



2019 APPROPRIATIONS LAW FORUM

U.S. GOVERNMENT ACCOUNTABILITY OFFICE



2019 Appropriations Law Forum

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Cover images: United States Capitol
Source: Architect of the Capitol

Digests of GAO Appropriations Law Decisions and Opinions

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

File: B-329603

Date: Apr. 16, 2018

Section 710 of the Financial Services and General Government Appropriations Act, 2017 (section 710) prohibits an agency from obligating 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 appropriations committees of Congress. The statutory language of section 710 requires notification not only for the purchase of furniture and for aesthetic changes, but also for supplying the office with other equipment. The U.S. Environmental Protection Agency (EPA) violated section 710 when it failed to notify the appropriations committees prior to obligating in excess of \$5,000 for the installation of a soundproof privacy booth for the office of the Administrator during the period of his appointment. Because EPA used its appropriations in a manner specifically prohibited by law, EPA violated the Antideficiency Act and should report a violation as required by 31 U.S.C. § 1351.

Matter of: Impoundment Control Act of 1974: Review of the President's Special Message of May 8, 2018

File: B-330045

Date: May 22, 2018

Under section 1012 of the Congressional Budget and Impoundment Control Act of 1974, the President may transmit to Congress a special message proposing that Congress rescind budget authority. On May 8, 2018, President Trump transmitted to Congress a special message proposing rescissions from 38 appropriation accounts. We are submitting this letter pursuant to our statutory duty to assist the Congress by reviewing the special message. Section 1001(4) of the Impoundment Control Act provides that the Act does not supersede any provision of law requiring the obligation of budget authority or the making of outlays thereunder. We concluded that 36 of the 38 proposals were consistent with section 1001(4). We concluded that two proposals were not consistent with section 1001(4). These amounts may not be withheld from obligation pending congressional consideration of the rescission proposal. We also concluded that: (1) each proposed rescission was properly classified as a rescission proposal and not as a deferral; (2) in no case did the Office of Management and Budget (OMB) instruct an agency to withhold from obligation an amount greater than that proposed for rescission; and (3) in no case did an agency withhold from obligation an amount greater than that proposed for rescission. We also determined whether prior GAO work addressed the subject matter of each proposal and noted the existence of such work where applicable.

Matter of: Impoundment Control Act of 1974: Release of Certain Withheld Amounts

File: B-330045.1

Date: May 24, 2018

On May 8, 2018, the President transmitted to Congress a special message proposing rescissions from 38 appropriation accounts. We concluded that two of these proposals were not consistent with section 1001(4) of the Congressional Budget and Impoundment Control Act of 1974 and, therefore, that the corresponding amounts could not be withheld from obligation pending congressional consideration of the rescission proposal. B-330045, May 22, 2018. On May 22, the Office of Management and Budget (OMB) advised us that it had instructed the Department of Transportation to release these amounts that were previously withheld from obligation.

Matter of: Impoundment Control Act of 1974: Review of the President's Supplementary Message of June 5, 2018

File: B-330045.2

Date: June 18, 2018

Under section 1012 of the Congressional Budget and Impoundment Control Act of 1974, the President may transmit to Congress a special message proposing that Congress rescind budget authority. On May 8, 2018, President Trump transmitted to Congress a special message proposing rescissions from 38 appropriation accounts. Section 1014(c) of the Act provides that the President must transmit to Congress a supplementary special message if any information in the President's special message is subsequently revised. On June 5, 2018, President Trump transmitted to Congress a supplementary special message revising ten of the rescission proposals included in the May 8 special message. We are submitting this letter pursuant to our statutory duty to promptly notify Congress of any change in the information that we submitted in our May 22, 2018, letter. The supplementary special message withdraws four rescission proposals submitted in the May 8 special message, and makes technical corrections or changes to the amount being proposed for rescission for six other rescission proposals. We reviewed the President's supplementary special message to confirm technical corrections and the proper withholding or release of amounts.

Matter of: U.S. Department of the Interior—Telephone Calls between the Secretary of the Interior and United States Senators from Alaska

File: B-329372

Date: June 27, 2018

In the absence of relevant facts, GAO is unable to render a legal opinion on whether the Secretary of the Interior's July 26, 2017 telephone calls with the United States Senators from Alaska violated the governmentwide anti-lobbying provision or other provisions applicable to Interior's use of its appropriation. The Department of the Interior Office of Inspector General, which had been asked to investigate the matter, was unable to complete its investigation and made no factual findings. The Department of Interior confirmed only that the Secretary spoke by telephone with the Senators and declined to provide further details about what was said.

Matter of: Impoundment Control Act of 1974—Release of Withheld Amounts Due to Expiration of 45-day Period

File: B-330045.3

Date: July 3, 2018

On May 8, 2018, pursuant to the Congressional Budget and Impoundment Control Act of 1974, President Trump transmitted to Congress a special message proposing rescissions from 38 appropriation accounts. Where the President properly transmits a special message, an agency may withhold corresponding amounts from obligation for up to 45 calendar days of continuous congressional session. If Congress, within the 45-day period, does not complete action on a bill rescinding the budget authority, the budget authority proposed to be rescinded must be made available for obligation. This 45-day period expired on June 22, 2018. As of that day, Congress had not passed a bill enacting any of the President's proposed rescissions, and thus the budget authority must be made available for obligation. We have contacted the agencies whose budget authority was affected by the rescission proposals and have confirmed that they have made the budget authority available for obligation.

Matter of: U.S. Department of Energy—Tweet Concerning the Secretary of Energy’s Guest Column on Health Care

File: B-329373

Date: July 26, 2018

The U.S. Department of Energy (Energy) issued a tweet concerning a guest column on health care that the Secretary of Energy wrote for a media outlet. We conclude that Energy violated 31 U.S.C. § 1301, the purpose statute, when it tweeted about the Secretary's column because Energy did not show that its appropriation was available for the purpose of informing the public about health care. Energy did not violate the prohibition on using appropriations for grassroots lobbying or for publicity or propaganda. Neither the tweet nor the column to which the tweet linked contained a clear appeal to the public to contact Members of Congress about pending legislation. In addition, neither the tweet nor the column to which the tweet linked constituted purely partisan communications, covert propaganda, or self-aggrandizement.

Matter of: U.S. Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions to Then-Administrator’s Appearance in a Trade Association’s Video

File: B-329504

Date: Aug. 22, 2018

The U.S. Environmental Protection Agency's (EPA) use of its appropriations for the then-Administrator's interview and appearance in a National Cattlemen's Beef Association (NCBA) video did not violate the publicity or propaganda or anti-lobbying provisions in applicable appropriations acts. The then-Administrator's appearance in the video did not constitute a communication that was self-aggrandizing, purely partisan, or covert. Further, neither EPA nor the then-Administrator made a clear appeal to the public to contact Members of Congress about pending legislation, nor did EPA adopt NCBA's materials as its own. Lastly, the then-Administrator's remarks did not tend to promote support for, or opposition to, a legislative proposal.

Matter of: U.S. Department of Health and Human Services—Application of Anti-Lobbying and Publicity or Propaganda Provisions

File: B-329199

Date: Sept. 25, 2018

The U.S. Department of Health and Human Services (HHS) did not violate certain legal provisions when it used its appropriations for activities related to the Patient Protection and Affordable Care Act (PPACA), including the reduction of certain planned public outreach, changes to the information on the HHS.gov and HealthCare.gov websites, agency postings on official HHS Twitter accounts, and the production and dissemination of videos through the official HHS YouTube account. First, HHS acted within its permissible range of discretion when it reduced certain planned public outreach because the curtailment of this outreach did not result in a program that was inconsistent with the requirements of applicable law. Second, HHS did not violate the publicity or propaganda or anti-lobbying provisions contained in appropriations acts, or an anti-lobbying provision contained in PPACA, through its agency communications with the public. HHS's appropriations are generally available for communicating with the public about HHS's activities and the policy views that underlie those activities, and the communications here were not self-aggrandizing, purely partisan, or covert. In addition, HHS did not make a clear appeal to the public to contact Members of Congress about pending legislation, nor did it adopt any third party's appeal. Further, HHS did not violate a provision restricting lobbying by grant or contract recipients because that provision does not apply to situations where the activity is directed by the agency and the activity is merely supported by a contractor. Lastly, HHS's changes to its HealthCare.gov website, which bore no apparent relation to legislative or regulatory modifications, did not violate the PPACA provision prohibiting the use of certain Exchange funds for lobbying activities.

Matter of: Updated Rescission Statistics, Fiscal Years 1974–2017

File: B-330019

Date: Sept. 27, 2018

GAO reviewed enacted rescissions from fiscal year 2012 through fiscal year 2017. Congress enacted rescissions totaling \$113,195,141,101 of budget authority during the period of our review and a total of \$379,966,792,175 since the passage of the Impoundment Control Act of 1974 through fiscal year 2017. Of the latter amount, \$25,006,704,717 comprises the dollar amount of Presidential proposals for rescissions that were enacted by Congress. The period of our review did not include the President's proposed rescissions in his special impoundment message of May 8, 2018. There were no Presidential proposals during the period of our review, and the last Presidential proposal prior to our review occurred in fiscal year 2000.

Matter of: Impoundment Control Act—Withholding of Funds through Their Date of Expiration

File: B-330330

Date: Dec. 10, 2018

An "impoundment" is any action or inaction by an officer or employee of the federal government that precludes obligation or expenditure of budget authority. The President has no unilateral authority to impound funds. The Impoundment Control Act of 1974 (ICA) allows the President to impound funds when he transmits a "special message" in accordance with the ICA. Upon sending the message, amounts proposed for rescission (that is, for permanent cancellation) may be impounded for a period of 45 days of continuous congressional session. At issue here is whether the ICA allows such an impoundment for fixed-period appropriations expiring during this 45-day period to continue through the date on which the funds would expire. We conclude that the ICA does not permit the impoundment of funds through their date of expiration. The plain language of the ICA permits only the temporary withholding of budget authority and provides that unless Congress rescinds the amounts at issue, they must be made available for obligation. Amounts proposed for rescission must be made available for prudent obligation before the amounts expire, even where the 45-day period provided in the ICA approaches or spans the date on which funds would expire.

Matter of: U.S. Department of Homeland Security—Impoundment Control Act and Appropriations for the Tenth National Security Cutter

File: B-329739

Date: Dec. 19, 2018

The Department of Homeland Security Appropriations Act, 2017, made a \$95 million line-item appropriation for the Coast Guard to contract for long lead time materials for the tenth National Security Cutter. DHS delayed the obligation of this amount after the House of Representatives passed a bill that proposed to rescind \$95 million from funds appropriated to the Coast Guard in fiscal year 2017.

An agency may withhold budget authority from obligation only if the President has transmitted a special message to Congress pursuant to the procedures established by the Impoundment Control Act. The President did not transmit a special message for the funds at issue, but nevertheless withheld the obligation of \$95 million. Therefore, DHS violated the Impoundment Control Act. Because we have confirmed that the funds were made available for obligation, we are not transmitting a report to Congress under the Impoundment Control Act.

Matter of: Testimony before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives—Application of the Antideficiency Act to a Lapse in Appropriations

File: B-330720, GAO-19-372T

Date: Feb. 6, 2019

The Antideficiency Act is one of the major laws through which Congress exercises its constitutional power of the purse. In general, the Act prohibits agencies from incurring financial obligations unless Congress has enacted sufficient appropriations.

In this testimony we discuss the fact that if a program has no available appropriations, and no exception to the Act applies, the agency must commence an orderly shutdown and normal operations may resume only after Congress enacts an appropriation to end the lapse.

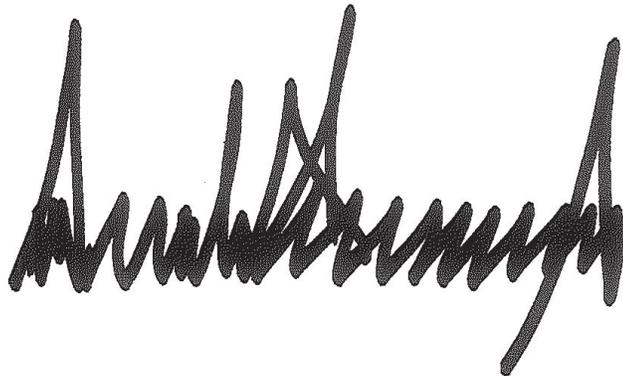
Impoundment Control Act

TO THE CONGRESS OF THE UNITED STATES:

In accordance with section 1012 of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 683), I herewith report 38 rescissions of budget authority, totaling \$15.4 billion.

The proposed rescissions affect programs of the Departments of Agriculture, Commerce, Energy, Health and Human Services, Housing and Urban Development, Justice, Labor, State, Transportation, and the Treasury, as well as of the Corporation for National and Community Service, Environmental Protection Agency, Railroad Retirement Board, the Millennium Challenge Corporation, and the United States Agency for International Development.

The details of these rescissions are set forth in the enclosed letter from the Director of the Office of Management and Budget.

A large, stylized handwritten signature in black ink, likely belonging to Andrew B. Stevenson, the Director of the Office of Management and Budget at the time.

THE WHITE HOUSE,

May 8, 2018.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

May 8, 2018

The President
The White House

Dear Mr. President:

Submitted for your consideration are proposals for rescission under section 1012 of the Congressional Budget and Impoundment Control Act of 1974 (ICA) (2 U.S.C. 683) for the Departments of Agriculture, Commerce, Energy, Health and Human Services, Housing and Urban Development, Justice, Labor, State, Transportation, and the Treasury, as well as for the Corporation for National and Community Service, Environmental Protection Agency, Railroad Retirement Board, Millennium Challenge Corporation, and the U.S. Agency for International Development.

As demonstrated in your first two Budgets, the Administration is committed to ensuring the Federal Government spends precious taxpayer dollars in the most efficient, effective manner possible. Given the long-term fiscal constraints facing our Nation, we must use all available means to put our fiscal house back in order.

To that end, the Administration is utilizing the authorities granted to the President under the ICA to propose rescissions to enacted appropriations. The proposals included in this package would make it the largest single ICA rescissions package ever proposed.

The attached rescission proposals include unobligated balances from prior-year appropriations and reductions to budget authority for mandatory programs. These proposals include rescissions of funding that is no longer needed for the purpose for which it was appropriated by the Congress; in many cases, these funds have been left unspent by agencies for years. These proposals also include rescissions of low priority and unnecessary Federal spending. We look forward to working with the Congress to identify additional opportunities to reduce wasteful and unnecessary Federal spending and put our Nation on a sustainable fiscal path.

This special message is transmitting your proposals to rescind \$15.4 billion in budget authority. If enacted, these rescissions would decrease Federal outlays in the affected accounts by an estimated \$3.0 billion; this would have a commensurate effect on the Federal budget deficit and the national economy, and would result in less borrowing from the Federal Treasury.

Recommendation

I join the heads of the affected departments and agencies in recommending you transmit the proposals to the Congress.

Sincerely,

A handwritten signature in black ink, appearing to read "Mick Mulvaney", written over a horizontal line.

Mick Mulvaney
Director

Enclosures

PROPOSED RESCISSION OF BUDGET AUTHORITY
Report Pursuant to Section 1012 of Public Law 93-344

Agency: DEPARTMENT OF HEALTH AND HUMAN SERVICES
Bureau: Centers for Medicare and Medicaid Services
Account: Children's Health Insurance Fund (075-0515 /X)

Amount proposed for rescission: \$5,149,512,000

Proposed rescission appropriations language:

Of the unobligated balances available from section 301(b)(3) of Public Law 114-10 and pursuant to section 2104(m)(2)(B)(iv) of the Social Security Act, \$5,149,512,000 are rescinded.

Justification:

This proposal would rescind \$5.1 billion in amounts made available by the Medicare Access and CHIP Reauthorization Act of 2015 to supplement the 2017 national allotments to States, including \$3.1 billion in unobligated balances available on October 1, 2017, and \$2 billion in recoveries as of May 7, 2018. The 2017 one-time appropriation was made available in addition to the annual Children's Health Insurance Program (CHIP) appropriation to reimburse states for eligible CHIP expenses. Authority to obligate these funds to States expired on September 30, 2017, and the remaining funding is no longer needed. Enacting the rescission would have no programmatic impact. The proposed rescission would have no effect on outlays.

PROPOSED RESCISSION OF BUDGET AUTHORITY
Report Pursuant to Section 1012 of Public Law 93-344

Agency: DEPARTMENT OF TRANSPORTATION
Bureau: Federal Highway Administration
Account: Miscellaneous Appropriations (069-0538 /X)

Amount proposed for rescission: \$85,938,251

Proposed rescission appropriations language:

Of the unobligated balances available in the "Surface Transportation Priorities" account under Treasury Account Fund Symbol 69X0538 from the Consolidated Appropriations Act, 2010 (Public Law 111-117) or any other Act, \$85,938,251 are rescinded.

Justification:

This proposal would rescind \$86 million in prior year balances, of which there were \$90 million available on October 1, 2017. The 2010 Consolidated Appropriations Act and prior Acts provided funding to carry out earmarked highway projects, many of which are less than \$1 million, and are not regionally or nationally significant projects justifying direct appropriations. Many of these earmarks would be eligible for regular Federal Aid Highway formula funding, and if these balances are rescinded, States could direct their Federal Aid formula grant funds towards these projects, if they so choose.

PROPOSED RESCISSION OF BUDGET AUTHORITY
Report Pursuant to Section 1012 of Public Law 93-344

Agency: DEPARTMENT OF TRANSPORTATION
Bureau: Federal Highway Administration
Account: Miscellaneous Highway Trust Funds (069-8058 /X)

Amount proposed for rescission: \$48,019,600

Proposed rescission appropriations language:

Of the unobligated balances available under the heading "Miscellaneous Highway Projects" from the Department of Transportation and Related Agencies Appropriations Act, 2001 (Public Law 106-346) or any other Act, \$48,019,600 are permanently rescinded.

Justification:

This proposal would rescind \$48 million in prior year balances, of which there were \$53 million available on October 1, 2017. These balances are derived from the Department of Transportation and Related Agencies Appropriations Act, 2001, related to miscellaneous highway projects. Given the age of the balances, there will be little to no programmatic impact in rescinding these funds.

Spending Authority and Permanent Appropriations: Government-Wide Inventory of Accounts



United States Government Accountability Office

Testimony

Before the Subcommittee on
Intergovernmental Affairs, Committee on
Oversight and Government Reform,
House of Representatives

For Release on Delivery
Expected at 10:00 a.m. ET
Tuesday, December 11, 2018

FEDERAL BUDGET

Government-Wide Inventory of Accounts with Spending Authority and Permanent Appropriations, Fiscal Years 1995 to 2015

Statement of Tranchau (Kris) T. Nguyen, Acting Director,
Strategic Issues and
Julia C. Matta, Managing Associate General Counsel,
Office of the General Counsel

Chairman Palmer, Ranking Member Raskin, and Members of the Subcommittee:

Thank you for the opportunity to discuss our work on federal agencies' reported use of spending authority and permanent appropriations from fiscal years 1995 through 2015. As you know, Congress can provide budget authority to federal agencies and programs through the annual appropriations process. It can also provide budget authority through laws other than annual appropriations acts, or through permanent appropriations that permit the agency to obligate budget authority without further congressional action. Our remarks today are based on our report that is being released at this hearing, entitled *Federal Budget: Government-Wide Inventory of Accounts with Spending Authority and Permanent Appropriations, Fiscal Years 1995 to 2015*.¹

Our definition of spending authority and permanent appropriations includes five types of budget authority: permanent appropriations, contract authority, borrowing authority, offsetting collections, and monetary credits or bartering.² These types of budget authority provide some flexibility for agencies because they do not have to await congressional action to incur obligations and make payments. Although Congress does not review these authorities annually as part of the annual appropriations process, these authorities are still subject to congressional oversight at any point in time, such as by placing limitations on the authorities in any given year. For example, in one or more annual appropriations acts, Congress could restrict the use of some or all of the

¹GAO, *Federal Budget: Government-Wide Inventory of Accounts with Spending Authority and Permanent Appropriations, Fiscal Years 1995 to 2015*, GAO-19-36 (Washington, D.C.: Nov. 29, 2018). In addition to this report, we are releasing an online dataset of our inventory of accounts with spending authority and permanent appropriations. This can be accessed on our public website at <https://www.gao.gov/products/GAO-19-36>.

²Permanent appropriations are budget authority to incur obligations and make payments without further legislative action. Contract authority is the authority to incur obligations in advance of appropriations; a subsequent appropriation or offsetting collection is needed to liquidate the obligations. Borrowing authority is authority that permits an agency to borrow money and obligate against amounts borrowed. Offsetting collections are collections authorized by law to be credited to agency accounts that can be obligated without further congressional action. Monetary credits or bartering is the authority to make purchases with seller credits or something other than dollar amounts.

budget authority, thereby using the annual appropriations process to control the use of spending authority and permanent appropriations.³

In this context, our testimony today summarizes the findings from our report on federal agencies' reported use of spending authority and permanent appropriations. This report updates our 1996 report on the same topic.⁴ Accordingly, this testimony discusses (1) federal budget accounts with spending authority and permanent appropriations, including changes in the number of accounts and dollar amounts since fiscal year 1994; and (2) whether the identified accounts are subject to or exempt from sequestration.

To produce our findings for the report, we analyzed budget data from fiscal years 1995 through 2015. We selected these years to cover the period from our prior work, which had analyzed budget data through fiscal year 1994, through the most recent year for which data were available when we began our work.⁵ We used the Office of Management and Budget's (OMB) MAX A-11 Data Entry system (MAX) and datasets with sequestration designations provided by OMB.⁶ We then provided each agency with their spending authority and permanent appropriations data for their review. Additional information on our scope and methodology is available in our report. Our work was performed in accordance with generally accepted government auditing standards.

³Restrictions passed in an annual appropriations act can be either temporary or permanent based on their statutory language. Unless the statutory language specifies that the restriction is permanent or otherwise indicates an expiration date, restrictions passed in annual appropriations acts are assumed to be in effect only for that given fiscal year.

⁴GAO, *Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations, 1996*, [GAO/AIMD-96-79](#) (Washington, D.C.: May 31, 1996). This report was supplemented by a letter with additional account information and revisions; see *Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations, 1997*, [GAO/OGC-98-23](#) (Washington D.C.: Jan. 19, 1998).

⁵Fiscal year 2015 actual budget data are presented in the Fiscal Year 2017 President's Budget Appendix.

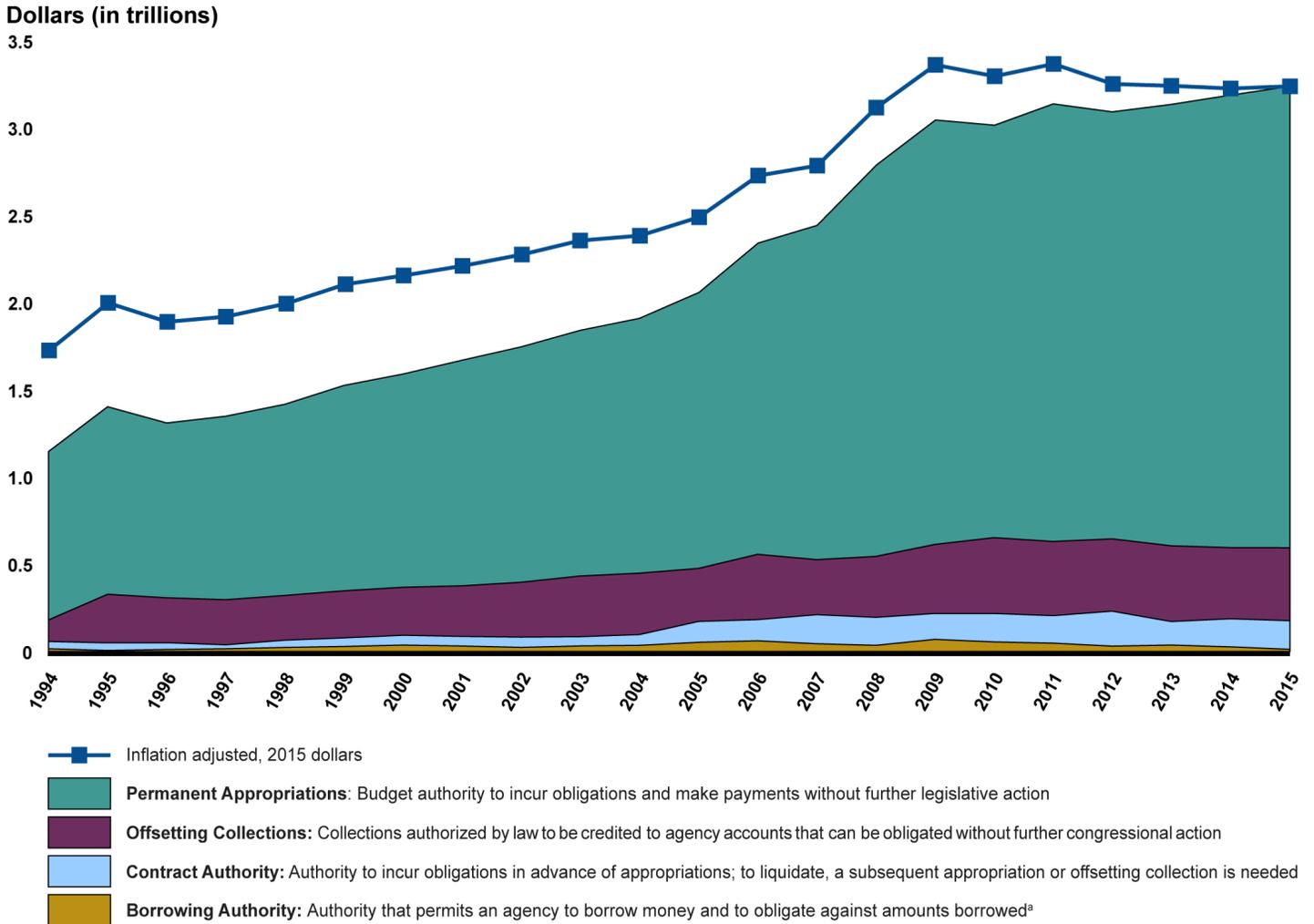
⁶MAX is a computer system used to collect and process most of the information required for preparing the President's budget for the federal government. MAX contains numerous edit checks to help ensure data consistency.

Reported Use of Spending Authority and Permanent Appropriations Has Increased Government-Wide

We found that the amount of spending authority and permanent appropriations reported government-wide grew 88 percent from fiscal years 1994 through 2015, adjusted for inflation.⁷ Specifically, in fiscal year 2015, approximately \$3.2 trillion was reported, compared with approximately \$1.2 trillion in fiscal year 1994 (\$1.7 trillion in fiscal year 2015 dollars). As a result of the growth of spending authority and permanent appropriations from fiscal years 1994 through 2015, more budget authority is available to agencies that does not require them to await congressional action to incur obligations.

⁷When discussing budget authority amounts, we considered “reported” or “used” as the actual budget authority amount, as shown in the “actual” column in the Program and Finance schedule of the President’s Budget Appendix. The total that we report for all spending authority and permanent appropriations and for offsetting collections likely overstates actual spending authority and permanent appropriations. For example, many accounts with offsetting collections authority report collections from federal and non-federal sources, or refunds of prior paid obligations, together in the President’s Budget. In general, collections from federal sources and refunds are not within our definition of spending authority and permanent appropriations. We included the entirety of the reported offsetting collections amounts because we and the agencies we asked were unable to reliably subtract collections from federal sources or refunds of prior paid obligations.

Figure 1: Growth of Spending Authority and Permanent Appropriations Government-Wide by Budget Authority Type, Fiscal Years 1994 through 2015



Source: GAO analysis of Office of Management and Budget data and information from federal agencies. | GAO-19-289T

Note: Federal agencies reported no use of any monetary credits or bartering—the authority to make purchases with seller credits or something other than dollar amounts, such as land or services.

^aFor purposes of this report, borrowing authority does not include the Department of the Treasury's authority to borrow from the public or other sources under chapter 31, of title 31 of the U.S. Code.

Growth in Total Spending Authority and Permanent Appropriations is Driven Primarily by Permanent Appropriations

Permanent appropriations were the primary driver of the growth in spending authority and permanent appropriations from fiscal years 1995 through 2015, as shown in figure 1 above. Entitlement programs, such as the Department of Health and Human Services' (HHS) Medicare and the Social Security Administration's (SSA) Old-Age and Survivors Insurance and Disability Insurance programs, are funded through permanent appropriations. These programs represent a significant proportion of reported budget authority in our inventory in fiscal year 2015. HHS reported the largest amount of spending authority and permanent appropriations in fiscal year 2015 with about \$979 billion, or about 30 percent. HHS's largest three accounts in our inventory all fund Medicare.⁸ SSA reported about \$920 billion or about 28 percent of total spending authority and permanent appropriations.

Since many spending authorities and permanent appropriations provide agencies budget authority based on program use and eligibility, demographic and program demand changes can affect the amount of reported budget authority. For example, since the Old-Age and Survivors Insurance and Disability Insurance programs administer benefits based on eligibility requirements and statutory formulas, the amount of budget authority used for the programs increases as more people become entitled.⁹ Programs administered by HHS and SSA continue to show spending increases largely as a result of the aging population and increasing health care costs.¹⁰

The Department of the Treasury (Treasury) reported the third highest amount of spending authority and permanent appropriations in our inventory. Of the \$542 billion in spending authority and permanent appropriations Treasury reported in fiscal year 2015, \$402 billion was for

⁸Multiple budget accounts fund Medicare because the program has several components and trust funds. This necessitates separate financial reporting units.

⁹The programs' appropriations are held in the Old-Age and Survivors Insurance Trust Fund and Disability Insurance Trust Fund. These amounts largely come from contributions in the form of payroll taxes, interest on the trust funds, and income taxes on some Social Security benefits. These amounts are permanently available for obligation by the Social Security Administration for the purpose of administering the program without subsequent congressional action. 42 U.S.C. § 401.

¹⁰For more information on the key drivers of federal spending, see GAO, *The Nation's Fiscal Health: Action Is Needed to Address the Federal Government's Fiscal Future*, [GAO-18-299SP](#) (Washington, D.C.: June 21, 2018).

interest on debt held by the public and intragovernmental debt.¹¹ We have reported that net interest on the federal debt is on track to be larger than any other category of spending in coming years due to continued projected growth in federal debt, and expected increases in interest rates.¹²

Other factors, such as legislative action, affected the growth in the use of spending authority and permanent appropriations to a lesser extent. For example, some existing statutes providing spending authority and permanent appropriations were amended to allow for increased use—permanently or temporarily.

Reported Budget Authority Amount Was Higher for Three of the Five Authority Types and Agencies Using the Authorities Have Changed

Although the total reported amount of spending authority and permanent appropriations increased over time, the changes for each authority type varied when comparing fiscal years 1994 to 2015. Reported budget authority grew for three of the five authority types—permanent appropriations, contract authority, and offsetting collections—in fiscal year 2015, as compared to fiscal year 1994.

- **Permanent appropriations:** Between fiscal years 1994 and 2015, the amount of reported permanent appropriations grew 81 percent, adjusting for inflation. Generally, the reported amount of permanent appropriations increased gradually, with the biggest growth occurring in fiscal year 2008. The majority of agencies had permanent appropriations from fiscal years 1995 through 2015. Together, in fiscal year 2015, the top three agencies—HHS, SSA, and Treasury—reported 91 percent of permanent appropriations used. HHS overtook SSA—the agency reporting the largest use in fiscal year 1994—and reported the highest dollar amounts of permanent appropriations for the first time in fiscal year 2006, likely due to rising health care costs. The majority of Treasury’s permanent appropriations are for interest on debt held by the public and intragovernmental debt. Treasury’s interest spending has dropped as a percentage of permanent appropriations since fiscal year 1994, due to lower interest rates that allow the government to borrow money more cheaply. However, interest rates are predicted to rise in the long term, which would increase interest spending.

¹¹Intragovernmental debt is federal debt owed by Treasury to federal government accounts, primarily federal trust funds such as Social Security and Medicare.

¹²[GAO-18-299SP](#).

- **Contract authority:** Use of contract authority grew 166 percent between fiscal years 1994 and 2015, adjusting for inflation. Five agencies had contract authority from fiscal years 1995 through 2015. The Departments of Defense, Energy, Housing and Urban Development, and Transportation used contract authority, while the Judicial Branch's Courts of Appeals, District Courts, and Other Judicial Services has contract authority, but did not use it. Overall, the number of accounts with contract authority has remained relatively stable. Only one account, at the Department of Defense, reported receiving new contract authority since 1995. In fiscal year 2015, five accounts at the Departments of Defense and Transportation, represented 99 percent of contract authority used—\$161.4 billion.
- **Offsetting collections:** The majority of agencies had offsetting collections authority during the time period we reviewed. The reported use of offsetting collections increased 126 percent when comparing fiscal years 1994 to 2015 and adjusting for inflation.¹³ This authority has a number of applications across the government, and generally authorizes agencies to collect fines, charge fees, or charge for permits among other uses. For example, the Department of Agriculture has the authority to use its portion of the fee for Agricultural Quarantine Inspection without congressional action.¹⁴ Since fiscal year 1995, 129 accounts received new offsetting collections authority. The largest usage of offsetting collections in fiscal year 2015 was the Postal Service's Postal Service Fund account. This account reported \$74 billion of offsetting collections for fiscal year 2015, which includes revenue for mail services.
- **Borrowing authority:** Reported borrowing authority varied during the time period we reviewed. It decreased 46 percent when comparing fiscal years 1994 and 2015 and adjusting for inflation. The use of borrowing authority was reported by 15 agencies from fiscal years 1994 through 2015. Two additional agencies, HHS and the Pension Benefit Guaranty Corporation, had unused borrowing authority. Since

¹³Generally, we did not rank the top agencies and accounts that used offsetting collections because we, and the agencies when asked, were unable to reliably subtract collections from federal sources or refunds of prior paid obligations. Except for working capital funds, collections from federal sources do not meet our definition of spending authority and permanent appropriations because their source is either annually appropriated or is itself in the inventory. An example is collections pursuant to reimbursable interagency agreements, such as those entered into under the Economy Act. 31 U.S.C. § 1535.

¹⁴21 U.S.C. § 136a.

1995, seven accounts reported receiving new borrowing authority across five different agencies including the Departments of Commerce and Transportation.¹⁵ The Department of Agriculture reported the largest dollar amount of borrowing authority in most years. The Department of Agriculture's large share of the total borrowing authority is for the Commodity Credit Corporation Fund. The Commodity Credit Corporation has the authority to borrow funds to carry out its programs.¹⁶ These programs include providing income and price support to agricultural producers, payments for conservation practices on farms, assistance in the development of international agricultural markets, and international feeding programs.

- **Monetary credits or bartering:** Six agencies have the authority to use monetary credits or bartering—the Departments of Agriculture, Defense, Energy, the Interior and State, and the Tennessee Valley Authority. However, none of these agencies reported using this authority from fiscal years 1995 through 2015. The number of authorities and agencies that have this authority are unchanged since fiscal year 1994.

The Percentage of Spending Authority and Permanent Appropriations Authorities Subject to Sequestration in Fiscal Year 2015 Decreased Compared to Fiscal Year 1994

Sequestration—cancellation of budgetary resources under a presidential order—is a process established in statute which helps to enforce spending limits and thereby control the deficit. In fiscal year 2015, 57 percent of spending authority and permanent appropriations authorities were exempt from sequestration, and therefore were not subject to this budgetary enforcement mechanism. This is a 20 percentage point increase since fiscal year 1994. Congress first established exemptions to sequestration when the Balanced Budget and Emergency Deficit Control Act of 1985 was enacted and has amended them since then. Since spending authority and permanent appropriations permit agencies to obligate budget authority without further congressional action, when these authorities are exempt from sequestration, agencies can continue to use these authorities without reductions when sequestration is in effect.

Chairman Palmer, Ranking Member Raskin, and members of the Subcommittee, this completes our prepared statement. We would be pleased to respond to any questions that you may have at this time.

¹⁵The other three agencies are the Departments of Agriculture, Defense, and Energy.

¹⁶15 U.S.C. § 713a-4.

GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this testimony, please contact Tranchau (Kris) T. Nguyen at (202) 512-6806 or nguyentt@gao.gov, or Julia C. Matta at (202) 512-4023 or mattaj@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Janice Latimer (Assistant Director), Lisa Motley (Assistant General Counsel), Lindsay Swenson (Analyst-in-Charge), Michael Bechetti, Ann Marie Cortez, and Katherine D. Morris.

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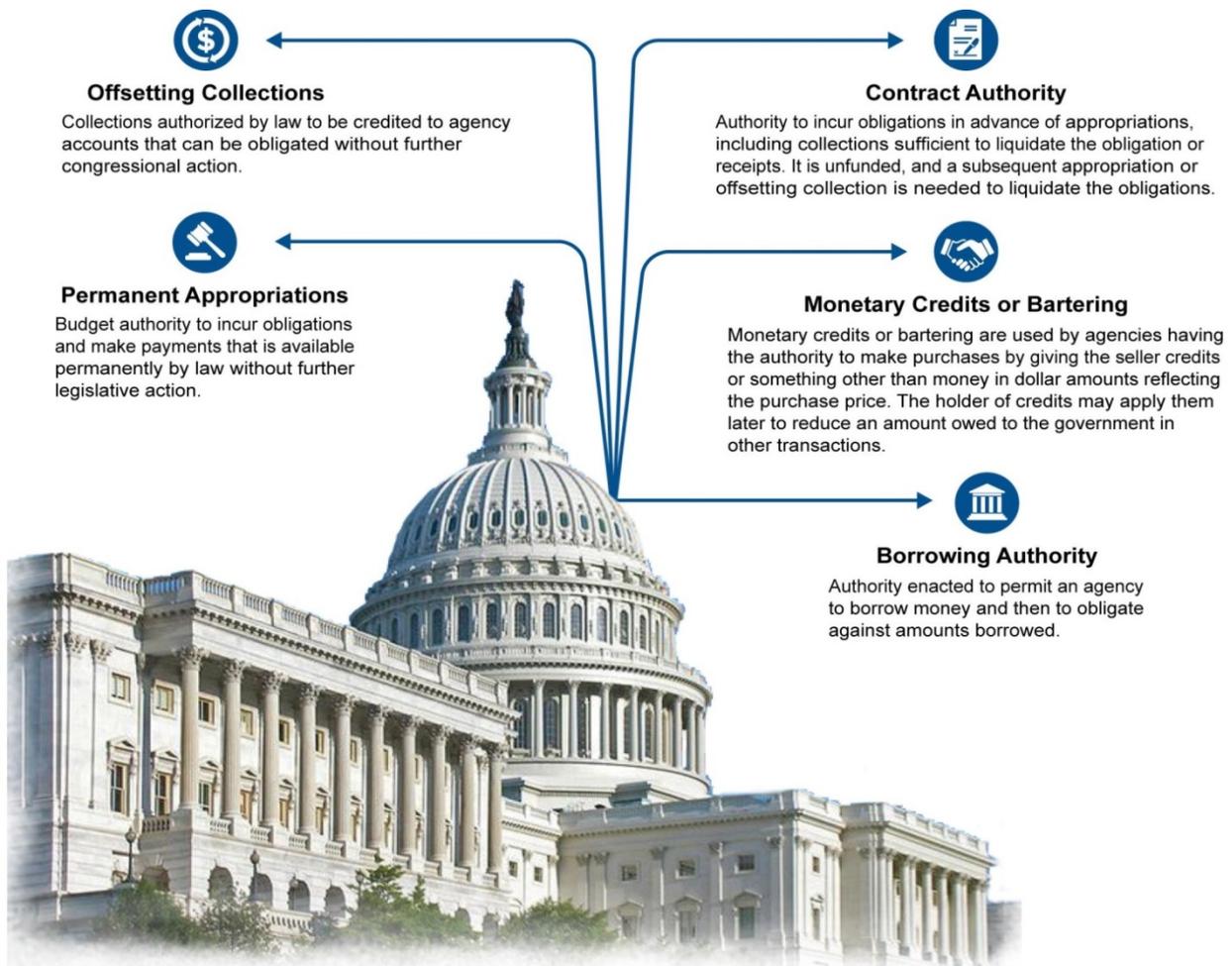
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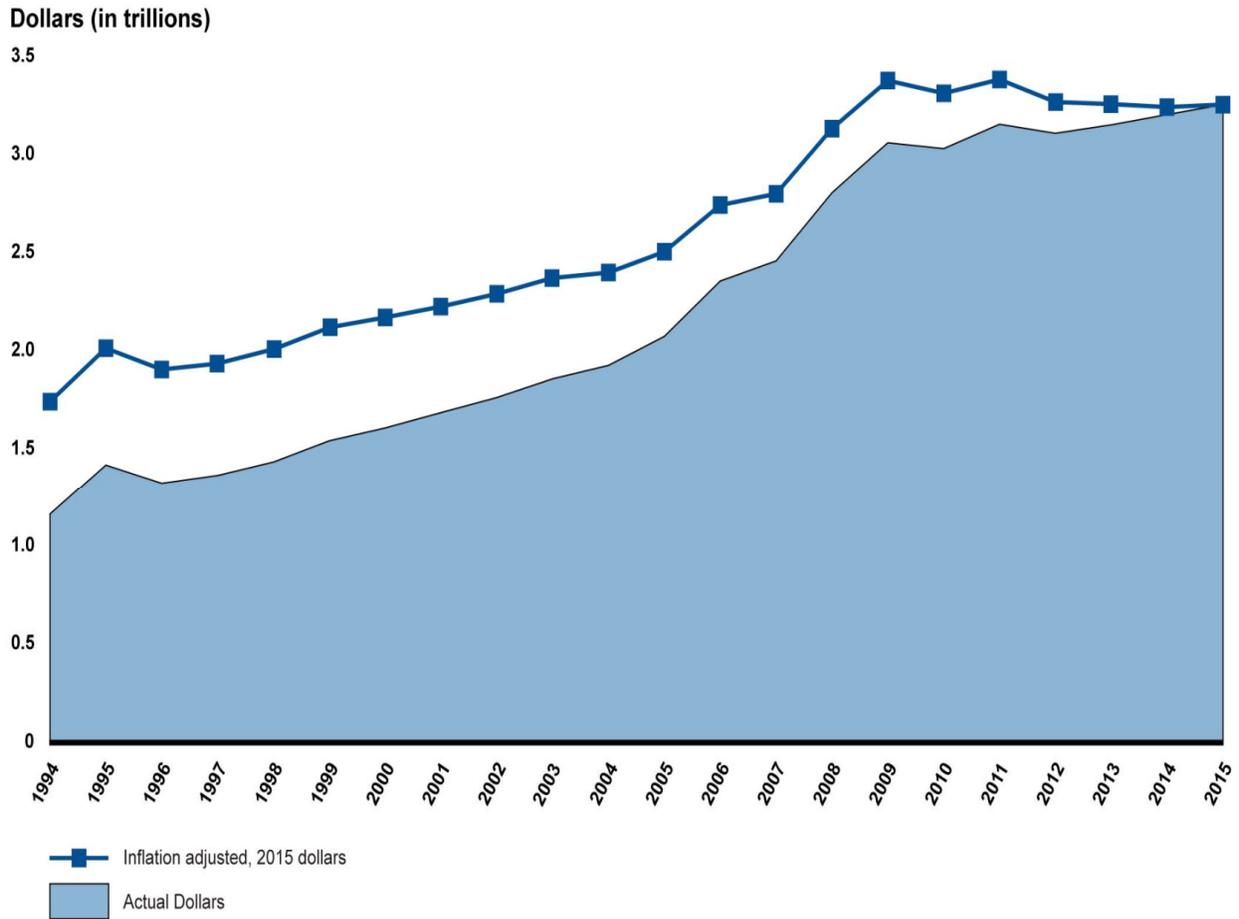
Excerpts from Government-Wide Inventory of Accounts with Spending Authority and Permanent Appropriations, Fiscal Years 1995 to 2015, GAO-19-36

Types of Budget Authority Included in Spending Authority and Permanent Appropriations



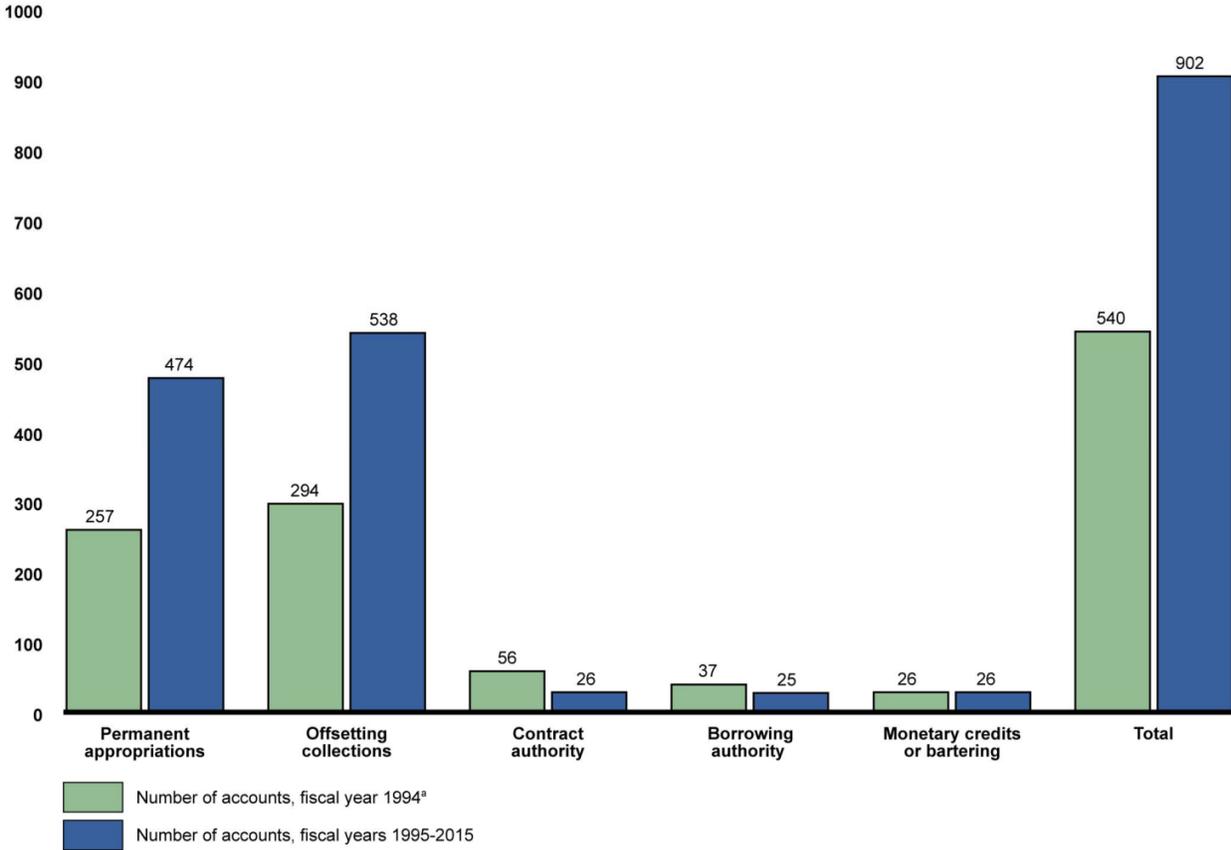
Source: GAO. | GAO-19-36

Growth of Spending Authority and Permanent Appropriations Government-Wide, Fiscal Years 1994–2015



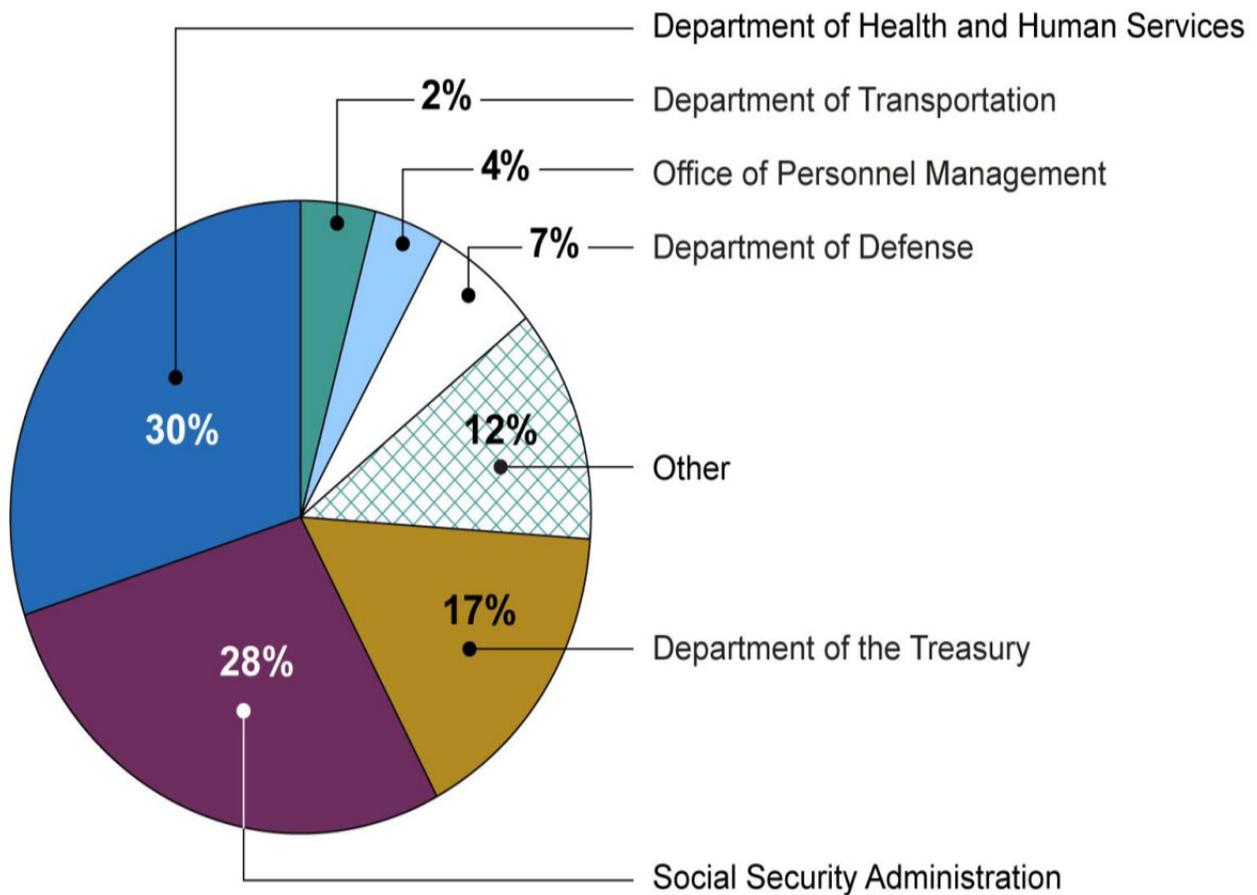
Source: GAO analysis of Office of Management and Budget data and information from federal agencies. | GAO-19-36

Number of Budget Accounts with Spending Authority and Permanent Appropriations, by Authority Type, Fiscal Years 1995–2015 Compared to 1994



Source: GAO analysis of Office of Management and Budget data and information from federal agencies. | GAO-19-36

Agencies Reporting the Largest Percentage of Total Spending Authority and Permanent Appropriations Used, Fiscal Year 2015



Source: GAO analysis of Office of Management and Budget data and information from federal agencies. | GAO-19-36

Online Dataset: Spending Authority and Permanent Appropriations from Fiscal Years 1995 through 2015 (GAO-19-36)

Prepared by: GAO

Source: GAO analysis of Office of Management and Budget data and information from federal agencies.

Department/Agency	Bureau	Account Number	Account Name	Authority Type	Source of Offsetting Collections	Statutory Reference(s)	Year Authority Enacted
Legislative Branch	Senate	00-0100-0-1-801	Compensation of Members, Senate	Permanent Appropriations	N/A	2 USC 4502	1981
Legislative Branch	Senate	00-0188-0-1-801	Congressional Use of Foreign Currency, Senate	Permanent Appropriations	N/A	22 USC 1754	1954
Legislative Branch	House of Representatives	00-0200-0-1-801	Compensation of Members and Related Administrative Expenses	Permanent Appropriations	N/A	2 USC 4502	1981
Legislative Branch	House of Representatives	00-0488-0-1-801	Congressional Use of Foreign Currency, House of Representatives	Permanent Appropriations	N/A	22 USC 1754(b)(1)(A)	1954
Legislative Branch	Joint Items	00-5083-0-2-801	United States Capitol Police Memorial Fund	Permanent Appropriations	N/A	2 USC 1951-1954	1998
Legislative Branch	House of Representatives	00-9931-0-1-801	House Revolving Funds	Offsetting Collections - Mand	Revolving fund with collections from non-public sources.	2 USC 2062, 4917, 5545	1983
Legislative Branch	Senate	00-9932-0-3-801	Senate Revolving Funds	Offsetting Collections - Mand	Fees for services and sales credited to the revolving funds.	2 USC 6573, 6574, 6576	1957
Legislative Branch	Architect of the Capitol	01-0105-0-1-801	Capitol Building	Offsetting Collections - Disc	Energy rebates from utility companies and other private companies providing services that result in energy savings.	P.L. 102-486	1992
Legislative Branch	Architect of the Capitol	01-0161-0-1-801	Capitol Visitor Center	Offsetting Collections - Disc	Funding received from the Capitol Preservation Commission for construction of the Capitol Visitor Center.	2 USC 2083	1988
Legislative Branch	Architect of the Capitol	01-4296-0-3-801	Capitol Visitor Center Revolving Fund	Offsetting Collections - Disc	Gift shop sales, commission from restaurant vendor, and other.	2 USC 2231-2234	2008
Legislative Branch	Architect of the Capitol	01-4297-0-3-801	Recyclable Materials Revolving Fund	Offsetting Collections - Mand	Collection and sale of recyclable materials collected from or on the Capitol buildings and grounds.	2 USC 1824a	2009
Legislative Branch	Architect of the Capitol	01-4518-0-4-801	Judiciary Office Building Development and Operations Fund	Borrowing Authority	N/A	40 USC 6504, 6507; P.L. 100-480	1988
Legislative Branch	Architect of the Capitol	01-4518-0-4-801	Judiciary Office Building Development and Operations Fund	Offsetting Collections - Mand	Rental payments and operating costs reimbursed from federal tenants.	40 USC 6506, 6507	1988
Legislative Branch	Capitol Police	02-0476-0-1-801	General Expenses	Offsetting Collections - Disc	Reimbursements from states and local government, and sale of surplus property.	2 USC 1905, 1906	2001
Legislative Branch	Library of Congress	03-0101-0-1-503	Salaries and Expenses, Library of Congress	Offsetting Collections - Disc	Sales of copies of card indexes and other publications of the Library.	2 USC 150	1977
Legislative Branch	Library of Congress	03-0102-0-1-376	Copyright Office, Salaries and Expenses	Offsetting Collections - Disc	Copyright fees.	17 USC 708(d), 803(e), 1316	1977
Legislative Branch	Library of Congress	03-5175-0-2-376	Payments to Copyright Owners	Offsetting Collections - Mand	Royalty fees for secondary transmissions by cable or satellite, or digital audio recording technology.	17 USC 111(d), 119(b), 1005	1976
Legislative Branch	Library of Congress	03-9971-0-7-503	Gift and Trust Fund Accounts	Permanent Appropriations	N/A	2 USC 156, 157, 158, 158a, 160, 175; 20 USC 2106, 2143	1925
Legislative Branch	Government Accountability Office	05-0107-0-1-801	Salaries and Expenses	Offsetting Collections - Disc	Collections and expenditure of reimbursements, and collection and expenditure of filing fee.	31 USC 782 note, 3555(c)	1990
Legislative Branch	Legislative Branch Boards and Commissions	09-8148-0-7-154	Open World Leadership Center Trust Fund	Offsetting Collections - Disc	Acceptance and crediting of donations and gifts.	2 USC 1151	2000
Legislative Branch	Legislative Branch Boards and Commissions	09-8300-0-7-801	U.S. Capitol Preservation Commission	Permanent Appropriations	N/A	2 USC 2083	1988

Funding Gaps: Issues Presented during a Government Shutdown



B-330720

February 6, 2019

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

Subject: *Testimony before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives—Application of the Antideficiency Act to a Lapse in Appropriations*

Chair McCollum, Ranking Member Joyce, and Members of the Subcommittee:

Thank you for the opportunity to discuss the Antideficiency Act and its application during a lapse in appropriations. A lapse in appropriations, also known as a funding gap, refers to a period of time between the expiration of an appropriation and the enactment of a new one during which an agency or program experiences a lapse in funding. For example, a fiscal year may end without the enactment of a full-year appropriation or a continuing resolution for the next fiscal year, or a continuing resolution may lapse without the enactment of a subsequent appropriation. Such a lapse may also occur if a particular appropriation becomes exhausted before the end of the fiscal year. A lapse in appropriations may vary in scope, and can affect individual agencies and programs or affect the federal government at large.

The Antideficiency Act

Through the Constitution, the framers of our government provided that the legislative branch – the Congress – has the power to control the government’s purse strings. The framers vested Congress with the power of the purse by providing in the Constitution that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const., art. I, § 9, cl. 7. Time and again, the Supreme Court has reaffirmed that this clause means exactly what its straightforward language suggests: “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.” *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

The Antideficiency Act is a major law in the statutory framework through which Congress exercises its constitutional control of the public purse. 31 U.S.C. §§ 1341, 1342, 1349–51, 1511–19. The Act prohibits agencies from obligating or expending in excess or in advance of an available appropriation unless otherwise authorized by law; accepting voluntary services for the United States, except in cases of emergency involving the safety of human life or the protection of property; and obligating or expending in excess of an apportionment, or in excess of the amounts permitted by agency regulation. 31 U.S.C. §§ 1341, 1342, 1517. Congress recently amended the Antideficiency Act to provide that, among other things, federal employees furloughed as the result of a lapse in appropriations shall be paid for the period of the lapse. Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, § 2, ___ Stat. ___ (Jan. 16, 2019); Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 103, ___ Stat. ___ (Jan. 25, 2019), *codified at* 31 U.S.C. § 1341(c)(2).

The Antideficiency Act is the only fiscal statute that includes both civil and criminal penalties for a violation. Those who violate the Antideficiency Act are subject to administrative discipline, such as suspension or removal from office, as well as criminal penalties in the case of a knowing and willful violation. 31 U.S.C. §§ 1349, 1350, 1518, 1519. Criminal penalties include a fine of not more than \$5,000, imprisonment for not more than 2 years, or both. 31 U.S.C. §§ 1350, 1519. In addition to these penalties, agencies must immediately report violations to the President and to Congress, and must also send a copy of the report to GAO. 31 U.S.C. §§ 1351, 1517(b). As of 2004, GAO serves as the repository for Antideficiency Act reports, and reports dating back to fiscal year 2005 can be accessed at GAO's website.¹ *Antideficiency Act Resources, available at www.gao.gov/legal/appropriations-law-decisions/resources* (last visited Jan. 29, 2019).

Application of the Antideficiency Act During a Lapse in Appropriations

Because of the Antideficiency Act's prohibition against incurring obligations in excess or in advance of an appropriation, a lapse in appropriations raises issues under the Act with regard to whether an agency can continue operations for a given program.

As an initial matter, certain agencies and programs may continue to operate without implicating the Antideficiency Act if the agency or program has available budget authority. Such authority may derive from multiple year or no-year appropriation carryover balances, or otherwise available balances from other authorities, such as from fee income that Congress made available for obligation. The source of these

¹ See Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title I, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004), *codified at* 31 U.S.C. §§ 1351, 1517(b).

available balances can be from a prior fiscal year's appropriations act granting multiple or no-year authority or from permanent authority made available outside of the annual appropriations process. In addition, certain statutory authorities may expressly authorize an agency to enter into obligations in advance of an appropriation. The Antideficiency Act is not implicated where an agency permissibly obligates available budget authority, even if other agencies or programs within an agency are concurrently experiencing a lapse in appropriations.

If an agency has available budget authority, programs within the agency may potentially operate using those available funds and, in general, the agency may incur and liquidate obligations, including those for employee salaries, as it normally would. However, an agency must still ensure that it adheres to all other applicable laws. For example, sometimes an agency may have two appropriations that may arguably be available for the same purpose. In those cases, an agency must elect to use a single appropriation. The agency may not switch to a different appropriation merely because the one it chose first is now depleted. B-307382, Sept. 5, 2006; B-272191, Nov. 4, 1997. This is sometimes known colloquially as the "pick-and-stick rule." This rule could be implicated if, while experiencing a lapse in appropriations, an agency begins to use a different appropriation than usual merely because the appropriation it would typically obligate for a given purpose has now lapsed.

Similarly, during a lapse in appropriations, agencies may potentially operate by exercising existing statutory authorities to transfer amounts between available appropriations or to reprogram amounts within the various purposes provided in an available appropriation. Agencies still must comply with statutory requirements contained in transfer or reprogramming authorities, including those requirements incorporated by reference into an appropriations act. Advance notification requirements, for example, provide a mechanism by which Congress may exercise its constitutional power of the purse. Where Congress conditions the availability of funding on advance notice to the appropriate congressional committees, such funding is not available until the agency provides the required notification. B-319009, Apr. 27, 2010. Congress may expressly include such a restriction in the statutory language itself, or it may incorporate the restriction by reference. See, e.g., B-329739, Dec. 19, 2018; B-323699, Dec. 5, 2012; B-316760, Feb. 19, 2009; B-183851, Oct. 1, 1975.

If an agency or program lacks available budget authority, as in the case of a lapse of appropriations, then, as a general matter, the Antideficiency Act bars the agency from incurring obligations. An agency without available budget authority may incur obligations only where an exception to the Antideficiency Act allows the agency to do so. One key exception is provided explicitly in the text of the Antideficiency Act itself. The Act permits agencies to incur obligations in advance of appropriations "for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. Importantly, in 1990, Congress amended this section to add: "As used in this section, the term 'emergencies involving the safety of human life or the protection of property' *does not include ongoing, regular functions of government the*

suspension of which would not imminently threaten the safety of human life or the protection of property.” Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, title XIII, § 13213(b), 104 Stat. 1388, 1388-621 (Nov. 5, 1990), *codified at* 31 U.S.C. § 1342 (emphasis added).

GAO has also recognized other limited exceptions to the Antideficiency Act that may, under some circumstances, allow agencies to incur obligations during a lapse in appropriations. For example, during a lapse in appropriations, Congress and the Executive may incur obligations to carry out core constitutional powers. Agencies also may incur those limited obligations that are incident to executing an orderly shutdown of agency activity.

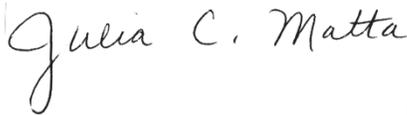
The Attorney General and the Office of Legal Counsel in the Department of Justice have also issued opinions describing other limited exceptions. As the Attorney General explained in a 1981 opinion, it is impossible to catalogue in advance all the agency activities that may fall within one of the exceptions to the Antideficiency Act. Instead, determining which activities may be excepted requires a case-by-case analysis of the particular program or circumstances at issue, as well as of the relevant statutes. For example, in that 1981 opinion, the Attorney General noted an exception to process Social Security payments. 5 Op. Off. Legal Counsel 1, 5 n.7 (1981). The Attorney General opined that agencies may incur obligations if authority to do so arises by “necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency.” *Id.* at 5. This exception was applied to only one example in the 1981 opinion. In a footnote, the Attorney General explained that it was under the “necessary implication” basis that he authorized obligations “for the administration of benefit payments under entitlement programs when the funds for the benefits payments themselves are not subject to a one-year appropriation.” *Id.* at 5 n.7. The footnote highlighted that Social Security benefits were funded through trust funds into which amounts were automatically appropriated and that the “benefit payments are to be rendered, at Congress’ direction, pursuant to an entitlement formula.” *Id.*

Where an agency incurs obligations under an exception to the Antideficiency Act, Congress has not yet enacted an appropriation sufficient to liquidate the obligation. Therefore, the agency may not make a payment to liquidate the obligation during the lapse in appropriations; instead, the agency may make a liquidating payment only after Congress enacts sufficient appropriations to do so. Congress recognized this bedrock principle when it recently amended the Antideficiency Act to provide pay for federal employees affected by a lapse in appropriations: the amendment provides that payment to employees after the lapse in appropriations ends is subject to the enactment of appropriations ending the lapse. Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, § 2, ___ Stat. ___ (Jan. 16, 2019); Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 103, ___ Stat. ___ (Jan. 25, 2019), *codified at* 31 U.S.C. § 1341(c)(2).

Conclusion

The Antideficiency Act is one of the major laws through which Congress exercises its constitutional power of the purse. In general, the Act forbids agencies from incurring obligations unless Congress has enacted sufficient appropriations. Therefore, if a program has no available appropriations, and no exception to the Antideficiency Act applies, the agency must commence an orderly shutdown and normal operations may resume only after Congress enacts an appropriation to end the lapse.

Chair McCollum, Ranking Member Joyce, and members of the Subcommittee, this completes my prepared statement. I would be pleased to respond to any questions that you may have.

A handwritten signature in black ink that reads "Julia C. Matta". The signature is written in a cursive style and is enclosed within a thin black rectangular border.

Julia C. Matta
Managing Associate General Counsel