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MEMORANDUM November 21, 2014

To: Hon. Jeff Sessions
Attention: Chris Cook

From: [redacted]

Subject: **Restrictions on Federal Funds Collected Through Fees or Otherwise Made Available**

This memorandum responds to your request for an analysis of whether an agency whose appropriations for its operations are entirely fee-funded would be bound by a restriction enacted by Congress prohibiting the use of "funds collected through fees or otherwise made available" for certain purposes.

In light of Congress's constitutional power over the purse,[1] the Supreme Court has recognized that "Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."[2] Where Congress has done so, "an agency is not free simply to disregard statutory responsibilities."[3] Therefore, if a statute were enacted which prohibited appropriated funds from being used for some specified purposes, then the relevant funds would be unavailable to be obligated or expended for those purposes.[4]

A fee-funded agency or activity typically refers to one in which the amounts appropriated by Congress for that agency or activity are derived from fees collected from some external source. Importantly, amounts received as fees by federal agencies must still be appropriated by Congress to that agency in order to be available for obligation or expenditure by the agency.[5] In some cases, this appropriation is provided through the annual appropriations process. In other instances, it is an appropriation that has been enacted independently of the annual appropriations process (such as a permanent appropriation in an authorizing act). In either case, the funds available to the agency through fee collections would be subject to the same potential restrictions imposed by Congress on the use of its appropriations as any other type of appropriated funds.

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[1] U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law").

[2] Lincoln v. Vigil, 508 U.S. 182, 192-193 (1993) (upholding the decision to discontinue the Indian Children's Program by the Indian Health Service, where funding for the program was provided in an annual lump sum appropriation to the agency).

[3] *Id.*

[4] 31 U.S.C. § 1301(a) ("Appropriations shall be applied *only* to the objects for which the appropriations were made except as otherwise provided by law.") (emphasis added).

[5] In the absence of an appropriation making fees collected by an agency available to that agency, the collected fees are placed in the general fund of the Treasury as miscellaneous receipts, unless otherwise directed. *See* GAO, 3 Principles of Federal Appropriations Law 12-182 (2008) (citing 31 U.S.C. § 3302(b)).

With respect to your question, the surrounding statutory language in which the provided clause would be enacted will determine how broadly a court would view Congress's intent. Without that surrounding language it is not possible to determine whether the language provided would apply to any particular agency.[6] However, the hypothetical examples discussed below may help demonstrate how such an analysis would proceed.

For example, such a prohibition could be written such that it applied to "funds collected through fees *by [the particular agency]* or otherwise made available *to [the particular agency.]*" In this case, the restriction would likely be read to apply to operations of the named agency. Alternatively, a provision could be written to apply to funds collected through fees by or available to "any agency." This would likely enlarge the scope of the restriction to apply to the activities of all federal agencies.

However, if the language as provided is used in the context of limiting statutory language, it may be read differently. For example, if it is included in an annual appropriations act, it could be read to apply only to fees collected by or funds available to the agencies funded by that act. On the other hand, when Congress has applied restrictions in an annual appropriations act to funds provided in "this act or any other act," that clause has been interpreted by the Comptroller General of the United States to apply to funds provided in other appropriations acts, as well as those enacted independently of the annual appropriations process, for the duration of the underlying appropriations act.[7]

In conclusion, the context in which a restriction on "funds collected through fees or otherwise made available" is enacted will determine which agencies or activities will be subject to that restriction. But, it is at least a theoretical possibility that a court could find that such a restriction reached activities or agencies that were entirely fee-funded.

[6] Without the terms of the actual restriction, it cannot be determined whether a particular funding limitation would be effective in accomplishing a particular policy purpose.

[7] *See, e.g.*, 50 Comp. Gen. 323 (Oct. 28, 1970) (applying prohibition against appropriations "contained in this or any other Act" from being used to pay for federal employees who were non-citizens to funds provided under permanent and indefinite appropriations to House and Senate restaurants). A funding restriction in an annual appropriations act is typically viewed as effective only for the duration of the act, unless the provision contains "words of futurity" that indicate congressional intent for the restriction to be permanent. *See* GAO, 1 Principles of Federal Appropriations Law 2-34 (2004).