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[Comments on Treasury Appropriation Limitation]

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DIGEST

The restrictions on the transfer of funds contained in section 103 of the Treasury, Postal Service and General Government Appropriations Act of 1990, Pub. L. No. 101-136, 103 Stat. 783, apply only to transfer authority contained in that section. Therefore, the Treasury Secretary may transfer funds without regard to those restrictions if he is otherwise authorized.

The Honorable Dennis DeConcini Chairman, Subcommittee on Treasury, Postal Service, and General Government Committee on Appropriations United States Senate

Dear Mr. Chairman:

This is in response to your request for our opinion concerning the scope of section 103 of the Treasury, Postal Service, and General Government Appropriations Act, 1990 (Treasury Appropriations Act), Pub. L. No. 101- 136, 103 Stat. 783. Specifically, you asked whether the restrictions on the transfer of funds contained in section 103 prohibited the Treasury Secretary from transferring $1.6 million from the Internal Revenue Service (IRS) to the Treasury Office of Inspector General (OIG) under authority of the Inspector General Act Amendments of 1988 (IG Act Amendments), Pub. L. No. 100-504, 102 Stat. 2515. In our opinion, the restrictions on the transfer of funds contained in section 103 apply only to transfer authority contained in that section. As such, they do not apply to funds transferred under authority of the IG Act Amendments. Therefore, the Treasury Secretary properly effected the transfer of funds in question.

BACKGROUND

Your staff has advised us that the Treasury Secretary transferred to OIG the function of conducting certain investigations within the Internal Revenue Service (IRS) and also transferred $1.6 million to perform that function. We are asked whether the Secretary had authority to effect the transfer of funds since the amount transferred exceeded 2 percent of OIG's appropriation and section 103 restricts transfers to no more than 2 percent of any appropriation to the Department of the Treasury.

DISCUSSION

We begin our discussion by determining the purpose of section 103. Section 103 provides that:

"Not to exceed 2 per centum of any appropriations in this Act for the Department of the Treasury may be transferred between such appropriations. However, no such appropriation shall be increased or decreased by more than 2 per centum and any proposed transfers shall be approved in advance by the Committees on Appropriations of the House and Senate."

The first sentence of section 103 is a common provision included in many appropriations acts. Congress routinely uses the phrase "not to exceed . . . may be transferred" permissively to grant agencies limited transfer authority. See, e.g., Pub. L. No. 101-101, Sec. 302, 103 Stat. 641, 662 (1998); Pub. L. No. 100-371, Sec. 302, 102 Stat. 857, 871 (1988). Nothing in section 103 indicates that Congress intended for it to be anything other than a grant of limited transfer authority.

Legislative histories accompanying previous provisions containing identical language support our interpretation of section 103 as a grant of transfer authority. See e.g. S. Rep. 406, 99th Cong., 2d Sess. 4 (1986); S. Rep. 562, 98th Cong., 2d Sess. 3 (1985). With respect to the fiscal year 1987 appropriations act, the Senate Committee on Appropriations stated:

"The administration has requested limited authority for the Secretary of the Treasury to transfer funds between appropriation accounts of the Department of the Treasury . . . .

"The Committee has approved the request of the Department that they be granted authority to transfer up to 1 percent between appropriations accounts, but only upon prior approval of the respective Committees on Appropriations. These transfers will be requested only in emergency situations when the need for such transfer is unforeseen and absolutely critical to the mission supported by the affected appropriation account, and only after authority [sic] has received the express approval of both the House and Senate Committees on Appropriations."

S. Rep. No. 406, 99th Cong., 2d Sess. 4 (1986).

The second sentence of section 103 requires advance approval by the Committees on Appropriations before a transfer and stipulates that in making transfers Treasury may not increase or decrease any appropriation by more than 2 percent. However, we do not believe that these restrictions apply to the transfer of funds by Treasury under any statutory authority. The fact that this sentence begins with "However" and refers to "such appropriations" suggests that it is referring back to the first sentence and thus is no more than a limitation on the transfer authority contained in the first sentence. We see nothing either in the language of the provision or the legislative history of its predecessor provisions to suggest that the Congress intended to restrict Treasury's transfer authority contained in other laws. Therefore, we conclude that the restrictions contained in the second sentence of section 103 apply only to the limited transfer authority contained in section 103.

Since the restrictions in section 103 apply only to transfer authority granted by section 103, the Secretary may transfer funds without regard to those restrictions if he is otherwise authorized to do so. Under the IG Act Amendments of 1988, the Treasury Secretary may transfer to OIG certain functions that he determines are properly related to the functions of OIG. 5 U.S.C. App. 9(a)(2). Under the statute any transfer of function also effects the transfer of the resources available Secretary had indepen-dent authority under the IG Act

Amendments to effect the transfer of funds and the transfer was proper.

A member of the Subcommittee staff requested that in the event we determined that section 103 did not apply to the transfer in question, we suggest language to make section 103 generally applicable to Treasury's authority to transfer funds. To make the restrictions in section 103 applicable to transfer authority contained in other laws, the Committee should delete "However, no such appropriation shall be increased or decreased" from the beginning of the second sentence of section 103 and substitute the following:

"Notwithstanding any authority to transfer funds between appropriations contained in this or any other Act, no transfer may increase or decrease any appropriation in this Act . . . ."

We trust that this opinion is responsive to your needs. Unless you release it earlier, this opinion will be available to the public 10 days from today.

Sincerely yours,

Milton J. Socolar for Comptroller General of the United States

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