



B-331132

December 19, 2019

The Honorable Robert C. “Bobby” Scott  
Chairman  
Committee on Education and Labor  
House of Representatives

The Honorable Andy Levin  
Vice Chairman  
Committee on Education and Labor  
House of Representatives

Subject: *Office of Management and Budget—Regulatory Review Activities during the Fiscal Year 2019 Lapse in Appropriations*

This responds to your request for our opinion regarding whether the Office of Information and Regulatory Affairs (OIRA) in the Executive Office of the President’s (EOP) Office of Management and Budget (OMB) violated the Antideficiency Act during a lapse in appropriations that occurred from December 22, 2018, through January 25, 2019.<sup>1</sup> Specifically, you asked whether OMB through OIRA’s activities violated the Antideficiency Act when it reviewed Department of Labor (DOL) regulatory materials during the lapse in appropriations.

As discussed below, we conclude that OMB violated the Antideficiency Act when, during the lapse in appropriations, it incurred obligations to review a DOL final rule and notice of proposed rulemaking. OMB lacked available budget authority for these activities and no exception to the Antideficiency Act permitted OMB to incur these obligations. Therefore, OMB must report its Antideficiency Act violation as required by 31 U.S.C. § 1351. OMB is expected to ensure that obligations for these activities are recorded against appropriations available for OIRA’s fiscal year 2019 costs.

---

<sup>1</sup> You also asked whether certain activities of the National Archives and Records Administration violated the Antideficiency Act during the lapse in appropriations. Letter from Chairman, House Committee on Education and Labor and Vice Chairman, House Committee on Education and Labor, to Comptroller General (May 23, 2019). We will address this question in a separate opinion.

In accordance with our regular practice, we contacted OMB to seek factual information and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/products/GAO-06-1064SP](http://www.gao.gov/products/GAO-06-1064SP); Letter from Managing Associate General Counsel, GAO, to General Counsel, OMB (June 24, 2019). OMB responded with its explanation of the pertinent facts and legal analysis. Email from Associate General Counsel, OMB, to Managing Associate General Counsel, GAO, *Subject: Response to GAO's Development Letter-OIRA Activity*, Attachment (Sept. 27, 2019) (attaching responses to GAO's letter from the Managing Associate General Counsel on behalf of OMB) (OMB Response).

## BACKGROUND

### OIRA's role in the federal rulemaking process

Federal regulations are created through the rulemaking process, as set forth in the Administrative Procedure Act (APA). Pub. L. No. 79-404, 60 Stat. 237 (1946), codified at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521. As part of notice and comment rulemaking, agencies are generally required to publish a notice of proposed rulemaking in the *Federal Register*,<sup>2</sup> give interested persons an opportunity to comment on the proposed rule, consider comments and respond as necessary, and publish the final rule in the *Federal Register*. 5 U.S.C. § 553.

OIRA is an office within OMB which, in turn, is within EOP. 31 U.S.C. §§ 501, 505. Pursuant to Executive Order No. 12866, OIRA reviews significant<sup>3</sup> proposed and

---

<sup>2</sup> The *Federal Register* is the official daily publication of agency rules, among other things. OIRA, *Regulations and the Rulemaking Process*, available at [https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp#reg\\_rule](https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp#reg_rule) (last visited Dec. 11, 2019).

<sup>3</sup> A significant regulatory action is any regulatory action likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order No. 12866. 58 Fed. Reg. at 51738. Agencies provide OIRA with a list of planned regulatory actions, indicating which actions the agency believes are significant regulatory actions within the meaning of Executive Order No. 12866. Those not designated as significant will not be subject to review by OIRA unless the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action. *Id.* at 51740–51741.

final rules from agencies, other than independent regulatory agencies, before they are published in the *Federal Register*. Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735, 51737, 51742, 51743, 51744 (Oct. 4, 1993). OIRA is to provide guidance and oversight so that each agency’s regulatory actions are consistent with law, the Executive Order, and the President’s priorities, and do not conflict with policies or actions of another agency. *Id.* at 51742. For proposed and final rules, the Executive Order generally requires OIRA to complete its review within 90 calendar days. *Id.* However, the head of the rulemaking agency may extend the review period, and the Director of OMB may extend the review period on a one-time basis for no more than 30 calendar days. *Id.*

#### Fiscal year 2019 lapse in appropriations and OIRA’s regulatory review activities

OMB receives a lump-sum<sup>4</sup> appropriation for its operations, which is available for OIRA’s activities. See, for example, Pub. L. No. 115-141, div. E, title II, 132 Stat. 348, 535, 548 (Mar. 23, 2018). On September 28, 2018, the President signed a continuing resolution appropriating amounts for OMB’s operations through December 7, 2018.<sup>5</sup> Pub. L. No. 115-245, div. C, §§ 101(4), 105, 132 Stat. 2981, 3123, 3124. After an extension enacted on December 7, 2018, the continuing resolution expired on December 21, 2018. See Pub. L. No. 115-298, 132 Stat. 4382 (Dec. 7, 2018). Accordingly, OMB experienced a lapse in appropriations from December 22, 2018, through January 25, 2019,<sup>6</sup> and implemented an orderly shutdown. EOP, *Contingency Plan for Shutdown Furlough* (Sept. 25, 2018), available at <https://www.whitehouse.gov/wp-content/uploads/2018/09/OMB-Contingency-Plan-Memorandum-20181001.pdf> (last visited Dec. 10, 2019) (*Contingency Plan*).

---

<sup>4</sup> A lump-sum appropriation is one that is made to cover a number of programs, projects, or items. For more information about types of appropriations, see GAO, *Principles of Federal Appropriations Law*, Vol. II, 3rd ed., ch. 6, § B.1, GAO-06-382SP (Washington, D.C.: Feb. 2006).

<sup>5</sup> A continuing resolution is “[a]n appropriation act that provides budget authority for federal agencies, specific activities, or both to continue in operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year.” GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 35–36.

<sup>6</sup> On January 25, 2019, the continuing resolution was extended through February 15, 2019. Pub. L. No. 116-5, 133 Stat. 10 (Jan. 25, 2019). Full-year appropriations for OMB’s activities were enacted on February 15, 2019. Financial Services and General Government Appropriations Act, 2019, Pub. L. No. 116-6, div. D, title II, 133 Stat. 13, 149, 151 (Feb. 15, 2019).

Appropriations for DOL for fiscal year 2019 were enacted on September 28, 2018, and, thus, DOL did not experience a lapse in fiscal year 2019 appropriations. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Pub. L. No. 115-245, div. B, title I, 132 Stat. 2981, 3048 (Sept. 28, 2018).

EOP's Contingency Plan, implemented in the fiscal year 2019 lapse in appropriations, provided that OMB would retain about 27 percent of its staff during a lapse but did not explain for what purpose these people would be retained. *Contingency Plan*. OIRA continued certain activities during the lapse, including the review of two DOL significant regulatory actions—a final rule and a notice of proposed rulemaking. OIRA, *OIRA Conclusion of EO 12866 Regulatory Review*, available at <https://www.reginfo.gov/public/do/eoDetails?rrid=128716> (last visited Dec. 10, 2019) (reflecting that OIRA received the final rule on December 7, 2018, and concluded its review on January 17, 2019); OIRA, *OIRA Conclusion of EO 12866 Regulatory Review*, available at <https://www.reginfo.gov/public/do/eoDetails?rrid=128779> (last visited Dec. 10, 2019) (reflecting that OIRA received the notice of proposed rulemaking on January 16, 2019, and concluded its review on March 7, 2019); OMB Response, at 2–3.

## DISCUSSION

At issue here is whether OMB, during the lapse in appropriations, could incur obligations for regulatory review activities.

The Antideficiency Act prohibits agencies from obligating or expending in excess or in advance of an available appropriation unless otherwise authorized by law. 31 U.S.C. § 1341. The Act further prohibits agencies from accepting voluntary services for the United States, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342. The Antideficiency Act is one of Congress's strongest means to further its constitutional power of the purse, and evidences a plain intent on the part of Congress to keep government agencies within the limits and purposes of appropriations provided for conducting their lawful functions. B-331093, Oct. 22, 2019; B-303961, Dec. 6, 2004; 42 Comp. Gen. 272 (1962). 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.

The Antideficiency Act is not implicated where an agency permissibly obligates available budget authority. B-330720, Feb. 6, 2019, at 3. If an agency or program has available budget authority—that is, authority to incur obligations—then it may continue to operate. 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. *Id.*, at 2. The source of these 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. *Id.*, at 2–3. In addition, certain statutory authorities may expressly authorize an agency to enter into obligations in advance of an appropriation, and such statutes authorize the agency to incur obligations in advance of appropriations without implicating the Antideficiency Act. B-330720, Feb. 6, 2019, at 3.

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 and the agency must commence an orderly shutdown of affected functions. An agency without available budget authority may incur obligations only where an exception to the Antideficiency Act allows the agency to do so.<sup>7</sup>

---

<sup>7</sup> See, e.g., 42 U.S.C. § 2210(j) (Nuclear Regulatory Commission and Secretary of Energy authority to “make contracts in advance of appropriations and incur obligations without regard” to the Antideficiency Act in order to administer indemnification and limitation of liability requirements); B-287619, July 5, 2001 (law directing the Department of Defense to provide medical services to beneficiaries who met statutory requirements authorized obligations to provide such services regardless of the availability of budgetary resources); 65 Comp. Gen. 4 (1985) (authorization to extend loan guarantees in amounts which may exceed available funding, and a requirement to promptly pay beneficiaries, constituted express authorization to incur obligations in excess or advance of appropriations); 39 Comp. Gen. 422 (1959) (statute requiring a certain effective date for salary increases for employees whose compensation was fixed and adjusted by law constituted clear authority for the agencies to incur obligations for the salary increases in excess of available appropriations); 38 Comp. Gen. 93 (1958) (a transfer from one appropriation account to another that was required by law and resulted in the donor account being over-obligated did not violate the Antideficiency Act because the transfer was mandated by law); 27 Comp. Gen. 452 (1948) (Maritime Commission authority to contract for an operating differential subsidy for a period not exceeding 20 years permitted obligations in advance of appropriations); B-211190, Apr. 5, 1983 (statute authorizing the Coast Guard “to expend, subject to such amounts as are provided in appropriations [a]cts for liquidation of contract authority, an amount equal to the revenues” authorized obligations prior to enactment of appropriations to liquidate contractual obligations); B-164497.3, June 6, 1979 (statute deeming agency approval of highway projects a contractual obligation of the federal government constituted authority to contract in advance of appropriations); B-168313, Nov. 21, 1969 (statute requiring that grants “shall be made over a fixed period not exceeding 40 years, and provision of such grants shall be embodied in a contract guaranteeing their payment” authorized the agency to contract in advance of appropriations).

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. We have 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. B-330720, Feb. 6, 2019, at 4. Agencies also may incur those limited obligations that are incident to executing an orderly shutdown of agency activity. *Id.*

However, given the Antideficiency Act’s central role in furthering Congress’s constitutional control of the public purse, “we interpret exceptions narrowly and in a manner to protect congressional prerogative,” and general language is not interpreted as implying a waiver of the Antideficiency Act. B-331093, Oct. 22, 2019, at 7, 9. Determining which agency activities may be excepted under the Antideficiency Act requires a case-by-case analysis and a narrowly-tailored application of the relevant statutory framework. *Id.*, at 5, 7.

#### Application of the Antideficiency Act

OMB experienced a lapse in appropriations from December 22, 2018, through January 25, 2019. During the lapse, OIRA completed its review of a DOL rule and initiated its review of a DOL notice of proposed rulemaking. OMB Response, at 2. OMB asserts that OIRA’s regulatory review activities were authorized to continue during the lapse in appropriations. OMB Response, at 1.

It is clear that during the lapse, OIRA had neither annual appropriations nor balances from other authorities to cover the costs of its regulatory review activities. See Pub. L. No. 115-298, 132 Stat. 4382 (Dec. 7, 2018) (the continuing resolution expired on December 21, 2018); *Contingency Plan* (OMB would have no other available funding for the salaries and expenses of OMB staff during a lapse in fiscal year 2019 appropriations). The question, therefore, is whether an exception to the Antideficiency Act provided OMB with authority to continue these activities during the lapse. We found no applicable exception in this case.

OMB asserts that continuation of OIRA’s regulatory review activities during the lapse in appropriations was authorized because the continuation of activities by DOL, a department that did not experience a lapse in its appropriations, necessarily implied that OIRA was authorized to review DOL’s proposed and final rules and that suspension of OIRA’s activity would prevent or significantly damage DOL’s activities. OMB Response, at 2–3. OMB states that the Antideficiency Act and opinions from the Attorney General support its position. *Id.*, at 1.

In particular, OMB refers to a 1981 opinion in which 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.” 5 Op. Off. Legal Counsel 1, 5 (1981). We addressed this opinion recently in B-331093, Oct. 22, 2019. As we noted there, the 1981 opinion applied this exception to the administration of Social Security payments. B-331093, Oct. 22, 2019, at 10. While we accepted the position with regard to Social Security payments,<sup>8</sup> we declined to extend it more widely. *Id.*, at 11.

As the Antideficiency Act is critical to Congress’s core constitutional power of the purse, we narrowly construe statutes in determining whether they authorize an exception to the Antideficiency Act. See B-331093, Oct. 22, 2019, at 8. We look for specific congressional intent in the relevant statute evidencing that the activity is to continue when appropriations are not available to satisfy the obligations. *Id.*, at 11 (where annual appropriations for the salaries and expenses of Internal Revenue Service (IRS) personnel necessary to issue tax refund payments had lapsed and there was no clear congressional intent in relevant statutes or the permanent, indefinite appropriation for tax refund payments evidencing that payments should continue, IRS could not incur obligations to issue tax refunds). An agency’s general authority to perform a certain activity, without anything more specific, does not constitute an exception to the Antideficiency Act. *Id.*

Here, OMB lacks authority to incur obligations for OIRA’s activities in advance of or in excess of available appropriations. OIRA is charged with administering federal information policy functions, including review of agency rules prior to publication in the *Federal Register*, among other things. 44 U.S.C. § 3503; 58 Fed. Reg. at 51742. However, OMB’s authority to carry out OIRA’s functions does not permit it to incur obligations in excess of available appropriations to carry out these functions.

Congress has not mandated that OMB incur obligations without regard to available budgetary resources. OMB’s authority to undertake regulatory review activities, without more affirmative and specific statutory language, does not authorize OMB to continue these activities in advance of enactment of its annual appropriations. We cannot infer a broad exception to the Antideficiency Act for activities that lack budget authority. B-331093, Oct. 22, 2019, at 12; *accord* B-303961, Dec. 6, 2004, at 8-9.

OMB also relies on a December 1995 opinion of the Attorney General. There, the Attorney General opined that where the Department of Justice (Justice) is experiencing a lapse in appropriations, but other agencies or departments of government are funded, it is implied that Justice may continue activities where a suspension of Justice’s activities would “prevent or significantly damage the

---

<sup>8</sup> In so doing, we noted that the Attorney General’s statement has become entrenched in practice for almost 40 years, and Congress is aware of this position. B-331093, Oct. 22, 2019, at 11. To revisit that position now would be tumultuous. *Id.*

execution of those funded functions.” 19 Op. Off. Legal Counsel 337, 338 (1995). OMB asserts that if OIRA had suspended review of DOL’s final rule,<sup>9</sup> then DOL would have been significantly harmed because the rule revoked reporting requirements that posed privacy and resource allocation concerns. OMB Response, at 2. According to OMB, without promulgation of the new rule, existing requirements under the 2016 rule would have mandated that private entities submit sensitive information to the federal government. *Id.*, at 2. Regarding the other DOL regulatory action that OIRA reviewed during the lapse in appropriations, a notice of proposed rulemaking,<sup>10</sup> OMB notes ongoing litigation regarding the rule and asserts that the federal government’s position in the litigation would have been significantly damaged if OIRA did not commence its review in a timely manner. *Id.*, at 3.

The information before us does not support OMB’s assertion that DOL would have been significantly harmed if OIRA had suspended its review. DOL had previously announced that it was not enforcing the deadline for private entities to submit to the government the information at issue.<sup>11</sup> There is nothing indicating that a temporary suspension in OIRA’s review of the final rule that rescinded the data submission requirements would nullify the previous decision not to enforce the deadline for submission of the data. Therefore, contrary to OMB’s assertion, the information before us shows that a delay in OIRA’s review of the DOL final rule during the lapse in appropriations would not have resulted in an enforceable requirement for private entities to submit the information to the federal government.

The information before us also does not support OMB’s assertion that the suspension of OIRA’s review would have significantly harmed the government’s position in ongoing litigation. The United States Court of Appeals for the Fifth Circuit had previously granted a stay in the litigation, pending the outcome of the rulemaking. Order Granting Appellant Mot. to Stay, Nov. 6, 2017, No. 17-41130. The court required DOL to submit status reports every 60 days. Ct. Letter to

---

<sup>9</sup> *Tracking of Workplace Injuries and Illnesses*, 84 Fed. Reg. 380 (Jan. 25, 2019).

<sup>10</sup> *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 10900 (Mar. 22, 2019).

<sup>11</sup> The existing requirements under the 2016 rule required private entities to submit certain information on workplace injuries and illnesses to DOL’s Occupational Safety and Health Administration (OSHA) that OSHA had not previously required or received. 84 Fed. Reg. 382 (Jan. 25, 2019). The deadline for submission of this information was July 2018. *Id.* However, OSHA issued a notice of proposed rulemaking in July 2018 to rescind the data submission requirement and simultaneously announced that OSHA would not enforce the July 2018 deadline for submission of the data without further notice while this new rulemaking was underway. 83 Fed. Reg. 36496 (July 30, 2018).



Counsel, July 6, 2018, No. 17-41130. In these reports, DOL told the court that it was actively engaged in the rulemaking process. See, e.g., Def.-Appellant Status Report, Dec. 21, 2018, No. 17-41130. DOL's responsibility was to keep the court updated while the rulemaking was underway. DOL could have satisfied this responsibility by notifying the court that a circumstance outside of its control (the lapse in OMB's appropriation) caused a pause in the rulemaking process, and that OMB's activities in the rulemaking process would proceed once OMB's appropriation was enacted into law. DOL's responsibilities to the court did not compel OIRA to review the regulatory action during the lapse in its appropriations.

Based on the foregoing, we conclude that no exception to the Antideficiency Act allowed OMB to incur obligations during the lapse in appropriations to review a DOL rule and notice of proposed rulemaking. There is no authority permitting OMB to conduct these regulatory review activities in advance of or in excess of its available appropriations. While DOL may be impacted by OMB's lapse in appropriations, such an impact is not sufficient to support an exception to such a fundamental statute. That impact can be addressed only through the legislative process. Only an affirmative grant of statutory authority would permit OMB to incur obligations in advance of or in excess of available appropriations.

#### Corrective action

OMB lacked budget authority for obligations it incurred to review DOL regulatory material, and no exception to the Antideficiency Act permitted these activities to continue during the lapse in appropriations. Therefore, OMB violated the Antideficiency Act when it incurred these obligations.

OMB received appropriations with the enactment on January 25, 2019 of a continuing resolution available through February 15, 2019, and a full-year appropriation enacted on February 15, 2019. Pub. L. No. 116-5, 133 Stat. 10 (Jan. 25, 2019); Pub. L. No. 116-6, div. D, title II, 133 Stat. 13, 149, 151 (Feb. 15, 2019). When OMB incurred the obligations at issue, Congress had not yet enacted these appropriations. Because the Antideficiency Act bars agencies from incurring obligations in advance of an available appropriation, and because no exception to the Antideficiency Act applied, OMB's activities violated the Antideficiency Act, notwithstanding Congress's subsequent enactment of appropriations. An agency is generally expected to correct Antideficiency Act violations by adjusting its accounts to charge the proper appropriation. B-330776, Sept. 6, 2019. Though OMB had no available budget authority when it incurred the obligations at issue, the proper corrective action in this case is for OMB to record the obligations against the proper appropriations that Congress subsequently made for OMB's expenses for fiscal year 2019. When OMB submits its Antideficiency Act report to Congress, it should describe actions taken to prevent recurring violations in similar circumstances in the future.

## CONCLUSION

OMB violated the Antideficiency Act when it incurred obligations during the lapse in appropriations to review DOL regulatory materials. OMB lacked budget authority to cover these obligations. The Antideficiency Act embodies Congress's constitutional power to require that agencies incur obligations only to the extent of available budget authority or as otherwise expressly permitted by an exception. Such exceptions to the Antideficiency Act exist only where established by a narrowly-tailored application of the relevant statutory framework to the facts and circumstances at hand. No such exception exists here. DOL had appropriations for fiscal year 2019 to continue its activities. OMB did not. OMB must report its Antideficiency Act violation as required by 31 U.S.C. § 1351, and correctly record the obligations and explain actions taken to preclude such violations in the future.

With this decision, we will consider any future obligations of this nature in similar circumstances to be a knowing and willful violation of the Antideficiency Act. The Act provides, in that event, that officials responsible for obligations in violation of the Act shall be "fined not more than \$5,000, imprisoned for not more than 2 years, or both." 31 U.S.C. § 1350.

If you have any questions, please call Shirley A. Jones, Managing Associate General Counsel, at (202) 512-8156, or Omari Norman, Assistant General Counsel for Appropriations Law, at (202) 512-8272.



Thomas H. Armstrong  
General Counsel