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February 25, 2008

The Honorable Robert C. Byrd
Chairman
Committee on Appropriations
United States Senate

The Honorable Thad Cochran
Ranking Minority Member
Committee on Appropriations
United States Senate

Subject: *Consolidated Appropriations Act, 2008—Incorporation by Reference*

In a letter dated January 30, 2008, you requested our opinion on the legal effect of seven appropriations provisions in the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (Dec. 26, 2007). The seven provisions at issue incorporate by reference an explanatory statement of the House Committee on Appropriations that was printed in the *Congressional Record* on December 17, 2007. You asked whether the agencies' use of the appropriations enacted in the seven provisions must comply with the referenced allocations contained in the explanatory statement.[1]

For the reasons stated below, we conclude that each of these provisions binds the agency's use of the enacted appropriation to the referenced allocations contained within the explanatory statement. Thus, the affected agencies are required to obligate and expend the appropriations in accordance with the referenced provisions of the explanatory statement.

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[1] Our general practice when issuing opinions is to obtain the views of the relevant agencies. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. Given the numerous agencies and the request by the Committee to expedite our opinion, we did not solicit the views of the relevant agencies in this case.

BACKGROUND

The Consolidated Appropriations Act, 2008 (Act) contained 11 regular appropriations acts and emergency military funding. Pub. L. No. 110-161. No conference report accompanied the Act; the two houses of Congress reached final agreement with an exchange of amendments. Library of Congress, Congressional Research Service, *Consolidated Appropriations Act for FY2008: Brief Overview*, No. RL34298 (Jan. 4, 2008). Congress presented the Act to the President on December 24, 2007, and the President signed the Act into law on December 26, 2007. Although Congress convened no conference committee, section 4 of the Act, which applies to the entire Consolidated Appropriations Act, states that an explanatory statement printed in the *Congressional Record* on December 17, 2007, by the Chairman of the House Committee on Appropriations should be considered as if it were a joint explanatory statement of a conference committee.

Section 6 contains the appropriations for each of the 11 regular appropriations acts, indicated by divisions A--K. You requested our opinion on the legal effect of the following seven provisions, all of which include legislative language incorporating by reference amount allocations, and in some cases terms and conditions, from the explanatory statement:

1. Under the heading *Department of Health and Human Services/Health Resources and Services Administration/Health Resources and Services* in division G:

   > "For carrying out [certain laws] . . . $6,978,099,000, of which $309,889,000 shall be available for construction and renovation (including equipment) of health care and other facilities and other health-related activities specified in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act) . . ."

   Pub. L. No. 110-161, § 6, div. G, title 2, 121 Stat. at 2169.

2. Under the heading *Department of Education/Higher Education* in division G:

   > "For carrying out, to the extent not otherwise provided, [certain laws] . . . $2,057,801,000 . . . *Provided further*, that $100,668,000 of the funds for part B of title VII of the Higher Education Act of 1965 shall be available for the projects and in the amounts specified in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act) . . ."

   Pub. L. No. 110--161, § 6, div. G, title 3, 121 Stat. at 2196.

3. Under the heading *Institute of Museum and Library Services/Office of Museum and Library Services/Grants and Administration* in division G:

> "For carrying out the Museum and Library Services Act of 1996 and the National Museum of African American History and Culture Act, $268,193,000, of which $18,610,000 shall be available for library, museum and related projects and in the amounts specified in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act) . . ."

Pub. L. No. 110-161, § 6, div. G, title 4, 121 Stat. at 2204.

4. Under the heading *Administrative Provisions—Small Business Administration* in division D:

> "For an additional amount under the heading "Small Business Administration, Salaries and Expenses," $69,451,000, to remain available until September 30, 2009, shall be for initiatives related to small business development and entrepreneurship, including programmatic and construction activities: *Provided*, That amounts made available under this section shall be provided in accordance with the terms and conditions as specified in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act) . . ."

Pub. L. No. 110-161, § 6, div. D, title 5, § 534, 121 Stat. at 2012.

5. Under the heading *Administrative Provisions—Federal Highway Administration* in division K:

> "Notwithstanding any other provision of law, the Secretary of Transportation shall set aside from revenue aligned budget authority authorized for fiscal year 2008 under section 110 of title 23, United States Code, such sums as may be necessary for the programs, projects and activities at the level of 98 percent of the corresponding amounts identified under this section in the explanatory statement accompanying this Act . . ."

Pub. L. No. 110-161, § 6, div. K, title 1, § 129, 121 Stat. at 2388.

6. Under the heading *General Provisions—Department of Transportation* in division K:

> "Funds provided or limited in this Act under the appropriate accounts within the Federal Highway Administration, the

> Federal Railroad Administration and the Federal Transit Administration shall be made available for the eligible programs, projects and activities at the level of 98 percent of the corresponding amounts identified in the explanatory statement accompanying this Act for the 'Delta Regional Transportation Development Program' . . ."

Pub. L. No. 110-161, § 6, div. K, title 1, § 186, 121 Stat. at 2406.

7. Under the heading *Community Planning and Development/Community Development Fund* in division K:

> "Of the amount made available under this heading, $179,830,000 shall be available for grants for the Economic Development Initiative (EDI) to finance a variety of targeted economic investments in accordance with the terms and conditions specified in the explanatory statement accompanying this Act: *Provided*, That the amount made available for each grant shall be at the level of 98 percent of the corresponding amount cited in said explanatory statement . . ."

Pub. L. No. 110-161, § 6, div. K, title 2, 121 Stat. at 2420.

DISCUSSION

In general, legislative history is informational and not legally binding. *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646 (2005); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); 55 Comp. Gen. 812, 820 (1976); 55 Comp. Gen. 307, 319 (1975). In this case, however, the text of these seven provisions of the Consolidated Appropriations Act expressly refers to the explanatory statement of the House Appropriations Committee, printed in the *Congressional Record* of December 17, 2007, that accompanied the appropriations bill. At issue here is whether the text of these provisions of the law incorporates the explanatory statement into the law such that the agencies' use of the appropriations enacted in the seven provisions is subject to the amounts, and in some cases terms and conditions, specified in the explanatory statement.

As a legislative tool, incorporation by reference is the use of legislative language to make extra-statutory material part of the legislation by indicating that the extra-statutory material should be treated as if it were written out in full in the legislation. *See generally Black's Law Dictionary* 781 (8th ed. 2004). For example, in a 2001 decision, in a case similar to what is before us here, the United States District Court for the District of Columbia upheld the incorporation by reference of an unenacted bill into an appropriations law. *Hershey Foods Corp. v. United States Department of Agriculture*, 158 F. Supp. 2d 37 (D.D.C. 2001), *aff'd*, 293 F.3d 520 (D.C. Cir. 2002).

In that case, the Consolidated Appropriations Act for fiscal year 2000 provided that "H.R. 3428 of the 106th Congress, as introduced on November 17, 1999" is "hereby enacted into law."[2] *Id.* at 38. The unenacted bill that was incorporated into the appropriations law had been published in the *Congressional Record*. The court said that "Congress may incorporate by cross-reference in its bills if it chooses to legislate in that manner." *Id.* at 41.

Incorporation by reference is a well-accepted legislative tool. *Hershey Foods Corp.*, 158 F. Supp. 2d at 41 ("Laws containing cross-references do not appear to be uncommon."). Indeed, there are numerous instances in which the Supreme Court, for more than 100 years, has accepted incorporation by reference without objection. In an 1892 decision, the Supreme Court had under consideration the scope of a federal statute regarding appeals from the local District of Columbia courts to the U.S. Supreme Court. *In re Heath*, 144 U.S. 92 (1892). The statute provided for appeals "in the same cases and in like manner as provided by law" with regard to federal circuit courts, thereby incorporating by reference those laws into this statute. *Id.* at 93. In addressing this statute, the Court took notice of a practice in the early days of the country: "It was not an uncommon course of legislation in the states, at an early day, to adopt, by reference, British statutes." *Id.* at 94 (quoting *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 625 (1801)). The Court said that in adopting the British statutes, "they become our own, as entirely as if they had been enacted by the legislature." *Id.* The Court raised no objection to the incorporation by reference at issue before it.

In *United States v. Sharpnack*, 355 U.S. 286 (1958), the Supreme Court considered a section of the Assimilative Crimes Act that, in enacting criminal laws for certain federal enclaves, incorporated by reference the criminal laws of the states in which those enclaves were located. The Act said, "Whoever . . . is guilty of any act or omission which . . . would be punishable . . . by the laws [of the state] at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. § 13 (1950). The Supreme Court explained, "Whether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as are the state laws themselves." *Sharpnack*, 355 U.S. at 293.

The Supreme Court proceeded to list other examples where Congress incorporated by reference state laws into federal laws: the Federal Tort Claims Act, basing the liability of the United States on "the law of the place where the act or omission occurred"; the Federal Black Bass Act, prohibiting the transportation of fish in interstate commerce if contrary to the law of the state from which it is transported; the Johnson Act, prohibiting the transportation of gambling devices in interstate

[2] The effect of the incorporation was to enact into law a final rule published by the Secretary of Agriculture in 1999.

commerce unless a state exempts itself from the Act; the Social Security Act, providing that an applicant will be considered the husband or wife of the insured if the courts of the state in which the insured is domiciled would find that the applicant and insured were validly married. *Sharpnack*, 355 U.S. at 295.

Recently, the Supreme Court has accepted the incorporation by reference of a Rehabilitation Act provision into the Americans with Disabilities Act: "The remedies, procedures and rights set forth in section 794a of title 29 [the Rehabilitation Act] shall be the remedies, procedures and rights this subchapter [the Americans with Disabilities Act] provides . . . " 42 U.S.C. § 12133. *See Tennessee v. Lane*, 541 U.S. 509, 517 (2004).

It is not just laws that the Supreme Court has acknowledged may be incorporated by reference. In *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), the Supreme Court accepted the incorporation by reference of a portion of an environmental impact statement. Congress, in the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1990, prohibited timber sales "within [spotted owl habitat areas] identified pursuant to . . . the Environmental Impact Statement . . . and the accompanying Record of Decision issued by the Forest Service on December 8, 1988," and "within the 110 areas identified in the December 22, 1987 agreement . . . between the Bureau of Land Management and the Oregon Department of Fish and Wildlife." *Robertson*, 503 U.S. at 434.

In all of these cases, the language of the statutes evidenced clear congressional intent to incorporate by reference, and the referenced material was specifically ascertainable from the legislative language so all would know with certainty the duties, terms, conditions, and constraints enacted into the law.[3] The seven provisions at issue here likewise evidence clear congressional intent to incorporate specific amounts, and in some cases terms and conditions, ascertainable with certainty by reference to the explanatory statement printed in the *Congressional Record* on December 17, 2007. The language of these provisions *directs* ("shall be") that amounts are available to agencies "in accordance with the terms and conditions specified in the explanatory statement," for "projects and in the amounts specified in the explanatory statement," for "activities specified in the explanatory statement," or "at a level of 98 percent of the corresponding amounts identified in the explanatory statement." These legislative phrases manifest a clear, unambiguous intent to incorporate the referenced explanatory statement.

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[3] *Cf. Southern Clay Products v. United Catalysts*, 43 Fed. App'x 379, 383–84 (Fed. Cir. 2002); *Advanced Display Systems v. Kent State University*, 212 F.3d 1272, 1282 (Fed. Cir. 2000). The Federal Circuit Court of Appeals, before accepting incorporations by reference in patents, looked for evidence of intent to incorporate and specific identification of the incorporated references.

Also, these provisions clearly and specifically identify what is to be incorporated. Each provision refers to either "the explanatory statement described in section 4" or "the explanatory statement accompanying this Act." Similar to the language in *Hershey Foods Corp.*, section 4 of the Act describes the explanatory statement in detail: "The explanatory statement regarding the consolidated appropriations amendment of the House of Representatives to the amendment of the Senate to H.R. 2764, printed in the House section of the Congressional Record on or about December 17, 2007 by the Chairman of the Committee on Appropriations of the House . . . ." Section 4 also explains that although no conference committee was convened, the explanatory statement described will serve as a joint explanatory statement for purposes of the Act. Whether the language in the seven provisions refers to the explanatory statement described in section 4 or to the explanatory statement accompanying the Act, the language can refer to only one document, because section 4, which applies to the entire Consolidated Appropriations Act, defines the explanatory statement printed in the December 17, 2007, *Congressional Record* as the joint explanatory statement accompanying the Act.[4]

With reference to the explanatory statement, each agency, and others who refer to the provisions, can ascertain with certainty what allocations the law imposes on its appropriations. For example, the Institute of Museum and Library Services appropriation provides, "For carrying out the Museum and Library Services Act of 1996 and the National Museum of African American History and Culture Act, $268,193,000, *of which $18,610,000 shall be available for library, museum and related projects and in the amounts specified in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act).*" Pub. L. No. 110-161, § 6, div. G, title 4, 121 Stat. at 2204 (emphasis added). To ascertain how to allocate the $18,610,000 among the various library, museum, and related projects, the Act directs the agency to the explanatory statement; section 4 of the Act tells the agency precisely what the explanatory statement is and where to find it. In the Act, this appropriation appears under the heading *Institute of Museum and Library Services/Office of Museum and Library Services/Grants and Administration* in division G. Under that same heading in the same division of the explanatory statement, found on page H16283 in the December 17, 2007, *Congressional Record*, the explanatory statement includes a table of projects and an amount for each project, with a total of $18,610,000. 153 Cong. Rec. H16284–86 (daily ed. Dec. 17, 2007).

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[4] The explanatory statement was published in the December 17, 2007, daily edition of the *Congressional Record*. The daily edition of the *Congressional Record* must be delivered on the day after the actual day's proceedings unless otherwise directed by the Joint Committee on Printing. 44 U.S.C. § 906. Additionally, the daily edition of the *Congressional Record* is typically available on the Internet the day following the proceedings at www.gpoaccess.gov/crecord/index.html (last visited Feb. 8, 2008).

For each of the other six provisions, the agencies, and others reading the provisions, can ascertain amount allocations by referring to the explanatory statement in the same way. For each of those six provisions, the explanatory statement includes a table of projects and an amount for each project. For three of the six provisions (Health Resources and Services, Higher Education, Small Business Administration), the amounts identified in the explanatory statement total the amounts set out in the provisions. In two of the provisions (Federal Highway Administration and Department of Transportation), no amounts were identified in the provisions; amounts, however, are ascertainable by reference to the explanatory statement. In three of the provisions (Federal Highway Administration, Department of Transportation, and Community Development Fund), Congress appropriated 98 percent of the corresponding amounts identified in the explanatory statement. For each of those three provisions, the amounts appropriated are easily calculated by reference to the explanatory statement. The Community Development Fund provision, which makes an appropriation for Economic Development Initiative grants, identified a specific amount in the provision; that amount equals 98 percent of the total of the amounts for grants identified in the explanatory statement.

Because the language of the seven provisions clearly and unambiguously expresses an intent to appropriate amounts as allocated in the explanatory statement and because reference to the explanatory statement permits the agencies and others to ascertain with certainty the amounts and purposes for which these appropriations are available, these provisions establish the referenced allocations contained in the explanatory statement as legally binding restrictions on the agencies' appropriations.

We conclude, therefore, that the affected agencies are required to obligate and expend amounts appropriated in these seven provisions in accordance with the referenced allocations in the explanatory statement.[5]

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[5] On January 29, 2008, President Bush issued an executive order stating that for appropriations laws and other legislation enacted after the date of the order, "executive agencies should not commit, obligate, or expend funds on the basis of earmarks included in any non-statutory source, including requests in reports of committees of the Congress or other congressional documents . . . except when required by law . . . ." Exec. Order No. 13457, *Protecting American Taxpayers From Government Spending on Wasteful Earmarks*, 73 Fed. Reg. 6417 (Feb. 1, 2008). The seven provisions at issue here were enacted in December 2007, before the executive order was issued, and therefore do not fall within the scope of the executive order. Nevertheless, because the amount allocations of the explanatory statement are incorporated into the appropriations act itself, they are "required by law" and, were the executive order in effect, would not constitute "earmarks included in any non-statutory source" as defined in the executive order.

Use of incorporation by reference as a legislative tool does not accrete to Congress any power not already provided by the Constitution. Appropriating funds is manifestly a congressional prerogative. U.S. Const. art. I, § 9, cl. 7. Congress is free to circumscribe agency authority to allocate resources by including restrictions within the text of appropriations and other acts. *Lincoln*, 508 U.S. at 193; 55 Comp. Gen. at 820; 55 Comp. Gen. at 320. Furthermore, as the court said in *Hershey Foods Corp.*, "Congress may incorporate by cross-reference in its bills if it chooses to legislate in that manner." *Hershey Foods Corp.*, 158 F. Supp. 2d at 41. It follows, therefore, that Congress may "cross-reference," or incorporate by reference, an explanatory statement into the law, even though the statement would not otherwise create legally binding requirements, and give the explanatory statement or references therein the force of law.

Also, incorporation by reference does not offend the Constitution's presentment clause. *Hershey Foods Corp.*, 158 F. Supp. 2d 37. The Constitution requires that, before a bill can become a law, it must pass both the House of Representatives and the Senate and be presented to the President for his signature. U.S. Const. art. I, § 7, cl. 2. The President then can sign or veto the bill, but if a bill is vetoed, Congress can vote to override the President's veto. In *Hershey Foods Corp.*, the plaintiff challenged the incorporation by reference of an unenacted bill into an appropriations act. The plaintiff claimed that because the incorporated bill was not properly presented to the President, it should not be given legal effect. The court disagreed. *Hershey Foods*, 158 F. Supp. 2d at 41. The court said that both Houses had passed the appropriations bill with the incorporation by reference and the appropriations bill was presented to the President, who signed it into law. *Id.* at 39. The court noted that the unenacted, incorporated bill had been published in the *Congressional Record*, a public document available to the President when he signed the appropriations bill into law. *Id.* at 41.

CONCLUSION

Legislative incorporation by reference is well founded historically and the Supreme Court has accepted it as a legislative tool without objection. The seven provisions at issue in this opinion unambiguously manifest the intent to incorporate by reference related amount allocations in the explanatory statement. The reference in these seven provisions to the explanatory statement permits the agencies and others to ascertain with certainty the amounts and purposes for which the appropriations enacted by these seven provisions are available.

Hence, these provisions establish the referenced allocations contained within the explanatory statement as legally binding restrictions on agency appropriations. The affected agencies, therefore, are required to obligate and expend the appropriations in accordance with the referenced provisions of the explanatory statement.

Sincerely yours,

Gary L. Kepplinger
General Counsel