FEDERAL COMPLIANCE
OFFICE OF THE GENERAL COUNSEL

UNITED STATES
POSTAL SERVICE

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

July 22, 2020

Mr. Austin Evers
American Oversight
1030 15th Street NW
Suite B255
Washington, DC 20005
foia@americanoversight.org

Re: Freedom of Information Act Appeal No. 2020-APP-00081
FOIA Case No. 2020-FPRO-01104

Dear Mr. Evers:

This is in response to your letter dated June 12, 2020, which was received in our office on the same day. In your letter, you appealed from the action of Manager, Financial Reporting Raymona Holt on your request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for access to "[a]ny final assessments or analyses regarding the impact of" the coronavirus outbreak on the Postal Service's ability to perform mail delivery and the impact of not receiving federal assistance through the CARES Act on the Postal Service's ability to perform daily mail services, deliver census materials, or prepare for an increase in demand related to vote by mail services. After carefully considering your appeal, we are remanding the action on your request in part and affirming it on modified grounds in part. A decision on this matter is attached to this letter.

With regard to the portion of this appeal that is being remanded for an additional search, you will receive a response directly from the appropriate records custodian. If you are dissatisfied with that response, you may file an appeal with the General Counsel at that time.

With the exception of the part of the request that was remanded for further processing, this is the final decision of the Postal Service regarding your right of access to records requested pursuant to the FOIA. You may seek judicial review of this decision by bringing suit for that purpose in the United States District Court for the district in which you reside or have a principal place of business, the district in which the records are located, or in the District of Columbia.

The Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect the requester's right to pursue litigation. The contact information for OGIS is as follows:

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National Archives and Records Administration
8601 Adelphi Road
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For the General Counsel,

Brittany
Wysokinski

Digitally signed by Brittany
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Date: 2020.07.22 09:31:28 -04'00'

Brittany Wysokinski
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Enclosure

cc: Raymona Holt
Joshua Colin
Tai Thompson
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UNITED STATES POSTAL SERVICE

OFFICE OF THE GENERAL COUNSEL
FEDERAL COMPLIANCE
HEADQUARTERS, WASHINGTON, D.C.

IN RE, APPEAL OF CASE NO.
2020-FPRO-01104

APPEAL NO. 2020-APP-00081

ATTORNEY BRITTANY M. WYSOKINSKI
ON BEHALF OF GENERAL COUNSEL THOMAS J. MARSHALL

OPINION AND ORDER

After careful consideration, this office is affirming Manager, Financial Reporting Raymona Holt's action in part, on modified grounds, and remanding the action on FOIA request 2020-FPRO-01104 in part.

I. STATEMENT OF FACTS

1. On May 12, 2020 the requester submitted a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for:

   - Any final assessments or analyses regarding the impact of the coronavirus outbreak, including economic consequences of the outbreak and responses to the outbreak, on USPS' ability to perform mail delivery.

   - Any final assessments or analyses regarding the impact of not receiving the federal assistance allocated in the CARES Act on USPS' ability to perform daily mail services, fulfill its obligations to deliver census materials, or prepare for expected increased demand for USPS' services, as voters turn to vote by mail methods in the lead up to the November 2020 election.

2. In the initial decision dated June 9, 2020, Ms. Holt responded to requester with 19 pages of responsive records with redactions made pursuant to FOIA Exemption 3 in conjunction with 39 U.S.C. § 410(c)(2), permitting the Postal Service to withhold information of a commercial nature that would not be disclosed under good business practice, and FOIA Exemption 5, which protects from disclosure records that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which federal governmental decisions and policies are formulated.

3. Requester appealed Ms. Holt's action on the grounds that the search for responsive records was inadequate, that Exemption 5 does not protect employee assessments of future events, and that Exemption 3 in conjunction with Section 410(c)(2) does not protect the Postal Service's financial assessments given that the Postal Service has asked Congress for billions of dollars in aid.

II. APPLICABLE LAW

Congress enacted the FOIA to "'pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). Congress balanced this objective by recognizing that "legitimate governmental and private interests could be harmed by release of certain types of information." *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 621 (1982). The FOIA "requires federal agencies to make Government records available to the public, subject to nine

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exemptions." *Milner v. Dep't of the Navy*, 562 U.S. 562, 562 (2011). In addition, other laws allow the Postal Service to withhold certain categories of records and information. *See* 39 U.S.C. § 410(c).

<u>Adequate Search</u>

An agency fulfills its obligations under FOIA if it can demonstrate "beyond material doubt" that its search was "reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (quoting *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (1983)). The adequacy of an agency's search for documents under the FOIA "is judged by a standard of reasonableness and depends . . . upon the facts of each case." *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). "[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

An agency's search for responsive records is adequate when all the offices that could be in possession of responsive documents are sent copies of the request with instructions to search for responsive documents and each office searches for responsive records. *Judicial Watch, Inc. v. U.S. Dep't of Health & Human Svcs.,* 27 F. Supp. 2d 240, 241, 244 (D.D.C.1998). *See also Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009) (affirming adequacy of search based on agency's reasonable determination regarding records being requested and searched accordingly); *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 55-58 (D.D.C. 2012) (concluding that agency's search was adequate because agency determined that all responsive records were located in particular location created for express purpose of collecting records related to subject of request and searched that location).

<u>Exemption 3</u>

If information is "specifically exempted from disclosure by statute," then it is also exempt from mandatory disclosure under the FOIA by incorporation. 5 U.S.C. § 552(b)(3) ("Exemption 3"). One statute that exempts information from disclosure is Section 410(c)(2) of the Postal Reorganization Act. 39 U.S.C. § 410(c)(2) ("Section 410(c)(2)"); *see also Wickwire Gavin v. U.S. Postal Serv.*, 356 F.3d 588, 592 n.6 (4th Cir. 2004); *Carlson v. U.S. Postal Serv.*, No. 13-cv-06017-JSC, 2015 WL 9258072, at *4 (N.D. Cal. Dec. 18, 2015); *Airline Pilots Ass'n v. U.S. Postal Serv.*, No. 03-2384 (ESH), 2004 WL 5050900, at *5 (D.D.C. June 24, 2004). This statute operates independently of the FOIA to exempt certain information from mandatory disclosure.

Section 410(c)(2) permits the Postal Service to withhold "information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed." 39 U.S.C. § 410(c)(2). "Information is of a commercial nature if it relates to commerce, trade, profit, or the Postal Service's ability to conduct itself in a businesslike manner." 39 C.F.R. § 265.14(b)(3); *see also Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1128-29 (9th Cir. 2007)(applying the common meaning of the term "commercial" to include all information that relates to commerce, trade, or profit). Section 410(c)(2) permits the withholding of a broader range of commercial information than similar FOIA exemptions. *See Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1129 (9th Cir. 2007)(applying the "common meaning" of the term "commercial"). This broader scope exists because the Postal Service is commissioned to operate like a private corporation and, therefore, must follow sound business principles. *Id.* at 1127-28.

In determining whether particular information is "commercial," in nature, the Postal Service considers six factors relating to whether the information is more akin to its role as a business entity competing in the market or its role as a provider of public services. *See* 39 C.F.R. § 265.14(b)(3)(i). No single factor is determinative but all are considered to determine the overall character of the information. 39 C.F.R. § 265.14(b)(3)(ii). In addition, the Postal Service has identified an extensive, though not exhaustive, list of types of information that are considered commercial and, thus, exempt from disclosure under Section 410(c)(2). *See* 39 C.F.R. § 265.14(b)(3)(ii).

If the information is commercial in nature and would not be disclosed "under good business practice," then the FOIA does not require the Postal Service to disclose the information. *Wickwire Gavin*, 356 F.3d at 594-95. No separate analysis is necessary to consider whether disclosure would cause competitive harm or to balance the commercial interest with the public's interest in knowing the information. *See id.* at 594-95; *Carlson*, 2015 WL 9258072 at *8-10. To determine whether commercial information would be disclosed under good business practice, courts look to the common practices of other businesses. *See Carlson*, 2015 WL 9258072 at *8.

Exemption 5

Records that normally are protected by a privilege in the context of civil discovery are exempted from mandatory disclosure under the FOIA. 5 U.S.C. § 552(b)(5) ("Exemption 5") (The FOIA does not require disclosure of "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested."); *see Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

One of the civil discovery privileges incorporated by Exemption 5 is the deliberative process privilege, which protects from disclosure records that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which federal governmental decisions and policies are formulated. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). For this privilege to apply, the record must have been pre-decisional and deliberative. *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 186 (1975).

A record is pre-decisional if it was prepared before any final agency decision on the relevant matter. *Nat'l Sec. Archive v. Cent. Intelligence Agency*, 752 F.3d 460, 463 (D.C. Cir. 2014). It also protects "memoranda containing recommendations which do not ripen into agency decisions." *See Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975). Facts in records protected by the deliberative process privilege are protected and not segregable to the extent that disclosing them would undermine the privilege. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (citing *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 87-91 (1973)). In addition, numbers can constitute deliberative material when they reflect "a complex set of judgments." *Quarles v. Dep't of Navy*, 893 F.2d 390, 392–93 (D.C. Cir. 1990) (finding that cost estimates were protectable under Exemption 5); *see also Fla. House of Representatives v. U.S. Dep't of Commerce*, 961 F.2d 941, 950 (11th Cir. 1992) (finding that adjusted census data qualified as an opinion under Exemption 5).

III. LEGAL ANALYSIS

Adequate Search

In this instance, the search only covered financial records. However, offices that handle postal operations may also be in possession of responsive records. Therefore, we are remanding this decision in part for a further search for responsive records.

Exemption 3

Requester asserts that records pertaining to the financial impact of the coronavirus cannot be withheld as commercial information because the Postal Service is using this analysis to request billions of dollars in public funds, which is "not analogous to the private 'good business practice'" that forms the basis of the standard under Section 410(c)(2).

In this instance, several factors support our conclusion that the information is commercial in nature. First, the Postal Service's need to project and analyze the potential impact of the coronavirus on postal finances relates to the Postal Service's activities that are analogous to a private business in the marketplace. 39 C.F.R. § 265.14(b)(3)(i)(B). The Postal Service relies on the sale of its services and products to fund its operations, similar to businesses in the private sector, and therefore its projections on how the coronavirus may impact those sales is akin to assessments that are also undertaken in the private sector.

Second, the withheld financial projections would be of potential benefit to individuals or entities in economic competition with the Postal Service, its customers, suppliers, affiliates, or business partners or could be used to cause harm to a commercial interest of the Postal Service, its customers, suppliers, affiliates, or business partners. 39 C.F.R. § 265.14(b)(3)(i)(C). For example, postal competitors could use this data to assess which services the Postal Service may consider most at risk during the pandemic and alter their own business plans accordingly to capitalize on the Postal Service's perceived weakness in a particular area.

The redactions to financial projections were therefore proper under Exemption 3 in conjunction with Section 410(c)(2).

Exemption 5

Requester asserts that assessments "of what will happen in the future based on factual information . . . are not the type of 'recommendations'" that Exemption 5 is meant to protect. However, the projections withheld in the responsive records are a result of a complex set of judgements that incorporate a number of different factors and, therefore, reflect the opinions of agency employees tasked with formulating such projections. In turn, these opinions of what various financial metrics might look like in the future were then used and relied upon in the decision-making process. Therefore, the redactions made to future projections were proper pursuant to Exemption 5.

Modified Release

Each year, the Postal Service publicly releases its annual financial plan. The information withheld in response to this request is information that is not reflected in this annual public disclosure. On appeal, our office found that one section of previously released information was accidentally redacted in response to this request. Therefore, our office is releasing this section of information. With the exception of this section of information, this office is affirming the redactions made pursuant to Exemption 3 in conjunction with Section 410(c)(2) and Exemption 5.

IV. CONCLUSION

For the foregoing reasons, FOIA No. 2020-FPFD-01104 (2020-APP-00081) is remanded for further processing in part and affirmed on modified grounds in part, in accordance with this decision.

For the General Counsel,

Brittany Wysokinski Digitally signed by Brittany Wysokinski
Date: 2020.07.22 09:30:48 -04'00'

Brittany M. Wysokinski
Attorney
Federal Compliance

UNITED STATES POSTAL SERVICE®

Financial Impact
COVID-19

[redacted]

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

Short-Term Outlook – Volume

[redacted]

Exemption 3 +39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process).

Index value – Pre-COVID

Volume Index	2019Q3 Actual	2019Q4 Actual	2020Q1 Actual	[redacted]
First Class	100	100	100	[redacted]
Marketing Mail	100	100	100	[redacted]
Periodicals	100	100	100	[redacted]
Shipping & Packages	100	100	100	[redacted]
International	100	100	100	[redacted]
Other	100	100	100	[redacted]
Total	100	100	100	[redacted]

Volume:	2019Q3 Actual	2019Q4 Actual	2020Q1 Actual	[redacted]
First Class	13,101	12,712	14,318	[redacted]
Marketing Mail	17,673	18,293	20,302	[redacted]
Periodicals	1,183	1,091	1,109	[redacted]
Shipping & Packages	1,420	1,451	1,737	[redacted]
International	202	180	240	[redacted]
Other	85	72	94	[redacted]
Total	*33,664*	*33,799*	*37,801*	[redacted]
4 Quarter Rolling Total:				[redacted]

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Short-Term P&L and Cash Flow Statement Impacts

FY2020 Actual/Forecast	Actual	Actual	Actual	Actual	Actual
$-Millions	Oct	Nov	Dec	Jan	Feb
Revenue	$ 6,205	$ 6,042	$ 7,148	$ 6,089	$ 5,717
Controllable Expenses	$ 6,310	$ 6,090	$ 7,382	$ 6,478	$ 5,872
Controllable income (Loss)	$ (105)	$ (48)	$ (235)	$ (389)	$ (155)
Non-Controllable Expenses	$ 265	$ 63	$ 33	$ 1,188	$ 1,132
Net income (Loss)	$ (370)	$ (111)	$ (267)	$ (1,577)	$ (1,287)
Cash Balance (No changes)	$ 8,507	$ 7,670	$ 8,430	$ 8,892	$ 9,148
+Social Security Holiday					
+Borrow $3.4B					
+Borrow $10B Additional					
+Default of FERS Normal Cost					

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Short-Term Strategies to Remain Liquid

✓ - BOG approved strategies

($ in millions)

✓ ✓

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

Exemption 3 +39 U.S.C. § 410(c)(2)

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process

[redacted]

Long-Term Comparison of Pre-COVID and Post-COVID 10 Year Impacts

Exemption 3 + 39 U.S.C. 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Previous Baseline - 10 Year IFP Scenario:

$ & pieces in billions	2020
Total Volume	138
Revenue	$ 71.8
Controllable Expenses	75.8
Non-Controllable Exp	3.6
Controllable Loss	(4.0)
Net Loss	**$ (7.6)**

Exemption 3 + 39 U.S.C. 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Exemption 3 + 39 U.S.C. 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Financial Scenario – Short-Term Legislative Relief and Scenario 3

Short-Term Legislative Relief:

1. $25B grant to cover COVID losses over the next two year period
2. $25B modernization grant to ensure USPS can maintain and modernize the infrastructure to support the nation
3. Debt forgiveness of the $14.4B in outstanding debt
4. Unrestricted borrowing authority up to $25B

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Financial Scenario – Short-Term Legislative Relief and Scenario 3

Exemption 3 + 39 U.S.C. § 410(c)(2)

[redacted]

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Next Steps - 10 Year Strategy

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

APPENDIX

[redacted]

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

Additional Regulatory Reform Proposals

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

Exemption 3 + 39 U.S.C. § 410(c)(2) and Exemption 5 (pre-decisional material/deliberative process)

[redacted]

SEC. 2302. DELAY OF PAYMENT OF EMPLOYER PAYROLL TAXES.

(a) IN GENERAL.—

(1) TAXES.—Notwithstanding any other provision of law, the payment for applicable employment taxes for the payroll tax deferral period shall not be due before the applicable date.

(2) DEPOSITS.—Notwithstanding section 6302 of the Internal Revenue Code of 1986, an employer shall be treated as having timely made all deposits of applicable employment taxes that are required to be made (without regard to this section) for such taxes during the payroll tax deferral period if all such deposits are made not later than the applicable date.

(3) EXCEPTION.—This subsection shall not apply to any taxpayer if such taxpayer has had indebtedness forgiven under section 1106 of this Act with respect to a loan under paragraph (36) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), as added by section 1102 of this Act, or indebtedness forgiven under section 1109 of this Act.

(b) SECA.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the payment for 50 percent of the taxes imposed under section 1401(a) of the Internal Revenue Code of 1986 for the payroll tax deferral period shall not be due before the applicable date.

(2) ESTIMATED TAXES.—For purposes of applying section 6654 of the Internal Revenue Code of 1986 to any taxable year which includes any part of the payroll tax deferral period, 50 percent of the taxes imposed under section 1401(a) of such Code for the payroll tax deferral period shall not be treated as taxes to which such section 6654 applies.

(c) LIABILITY OF THIRD PARTIES.—

(1) ACTS TO BE PERFORMED BY AGENTS.—For purposes of section 3504 of the Internal Revenue Code of 1986, in the case of any person designated pursuant to such section (and any regulations or other guidance issued by the Secretary with respect to such section) to perform acts otherwise required to be performed by an employer under such Code, if such employer directs such person to defer payment of any applicable employment taxes during the payroll tax deferral period under this section, such employer shall be solely liable for the payment of such applicable employment taxes before the applicable date for any wages paid by such person on behalf of such employer during such period.

(2) CERTIFIED PROFESSIONAL EMPLOYER ORGANIZATIONS.—For purposes of section 3511, in the case of a certified professional employer organization (as defined in subsection (a) of section 7705 of the Internal Revenue Code of 1986) that has entered into a service contract described in subsection (e)(2) of such section with a customer, if such customer directs such organization to defer payment of any applicable employment taxes during the payroll tax deferral period under this section, such customer shall, notwithstanding subsections (a) and (c) of section 3511, be solely liable for the payment of such applicable employment taxes before the applicable date for any wages paid by such organization to any work site employee performing services for such customer during such period.

(d) DEFINITIONS.—For purposes of this section—

(1) APPLICABLE EMPLOYMENT TAXES.—The term "applicable employment taxes" means the following:

(A) The taxes imposed under section 3111(a) of the Internal Revenue Code of 1986.

(B) So much of the taxes imposed under section 3211(a) of such Code as are attributable to the rate in effect under section 3111(a) of such Code.

(C) So much of the taxes imposed under section 3221(a) of such Code as are attributable to the rate in effect under section 3111(a) of such Code.

(2) PAYROLL TAX DEFERRAL PERIOD.—The term "payroll tax deferral period" means the period beginning on the date of the enactment of this Act and ending before January 1, 2021.

(3) APPLICABLE DATE.—The term "applicable date" means—

(A) December 31, 2021, with respect to 50 percent of the amounts to which subsection (a) or (b), as the case may be, apply, and

(B) December 31, 2022, with respect to the remaining such amounts.

(4) SECRETARY.—The term "Secretary" means the Secretary of the Treasury (or the Secretary's delegate).

(e) TRUST FUNDS HELD HARMLESS.—There are hereby appropriated (out of any money in the Treasury not otherwise appropriated) for each fiscal year to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund established under section 201 of the Social Security Act (42 U.S.C. 401) and the Social Security Equivalent Benefit Account established under section 15A(a) of the Railroad Retirement Act of 1974 (45 U.S.C. 231n–1(a)) an amount equal to the reduction in the transfers to such fund for such fiscal year by reason of this section. Amounts appropriated by the preceding sentence shall be transferred from the general fund at such times and in such manner as to replicate to the extent possible the transfers which would have occurred to such Trust Fund had such amendments not been enacted.

(f) REGULATORY AUTHORITY.—The Secretary shall issue such regulations or other guidance as necessary to carry out the purposes of this section, including rules for the administration and enforcement of subsection (c).