Contrasting Relationships of Financial and Banking Oversight Agencies:

Self-Funding Agencies Versus Appropriation-Dependent Agencies

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In the last several decades, Congress has forgone their duty to properly fund the government before the start of the fiscal year. This has led to multiple continuing resolutions or large end-of-the-year omnibus spending bills well after the new fiscal year has begun. Congressional failure to fund the government in a timely manner creates uncertainty for regulators and directly impacts their operations. This article analyzes the three distinct funding mechanisms of the Commodity Futures Trading Corporation, the Securities and Exchange Commission and the Federal Deposit Insurance Corporation, and how the appropriations process or self-funding model impacts their operations. For the handful of self-funding agencies who exist outside the congressional appropriations process, their operational activity continues to function without interruption. But for most financial service regulators that rely on direct appropriations, their oversight actions and responsibilities are placed on pause until Congress approves a budget and the President signs the legislation.

https://doi.org/10.4079/pp.v28i0.7

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ACKNOWLEDGEMENTS

The author would like to first thank his parents, Vicki and Bill Setterlund, who have always supported his education, career and adventure pursuits through their unconditional love and continued advice throughout the years. He would also like to thank his beloved girlfriend Jennifer Calderon, for her everlasting support of his career and education in Washington, D.C. Grateful for her careful eye, wordsmithing talents and thoughtful critics, James delightfully thanks Policy Perspectives Associate Editor, Aleida Fernandez, for her contributions toward the article and setting high standards for the team to achieve together. He wishes to thank Professor David Brunori for the opportunities he has provided through his mentorship and educational goals. Finally, he wishes to thank his employer, Americans for Tax Reform, and Executive Director, Chris Butler, for their educational support.

INTRODUCTION

While self-funded agencies have existed for over a century, they only account for a fraction of federal agencies in the United States (US) (Kurly 2013). Most federal agencies receive their funding from appropriations legislation passed by Congress and signed by the President. Self-funded agencies, on the other hand, receive their funding through other means, such as fees, although some receive partial funding from congressional appropriations. Because of this financial autonomy, they are largely provided with independence not only in their regulatory authority and oversight but are also insulated from Capitol Hill politics that oftentimes result in political infighting over certain agency programs, reduced agency funding, or failure to pass all 12 appropriations bills before the end of the fiscal year.

When Congress fails to enact appropriations before the end of the fiscal year, most federal agencies are propelled into uncertainty of how to operate without federal funding. Until Congress passes, and the President signs, short-term funding authorizations, also known as continuing resolutions (US Senate 2021), or omnibus spending bills (Strand 2011), agencies are forced to cease operations and move into a government shutdown.

The protection self-funded agencies have from congressional and White House politics has helped preserve most of those agencies' operational autonomy during these times. However, the extent to which they remain autonomous and free from shutdowns varies based on their funding structures. The funding structures of the Commodity Futures Trading Commission (CFTC), the Securities and Exchange Commission (SEC), and the Federal Deposit Insurance Corporation (FDIC), in particular, are illustrative of how differing levels of self-funding can affect the agency's experience throughout the congressional budget processes. While none are completely protected from congressional politics, the extent to which they are insulated from the whims of Congress depends their unique budget processes.

BACKGROUND

While the CFTC, SEC, and FDIC oversee distinct parts of the financial marketplace, their roles and functions vary. The CFTC was originally established in 1974 to oversee futures trading on agriculture commodities like corn and wheat, but now also regulates some aspects of the cryptocurrency market. The SEC was founded after the Great Depression to oversee fraud and investor protection within the securities and capital markets. In 1933, the FDIC was established to provide insurance on customers' deposits held in banks and savings institutions.

Following the 2008 financial crisis, Congress and President Barack Obama took action to address perceived failures in regulatory oversight by enacting the 2010 Dodd-Frank Act (US House 2009). As part of this legislation, the CFTC, the SEC, and the FDIC were tasked with increased oversight of the financial marketplace and their budgets were increased to assist with this oversight (US House 2009). After the markets stabilized, Congress has steadily increased the agencies' budgets while asking them to broaden their regulatory responsibilities.

Today, the CFTC has independent regulatory authority but is funded directly through the appropriations process. The FDIC is self-funded from the premiums that banks pay for deposit insurance. And the SEC is a hybrid of the two funding mechanisms, requiring congressional authority to collect fees assessed from market participants to fund their annual budget. The CFTC and SEC's agency structure and authority, unlike the FDIC, can be disrupted when there are political fights over government funding appropriations.

THE CFTC, THE SEC, & FY2019 APPROPRIATIONS

Self-funding offers many advantages to agencies that claim they are underfunded by Congress. It allows agencies to achieve more of their stated priorities with fewer constraints from the annual appropriations process or direct oversight of their regulatory activities. Yet, self-funded agencies may not have all the resources needed to achieve the goals created by Congress. For example, the SEC has not fully completed their rule-making mandates stemming from Dodd-Frank in the decade since its enactment, largely due to other congressional priorities that have superseded this process (SEC 2020b).

In 2018, the SEC submitted a budget request for FY2019 of $1.658 billion in funding (SEC 2019a), while the CFTC requested $281.5 million (CFTC FY19). In May 2018, the House Appropriations Subcommittee on Financial Services and General Government passed legislation (Rep. Graves 2018) that would match the SEC's request of $1.658 billion; the House Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies approved legislation (Rep. Aderholt 2018) that would increase the CFTC's budget by $6 million, from its previously established funding level of $249 million, leaving the agency with a potential budget of only $255 million. In June 2018, the Senate Appropriation Subcommittee on Financial Services and General Government approved legislation (Sen. Lankford 2018) also matching the SEC's requested budget level of $1.658 billion and deciding to match the CFTC funding request of $281.5 million.

Although these bills made it out of the subcommittees, they failed to advance to the floor of each chamber or make it to President Donald Trump's desk to sign. As these bills and other appropriations legislation lingered, Congress and the White House faced the threat of a government shutdown if they failed to provide funding for the agencies. To avoid several shutdowns throughout calendar year 2018, Congress passed five continuing resolutions after they failed to enact seven of the twelve spending bills (McClanahan 2019).

In January 2019, the House drafted H.J.Res.31, which provided funding for the SEC and CFTC through FY2019. Both agencies ultimately received a minor increase in their appropriations funding as a result of the continuing resolutions, with the SEC receiving approval to collect $1.674 billion in industry fees (US House 2019, 164) and the CFTC receiving $268 million in direct appropriations (US House 2019, 152). President Trump signed H.J.Res.31 into law on February 15, 2019 (White House 2019).

CFTC BUDGET CONSTRAINTS & PROPOSED CFTC SELF-FUNDING AUTHORITY

During the FY2019 government funding debate, the CFTC faced the real possibility of having to reconcile with a cut to its funding and the impacts it could have on its operations. One year prior, the CFTC's budget was cut by $1 million for the FY2018 appropriations (CFTC 2018), despite remaining constant at $250 million for the previous three fiscal years (CFTC 2016; CFTC 2017). As a result of the decreased funding, a September 2018 email indicated the CFTC began informing eligible staff that they could receive up to $25,000 to leave the agency, allowing for the early retirement of some, with others eligible to keep their full benefits (Bain and Schmidt 2018).

In President Trump's FY2019 budget, he called for keeping the agency's budget flat at $250 million but allowing the agency to collect an additional $31.5 million in fees to fund their operations (OMB 2018c). CFTC Chairman and Trump appointee, Christopher Giancarlo, opposed the collection of fees, putting the agency and its Chairman at odds with the Trump Administration. In a rare rebuttal, the CFTC sent their own budget to Congress requesting $281.5 million in appropriations (CFTC 2017).

Chairman Giancarlo used what is known as a "budget bypass," (Monke 2017), a relatively rare process to directly submit the CFTC's budget to Congress (CFTC 2017) instead of to the Office of Management and Budget. The enactment of the Budget and Accounting Act of 1921 empowers the President to establish and provide a federal budget request to Congress for approval or disapproval (US Senate 1921). Traditionally, OMB would receive the CFTC's budget proposal and formally submit the CFTC's budget request to Congress on behalf of the Commission. The CFTC is one of a few federal agencies to have budget bypass authority. Ultimately, the CFTC received $268 million from H.J.Res.31 and was not provided with the authority to collect fees from industry participants as proposed by the Trump Administration's budget request (US House 2019)

SEC FEE COLLECTION & AUTHORITY

Unlike the CTFC, the SEC is slightly more insulated from budget cuts. This is in large part due to its financial structure. The SEC has been able to collect fees from the sale of securities transactions since its establishment; however, Congress retains the authority to set the Commission's budget by determining how much the agency is permitted to collect in fees from industry participants to fund their operations. In FY2019, the Commission was granted authority to collect $1.674 billion in fees from industry participants through H.J.Res.31 (US House 2019, 164).

Fees from national securities exchanges like the New York Stock Exchange, self-regulatory organizations such as the Financial Industry Regulatory Authority, brokerage firms, public companies, investment advisors, and other market participants help cover some of the costs associated with the SEC's regulatory and oversight responsibilities of equity dealers (SEC 2020a). Rates are affected by the annual appropriations from Congress and are adjusted accordingly. When the SEC receives their annual appropriations from Congress, the agency has 30 days to publish a notice of the new fee rate in the *Federal Register* (Sager 2015, 10). In March 2019, the SEC set its fee rates on most securities transactions at $20.70 per million dollars, which can lead to the collection of hundreds of millions of dollars (SEC 2019c).

Detailed in the SEC's a summary of financial performance, the Commission's filing fee revenue totaled $489 million (SEC 2017b). Of this total, the SEC deposited $50 million into their Reserve Fund, which can operate much like a rainy-day fund and be used to fund the SEC's "operations, create budgetary authority, and are reported as a component of Appropriations (Discretionary and Mandatory) on the SEC's Statement of Budgetary Resources" (SEC 2017b, 15). This capital in the Reserve Fund can also be used to sustain operations if Congress were to decrease the Commission's funding (SEC OIG 2015). It has also been used for information technology modernization efforts (SEC OIG 2015).

The Reserve Fund, created under Dodd-Frank, gives the SEC authority to establish a rainy-day fund with the US Department of the Treasury and enables the agency to deposit up to $50 million per year from registration fees, with a maximum balance limit of $100 million (US House 2009, 581). The Fund is separate from the agency's annual appropriations and is not subject to apportionment (US House 2009, 581). This fund has drawn the ire of many fiscal conservatives who see it as a way for the agency to collect off-budget appropriations to spend at their discretion without congressional oversight. There have been multiple unsuccessful congressional attempts to repeal it, with the most recent in 2017 (Rep. Hensarling 2017, 426; US House 2017).

Having seen the Fund as additional spending authority, the Trump Administration's budget proposed eliminating this capital source in Fiscal Years 2018 (OMB 2018), 2019 (OMB 2018) and 2020 (OMB 2019) proposals. Republicans have long considered the Fund unaccountable to American taxpayers (OMB 2018) and a way for the SEC "to carry over unspent appropriations from year to year" (US House Committee on Financial Services 2017, 123). President Trump's OMB was critical about the Fund falling outside the appropriations process and believed the Fund's resources should be diverted to the Treasury Department to pay down the national deficit (OMB 2020). However, the Fund remains, and even Jay Clayton, Trump's appointee to lead the SEC, broke with the White House's elimination stance, testifying at both the House Financial Services (SEC 2018b) and Senate Banking (SEC 2017c) Committees on the need for the Fund for its operations.

The SEC's hybrid-funding model has protected the agency from some political fights on Capitol Hill over its budget, and the Reserve Fund has served as an additional revenue source for the agency to continue to carry out certain priorities during budget shortfalls. Despite some concerns about a potential lack of oversight, Congress has provided the SEC with nearly complete self-funding authority, while only retaining a minor director appropriations role for the purpose of retaining direct oversight of the independent agency. In fact, the agency's operations are hardly affected by Congress's budget control authority, except during times of government shutdowns when it is unable to collect fees and forced to limit some of its operations (SEC 2017a).

FDIC BUDGET: ABSOLUTE SELF-FUNDING

When the FDIC was established, Congress provided the new agency with its initial capital––the only time the FDIC has received government funding. Unlike the CFTC and SEC, the FDIC does not receive any tax dollars to fund its operations. Instead, the agency's operations are funded exclusively through premiums that banks and other financial savings institutions pay for the federal agency's insurance coverage and from the sale of US Treasury notes (FDIC 2018). This funding model allows the agency to maintain complete fiscal autonomy and operate separately from the federal government's appropriations process.

Traditionally, the FDIC had borrowing authority with the Treasury for $100 billion, which was, in effect, a line of credit (2013). During the 2008 recession and under the authority of the Emergency Economic Stabilization Act, however, the FDIC's line of credit with Treasury was suspended, resulting in an unlimited line of credit (US House 2007, 35). Today, the unlimited authority exists so long as an agreed upon plan for repayment exists between the Treasury and the FDIC (US House 2009). Before Dodd-Frank, the FDIC was mandated by law to maintain a reserve ratio level of at least 1.15 percent for their Deposit Insurance Fund (DIF) (FDIC 2010, 7), but that ratio has continued to increase, going up to 1.41 percent as recently as the end of the third quarter of 2019—well above the mandate (Fritzdixon et. al.). This ratio allows the FDIC to have a steady stream of money "on hand" to cover the loss of a customer's deposit account should their bank fail.

From time to time, Congress has taken action to increase the DIF ratio (FDIC 2019), empowering the FDIC to safely protect consumers' bank deposits without needing to access the line of credit with the Treasury Department. The FDIC's budget authority and self-funding model has allowed the agency to remain shielded from congressional partisanship over its budget and operations, unlike the CFTC and SEC. The FDIC's deposit coverage has remained politically neutral.

While the FDIC's budget and operational autonomy from Congress may be dissimilar from the SEC and the CFTC, they are not completely free from congressional scrutiny. FDIC regulatory actions, specifically their proposed rulemaking to amend the Community Reinvestment Act (Waters 2020a) and issuance of Industrial Loan Company banking charters (Waters 2020b), have drawn interest from lawmakers. Despite their disapproval, however, Congress cannot defund—nor threaten to defund—the FDIC because appropriations do not cover rules implementation. Thus, the power of the purse is not nearly as strong as it is for the SEC and the CFTC.

AGENCY OPERATIONS IN THE FACE OF A GOVERNMENT SHUTDOWN

The threat of a federal government shutdown fosters uncertainty for government agencies. The last time Congress passed all 12 appropriations bills on time was 1997 (US House 1996), and since 2010, there have been 40 continuing resolutions (McClanahan 2019). Without appropriations, most federal agencies must completely halt their operations. Financial markets do not care about shutdowns and continue to function, and while the FDIC is unaffected due to their financial independence from Congress, shutdowns create unpredictability for the CFTC and SEC, both of whom must suspend part of their oversight operations.

The SEC, with the support of the Reserve Fund, has funding to continue most operations, but non-emergency inspections and examinations are suspended (SEC 2018a). In December 2017, the Commission adopted a contingency plan for an expected government shutdown in 2018 wherein its Market Watch division would remain unaffected (SEC 2017a). However, "the Divisions of Corporation Finance, Investment Management, Trading and Markets, and the Office of Compliance Inspections and Examinations will be unable to process filings, provide interpretive advice, issue no-action letters, or conduct any other normal Division and Office activities" (SEC 2017a, 12). As a result, non-investigative operations, like processing applications for businesses to become public through initial public offerings, were suspended. It is unclear in the SEC's contingency plan how much rainy-day funding the Commission truly has and for how long it could operate without congressional authority to collect new fees. It is also unclear how quickly the agency could repurpose the Fund's capital away from IT modernization to operational expenses. But it is evident that, for at least a short period of time, the SEC would remain mostly operational during a shutdown.

The agency most affected by a shutdown is the CFTC. According to the CFTC's preparation for the January 22, 2019 shutdown, 90 percent of agency staff would be furloughed immediately, with an option to recall them only available if there was a financial marketplace emergency (CFTC 2018d). Of the 673 agency employees, only about 61 would be exempt from furlough to "ensure…the oversight of the derivatives markets and to police those markets to ensure they are free of fraud and manipulation," allowing commodities, futures exchanges, and stock markets to continue to operate under the supervision of the federal government (CFTC 2018e, 2; Baret 2018). As a result, the agency's operations would be severely limited and many divisions would be completely defunct.

CONCLUSION

With the 2019 fiscal year set to begin, and without a finalized appropriations bill to fund the SEC and CFTC (Rep. Calvert 2019), Congress acted quickly to pass a continuing resolution, holding both agencies' funding constant at their FY2018 levels through December 7, 2018 (US House 2018, 144). Fast forward to December, and both chambers of Congress failed to reach an agreement to fund the government, resulting in a nearly two-month government shutdown beginning December 22, 2018 (Webel 2019, 2) and ending on February 14, 2019 (White House 2019).

Heading into the shutdown, both the SEC and the CFTC took actions to prepare their agencies' operations. The SEC updated their Operations Plan (SEC 2018a) and provided guidance for employees on how best to proceed if they are furloughed (SEC 2019b). The CFTC notified OMB that the agency would retain its political appointees because "their work is necessary to address an imminent risk to the safety of human life [and] protective property" (CFTC 2018e, 2). During the shutdown, the SEC had enough funding to continue to operate until midnight December 26, 2018, after which the agency began furloughing employees (SEC 2019b). The small CFTC team was exempt from furloughs and continued to "monitor futures and swaps markets, ensure essential enforcement activities are carried out, and evaluate market activity across futures and swaps to identify any potential impact on the clearing system" (CFTC 2018d). In both cases, the

CFTC and SEC took measures to remain operational and provided oversight of the financial marketplace as best they could with limited agency staff.

Unfortunately, the series of continuing resolutions and ensuing government shutdown of 2018 are not isolated events. In the subsequent years, Congress passed two continuing resolutions for FY2020 (CRS 2020), and five continuing resolutions for FY2021 (CRS 2021). The uncertainty surrounding funding can present difficulties for agency planning and can upend impending priorities, including delayed contracts and grants, delayed hiring, management challenges, lost employee productivity; in its worst case, it can also affect the country's economic productivity (Krause 2019).

As long as Congress continues to vacate their duty to fund the government before the start of the new fiscal year, financial regulators may need to prepare for a continued lack of predictability. Given the importance of their duties in overseeing and regulating the American economy, funding these agencies appropriately and within the fiscal year time frame should be a top congressional priority. Stability in the appropriations process could protect these agencies from the swings congressional budget uncertainty, instead empowering financial agencies to conduct their operations efficiently and refocus their efforts toward their policy priorities.

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