistant General Counsel affirmed that because the OIG received funding from a source that was still available in the event of a lapse of appropriations that the OIG could remain open. Similar discussions occurred between OIG staff and OMB examiners in 2016 and OMB's Assistant General Counsel ultimately provided OMB's concurrence with the OIG's 2015 memorandum, in writing, on July 20, 2017.⁶ The 2015 memorandum and OMB concurrence are attached.

Since 2015, for the reasons described above, the legal opinion of OIG counsel is that the FDIC OIG is authorized to continue operations during a lapse in appropriations, relying on the FDI Act as legal spending authority.

cite any statutes, cases, regulations, or other authority to support its analysis. We do not believe that this memorandum was ever formalized or approved by the FDIC's Legal Division, or that the OIG relied upon it in any way. For the reasons stated elsewhere in this legal opinion, we believe that the legal conclusions stated in the draft memorandum are erroneous.

⁶ OIG attorneys also consulted with a Special Counsel in the Department of Justice's Office of Legal Counsel (OLC) on September 12, 2017 and with an Assistant General Counsel for the Government Accountability Office (GAO) on December 6, 2017. Although they were not authorized to provide a formal concurrence, the OLC and GAO attorneys did not present any objections to the legal analysis and conclusions discussed in this legal opinion.

FDIC OIG Spending During a Lapse in Appropriations Complies With the Antideficiency Act

The Antideficiency Act prohibits all officers and employees of the federal government from entering into obligations in advance of appropriations and prohibits employing federal personnel in the absence of appropriations except in emergencies, unless otherwise authorized by law. See 31 U.S.C. §§ 1341 *et seq.*

In the absence of appropriations, FDIC OIG may continue to enter into obligations and employ personnel in compliance with the terms of the Antideficiency Act because these activities are “otherwise authorized by law” -- the FDI Act.⁷ In a legal opinion interpreting the Antideficiency Act, the Attorney General specified that “[i]f an agency may infer, as a matter of law, that Congress has authorized it to operate in the absence of appropriations, then in permitting the agency to operate, the agency’s supervisory personnel cannot be deemed to violate the Antideficiency Act.” 43 Op. Att’y Gen. 224, 4A Op. Off. Legal Counsel 16 (1980). In a subsequent 1981 opinion, the Attorney General stated “when an agency’s regular appropriation lapses, that agency may not enter contracts or create other obligations unless the agency has legal authority to incur obligations in advance of appropriations. Such authority, in some form, is not uncommon in the Government. For example, notwithstanding the lapse of regular appropriations, an agency may continue to have available to it particular funds that are subject to a multi-year or no-year appropriation. A lapse in authority to spend funds under a one-year appropriation would not affect such other authorities.” 43 Op. Att’y Gen. 293, 5 Op. Off. Legal Counsel 1 (1981).

The FDI Act is a law that authorizes FDIC spending without further appropriation by Congress, fitting within the exception to the Antideficiency Act permitting spending otherwise authorized by law in the absence of current appropriations. Therefore, continuing FDIC OIG operations in the absence of current appropriations complies with the Antideficiency Act.

⁷ The Antideficiency Act also provides authority to fund emergency operations in the absence of any spending authority, however, we need not analyze those provisions since the FDI Act provides legal spending authority. We also believe that spending from the DIF may be excluded entirely from the coverage of the Antideficiency Act because it is not spending from the Treasury, but we did not examine that question in detail for purposes of this legal opinion.