



B-329603

April 16, 2018

The Honorable Tom Carper
Ranking Member
Committee on Environment and Public Works
United States Senate

The Honorable Tom Udall
Ranking Member
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations
United States Senate

The Honorable Peter DeFazio
Ranking Member
Committee on Transportation and Infrastructure
House of Representatives

The Honorable Betty McCollum
Ranking Member
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations
House of Representatives

Subject: *U.S. Environmental Protection Agency—Installation of Soundproof Privacy Booth*

This responds to your request for an opinion regarding the U.S. Environmental Protection Agency’s (EPA) use of its fiscal year (FY) 2017 appropriations to install a soundproof privacy booth in the EPA Administrator’s office. Specifically, you ask whether EPA obligated FY 2017 funds in a manner consistent with section 710 of the Financial Services and General Government Appropriations Act, 2017 (section 710) and the Antideficiency Act.¹

¹ Letter from Representative Betty McCollum, Ranking Member of the Subcommittee on Interior, Environment, and Related Agencies, to Comptroller General (Jan. 12, 2018); letter from Senator Tom Carper, Ranking Member of the Committee on Environment and Public Works, to Comptroller General (Jan. 9, 2018); letter from
(continued...)

Section 710 prohibits an agency from obligating or expending an amount in excess of \$5,000 to furnish, redecorate, purchase furniture for, or make improvements for the office of a presidential appointee during the period of appointment without prior notification to the Committees on Appropriations of the House of Representatives and the Senate. Pub. L. No. 115-31, div. E, title VII, § 710, 131 Stat. 135, 379 (May 5, 2017). The Antideficiency Act prohibits federal agencies from incurring obligations in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a).

As explained below, we conclude that EPA violated section 710 when it obligated \$43,238.68 for the installation of a soundproof privacy booth without providing advance notice to the Committees on Appropriations of the House of Representatives and the Senate. Further, because EPA obligated appropriated funds in a manner specifically prohibited by law, we conclude that EPA violated the Antideficiency Act.

Consistent with our practice for legal opinions, we requested and received from EPA's Office of General Counsel information regarding the factual circumstances of this matter, as well as its legal views regarding whether EPA's actions complied with section 710 and the Antideficiency Act. Letter from Principal Deputy General Counsel, EPA, to Managing Associate General Counsel, GAO (Mar. 23, 2018) (EPA Letter); Letter from Managing Associate General Counsel, GAO, to Acting General Counsel, EPA (Dec. 21, 2017); GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP.

BACKGROUND

EPA obligated \$43,238.68 from its FY 2017 Environmental Programs and Management (EPM) appropriation account for the installation of a soundproof privacy booth for the Administrator's office.² EPA did not send advance notice of this obligation to the Committees on Appropriations of the House of Representatives and the Senate.³

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Representative Peter DeFazio, Ranking Member of the House Committee on Transportation and Infrastructure, to Comptroller General (Jan. 9, 2018); letter from Senator Tom Udall, Senate Committee on Appropriations, Ranking Member of the Subcommittee on Interior, Environment, and Related Agencies, to Comptroller General (Nov. 9, 2017).

² EPA Letter, at 2.

³ *Id.* at 4–5.

EPA stated that the amounts obligated included \$24,570 for “Privacy booth purchase, delivery, and assembly,” \$3,470 for “Concrete Floor Leveling,” \$3,360.97 for “Drop Ceiling Installation,” \$3,350 for “Prep and Wall Painting,” \$7,978 for “Removal of CCTV Equipment,” and \$509.71 for “Infrastructure Cabling and Wiring.”⁴ The contract for the privacy booth itself required that the booth “be assembled by modular components.”⁵ According to EPA, the area in which the privacy booth is located, a former storage closet in the Administrator’s office, is assigned to the Administrator.⁶

EPA provided that its “Security Management Division requires that a classified telephone must be located in an area where the employee can have private conversations. That is, a classified phone cannot simply be put on an office desk or in a conference room.”⁷ According to EPA, the booth “not only enables the Administrator to make and receive phone calls to discuss sensitive information, but it also enables him to use this area to make and receive classified telephone calls (up to the top secret level) for the purpose of conducting agency business.”⁸

DISCUSSION

Section 710: Statutory Notification Requirement

Section 710 provides:

“During the period in which the head of any department or agency, or any other officer or civilian employee of the Federal Government appointed by the President of the United States, holds office, no funds may be obligated or expended in excess of \$5,000 to furnish or redecorate the office of such department head, agency head, officer, or employee, or to purchase furniture or make improvements for any such office, unless advance notice of such furnishing or redecoration is transmitted to the Committees on Appropriations of the House of Representatives and the Senate. For the purposes of this section, the term ‘office’ shall include the entire suite of offices assigned to the individual, as well as any other space used primarily by the individual or the use of which is directly controlled by the individual.”

⁴ *Id.* at 2.

⁵ EPA, Order No. EP-17-H-000248, at 3 (Aug. 29, 2017).

⁶ EPA Letter, at 4.

⁷ *Id.*

⁸ *Id.* at 3–4. EPA did not state whether the booth has been certified as a “Sensitive Compartmented Information Facility” (SCIF).

Pub. L. No. 115-31, div. E, title VII, § 710. As relevant here, section 710 requires that an agency notify the appropriations committees before it (1) obligates in excess of \$5,000 to (2) furnish, redecorate, purchase furniture for, or make improvements for (3) the office of the Administrator, with the word “office” having a specific statutory definition for the purposes of this section.⁹

It is clear that two of the three elements of the section 710 notification requirement have been met. First, EPA obligated in excess of \$5,000 by obligating over \$24,000 for the booth itself and over \$18,000 for the associated space reconfiguration costs.¹⁰ Second, the privacy booth is, for purposes of section 710, located in the Administrator’s office. EPA states that the “area where the privacy booth is located is assigned to the Administrator” and that the “privacy booth is located in the Administrator’s office as that term is defined under section 710.”¹¹ Thus, at issue here is whether EPA obligated these funds to furnish, redecorate, purchase furniture for, or make improvements for the Administrator’s office.

As with any question of statutory interpretation, a section 710 analysis begins with the statute’s text. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). Where, as here, the language of a statute is unambiguous, the ordinary meaning of the statute controls. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); B-326013, Aug. 21, 2014. When a term is not defined in the legislation itself, a court may turn to the dictionary definition for its common meaning. *United States v. Lehman*, 225 F.3d 426, 428–29 (4th Cir. 2000). See *NLRB v. Canning*, ___ U.S. ___, 134 S. Ct. 2550, 2561 (2014); *Bilski v. Kappos*, 561 U.S. 593, 603, 607 (2010); *Carcieri*, 555 U.S. at 388; *Dodd v. United States*, 545 U.S. 353, 358 (2005); *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 225–27 (1994); *United States v. Vargas-Duran*, 356 F.3d 598, 602–03 (5th Cir. 2004).

⁹ As provided, section 710 applies “[d]uring the period in which the head of any department or agency, or any other officer or civilian employee of the Federal Government appointed by the President of the United States, holds office.” Pub. L. No. 115-31, div. E, title VII, § 710. Because the EPA Administrator is appointed by the President of the United States, the circumstances in this opinion satisfy this criterion for the application of section 710. See Reorganization Plan No. 3 of 1970, *Environmental Protection Agency*, § 1, 35 Fed. Reg. 15623, 15623 (Oct. 6, 1970), reprinted in 5 U.S.C. app. at 189 (2006), and in 84 Stat. 2086 (1970) (providing that the President appoints the Administrator).

¹⁰ EPA Letter, at 2.

¹¹ *Id.* at 4.

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).

In accordance with these principles, we conclude that Congress intended for each of the four limitations in section 710 to have distinct operative effect. The four types of obligations that require notification under section 710 are: (1) to furnish; (2) to redecorate; (3) to purchase furniture for; or (4) to make improvements for. By using the word “or,” Congress created a disjunctive list. Thus, an obligation that falls under any one of these conditions will trigger the notification requirement. See *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975).

As used in ordinary English, the verb “furnish” means “to equip with what is needed, especially to provide furniture for.” *American Heritage Dictionary of the English Language* 713 (4th ed. 2009) (definition of “furnish”). In drafting section 710, Congress included both the verb “furnish” and the phrase “purchase furniture for.” Because interpreting “furnish” as referring merely to furniture would render the phrase “purchase furniture for” surplusage, to “furnish” must include not only buying furniture, but also, consistent with its definition, supplying the office with other equipment.

In its letter to our Office, EPA stated that “[t]he agency’s installation of a soundproof privacy booth and the outfitting of space to house it constitute a change to the functionality of unused space in order to support specific mission requirements.”¹² According to EPA, the privacy booth “serves a functional purpose” by allowing the Administrator to carry out agency business “without concern that classified, deliberative, privileged, or sensitive information might inadvertently be disclosed to those who are not intended to receive such information.”¹³ EPA also maintained that the “privacy booth is analogous to other functional items an employee might require to perform his job duties such as a high speed computer, high speed copier/scanner, or television.”¹⁴

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Id.* at 4.

Thus, by EPA's own terms, the installation of the privacy booth equips the office with a new, practical addition to the office: a space in which the Administrator may conduct official telephone calls concerning classified, deliberative, privileged, or sensitive matters. Indeed, EPA states that its "obligation of funds for the installation of a privacy booth was an expense necessary to ensure that the Administrator's office was equipped with an item that enables the Administrator to conduct agency business in a private space"¹⁵ and that installation of the booth "allow[s] [the Administrator] to perform his official duties."¹⁶ EPA's statements place the privacy booth squarely within the meaning of "furnish," as the booth equipped the office with something that EPA asserts it needed. Accordingly, section 710 applied to this obligation and EPA was required to notify the appropriations committees of its proposed obligation.

EPA argues that section 710 does not apply to the obligation of funds for the installation of the privacy booth because the privacy booth "does not constitute an aesthetic improvement contemplated by section 710."¹⁷ According to EPA, the "purpose of the \$5,000 redecorating limitation is to ensure that Congress is aware of any funds (above \$5,000) that are being spent for items to accommodate the individual preferences of the appointee, rather than for items to conduct official agency business."¹⁸ This interpretation is inconsistent with the plain meaning of section 710. As discussed above, section 710 requires notification for each of four distinct types of obligations: (1) to furnish; (2) to redecorate; (3) to purchase furniture for; or (4) to make improvements for. The common meaning of the verb "redecorate" is "to change the appearance or furnishings of." *American Heritage Dictionary* at 1463 (definition of "redecorate"). The root of that term—"decorate"—means to "adorn with something ornamental." *Id.* at 472. EPA improperly attributes the aesthetic root of the term "redecorate" to the remaining three phrases, each of which involve functional changes for an office. By using four separate terms and requiring advance notification for each, Congress enacted a provision that applies not only to changes that are primarily aesthetic, but also to changes that provide a practical benefit for an office.

In accordance with the plain meaning of the statutory language and EPA's own statements regarding the privacy booth, section 710 applies to this obligation and, accordingly, EPA was required to notify the appropriations committees of its proposed obligation. By failing to provide such advance notice, EPA violated section 710. We draw no conclusions regarding whether the installation of the privacy booth

¹⁵ *Id.* at 1.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 3.

¹⁸ *Id.*

was the only, or the best, way for EPA to provide a secure telephone line for the Administrator.¹⁹ EPA's failure to make the necessary notification is the only subject of this opinion. However, we recognize the requirement to protect classified material and the need for employees to have access to a secure telephone line when handling such information in the course of conducting official agency business. After making the required notification, section 710 would have presented no bar to EPA's activities.

Application of the Antideficiency Act

An agency violates the Antideficiency Act if it incurs an obligation in excess of legally available amounts. 31 U.S.C. § 1341(a); B-327432, June 30, 2016; B-319009, Apr. 27, 2010. In B-327432, we held that, in violating a similar notification requirement (section 711) in the Consolidated Appropriations Act, 2010, the Federal Maritime Commission (FMC) also violated the Antideficiency Act.²⁰ B-327432, at 3–4. As we explained in that decision, Congress had conditioned the availability of funds on the agency's compliance with the notification requirement and, because FMC had failed to notify the appropriations committees of Congress of its proposed obligation, the funds were not legally available. *Id.* at 3 (noting that "Congress has the right to predicate the availability of appropriations on compliance with specified notification requirements"); *see also* B-319009, Apr. 27, 2010.

In this case, EPA violated the FY 2017 version of this same notification requirement when it obligated funds in excess of \$5,000 without providing the appropriations committees with advance notice of its proposed obligation. Because EPA did not comply with the notification requirement, the funds were not legally available at the time EPA incurred the obligation. By obligating in excess of the amount available, EPA violated the Antideficiency Act. 31 U.S.C. § 1341(a). EPA should report its Antideficiency Act violation as required by law. 31 U.S.C. § 1351.

¹⁹ In addition to the privacy booth in the Administrator's office, there are two SCIFs in the EPA headquarters building. E-mail from Associate General Counsel for Civil Rights and Finance, EPA, to Assistant General Counsel, GAO, *Subject: EPA Response to letter* (Mar. 28, 2018). These are operated by EPA sub-organizations and are located three floors away from the Administrator's office. *Id.* The SCIF must be reserved to conduct an individual call. *Id.*

²⁰ Section 711 of the Consolidated Appropriations Act, 2010 is the FY 2010 version of the FY 2017 section 710 statutory notification requirement at issue here; the language of these provisions is identical. Pub. L. No. 115-31, div. E, title VII, § 710; Pub. L. No. 111-117, div. C, title VII, § 711, 123 Stat. 3034, 3207–08 (Dec. 16, 2009).

CONCLUSION

EPA violated section 710 of the Financial Services and General Government Appropriations Act, 2017 when it failed to notify the Committees on Appropriations of the House of Representatives and Senate prior to obligating in excess of \$5,000 to install a soundproof privacy booth for the office of the Administrator during his period of appointment. Because EPA used its appropriations in a manner specifically prohibited by law, EPA violated the Antideficiency Act. EPA should report its Antideficiency Act violation as required by law.

If you have any questions, please contact Julia C. Matta, Managing Associate General Counsel, at (202) 512-4023, or Omari Norman, Assistant General Counsel for Appropriations Law, at (202) 512-8272.

A handwritten signature in black ink that reads "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the first few letters.

Thomas H. Armstrong
General Counsel