



October 22, 2019

Congressional Requesters

Subject: *U.S. Department of the Treasury—Tax Return Activities during the Fiscal Year 2019 Lapse in Appropriations*

This responds to your request for our opinion regarding whether the Internal Revenue Service (IRS) in the U.S. Department of the Treasury (Treasury) 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 IRS's decision to process tax returns and issue refunds to taxpayers as originally scheduled despite the lapse in appropriations violated the Antideficiency Act.

As discussed below, we conclude that Treasury violated the Antideficiency Act when, during the lapse in appropriations, it incurred obligations to process tax remittances (payments submitted by individuals) and issue tax refunds. Treasury lacked available budget authority to support these activities and no exception to the Antideficiency Act permitted IRS to incur these obligations. Therefore, Treasury must report its Antideficiency Act violation as required by 31 U.S.C. § 1351. Treasury is expected to ensure that obligations for these activities are recorded against appropriations available for IRS's fiscal year 2019 costs.

In accordance with our regular practice, we contacted Treasury 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 Assistant General Counsel, GAO, to General Counsel, Treasury (June 18, 2019). In response, Treasury provided us with a copy of a letter it sent to the House and Senate Appropriations Committees on January 15, 2019, which sets forth the legal basis asserted by IRS for the payment of tax refunds during a lapse in appropriations. Letter from Deputy Assistant Secretary, Office of Legislative Affairs, Treasury, to

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<sup>1</sup> Letter from Ranking Member, Permanent Subcommittee on Investigations, Senate Committee on Homeland Security and Governmental Affairs; then-Chairman, House Committee on Oversight and Reform; and Ranking Member, Senate Committee on Homeland Security and Governmental Affairs, to Comptroller General (May 23, 2019).

Chairwoman, House Committee on Appropriations; Ranking Member, House Committee on Appropriations; Chairman, Senate Committee on Appropriations; and Vice Chairman, Senate Committee on Appropriations (Jan. 15, 2019) (Response Letter).

## BACKGROUND

### IRS and individual federal tax returns

IRS administers and supervises the execution and application of the internal revenue laws, under the authority of the Secretary of the Treasury. 26 U.S.C. §§ 7801(a)(1), 7803(a)(2); IRS, *The Agency, its Mission and Statutory Authority*, available at <https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority> (last visited Oct. 10, 2019). As is commonly understood, the federal income tax is a pay-as-you-go tax system whereby an individual's employer withholds taxes from the individual's paychecks during the year or, for self-employed individuals, payments of estimated taxes are made quarterly during the year. 26 U.S.C. §§ 3402(a), 6017, 6654. Individuals are generally required to file a tax return with IRS by April 15 each year, reporting their income and withholdings, among other things, and calculating the additional amount owed, if any, or the excess amount paid and due as a refund. See 26 U.S.C. §§ 6012(a), 6091(a)–(b)(1), 6072(a), 6402(a); 26 C.F.R. §§ 1.6012-1(a)(1), (a)(6), 1.6091-2(a).

IRS processes tax returns using a multi-step procedure, the specifics of which depend on whether the return is filed by mail or electronically. IRS, *IRS Submission Processing Pipeline*, available at <https://www.irsvideos.gov/Professional/IRSWorkProcesses/SubmissionProcessingPipeline> (last visited Sept. 24, 2019). The first step involves routing returns with remittances to ensure deposit of the payment within 24 hours. *Id.* Data is input into the computer and checked for errors. *Id.* Lastly, if no errors or inconsistencies are found and all requirements are met, refunds or balance due notices are issued to taxpayers. *Id.*

Taxpayers for whom withholding is greater than their tax liability may be entitled to receive a tax refund for the overpayment. 26 U.S.C. § 6402(a). Section 6402 of title 26 of the United States Code authorizes IRS, within the applicable period of limitations, to first credit the amount of any overpayment, including any allowable interest, against any internal revenue tax liability owed and to then refund any remaining balance to the taxpayer. *Id.* IRS is required to pay interest on tax refunds issued late. 26 U.S.C. § 6611(a), (e)(1).

Taxpayers whose withholding is less than their tax liability—or who do not pay sufficient estimated taxes during the year—will have a balance due when they file their tax returns. 26 U.S.C. §§ 6012(a), 6151. An individual with a balance due may submit payment electronically, or by sending a check, money order, or cash. 26 U.S.C. § 6311(a); 26 C.F.R. §§ 301.6311-1, 301.6311-2; IRS, *Topic No. 202 Tax Payment Options*, available at <https://www.irs.gov/taxtopics/tc202> (last visited

Oct. 10, 2019); IRS, *Pay by Check or Money Order*, available at <https://www.irs.gov/payments/pay-by-check-or-money-order> (last visited Oct. 10, 2019). Failure to file an individual tax return or pay a balance due may result in additional amounts being due. 26 U.S.C. § 6651(a). Financial penalties may be imposed on taxpayers for dishonored payments, such as bad checks. 26 U.S.C. § 6657.

### Fiscal Year 2019 lapse in appropriations and IRS's tax return activities

On September 28, 2018, the President signed a continuing resolution appropriating amounts for IRS's operations through December 7, 2018.<sup>2</sup> Pub. L. No. 115-245, div. C, §§ 101(4), 105(3), 132 Stat. 3123, 3124 (Sept. 28, 2019). 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, IRS experienced a lapse in appropriations from December 22, 2018, through January 25, 2019.<sup>3</sup> Amounts for tax refund payments are provided by a permanent and indefinite appropriation<sup>4</sup> under 31 U.S.C. § 1324 and, thus, were not impacted by the lapse in IRS's annual appropriations. See Response Letter, at 2.

IRS's Non-Filing Season Lapsed Appropriations Contingency Plan, in place from October 1, 2018, through December 31, 2018, and May 1, 2019 through September 30, 2019, provided that IRS would continue certain functions in a lapse including processing tax remittances (payments submitted by individuals) and processing electronic returns up to the point of issuing tax refunds, but would not issue refunds themselves. See IRS, *IRS Fiscal Year 2019 Non-Filing Season Lapsed Appropriations Contingency Plan*, 5, 12–13 (Nov. 29, 2018) (Non-Filing

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<sup>2</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>3</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 IRS's activities were enacted on February 15, 2019. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. D, title I, 133 Stat. 139, 144 (Feb. 15, 2019).

<sup>4</sup> A permanent and indefinite appropriation is an appropriation of an unspecified amount which, once made, is always available for specified purposes and does not require repeated action by Congress to authorize its use. See B-160998, Apr. 13, 1978. For a discussion of the types of appropriations, including permanent, indefinite appropriations, see GAO, *Principles of Federal Appropriations Law*, 4<sup>th</sup> ed., 2016 rev., ch. 2, § A.8.(b), (c), GAO-16-464SP (Washington, D.C.: Mar. 2016).

Season Contingency Plan). This contingency plan was in place when the lapse in appropriations began on December 22, 2018.

According to Treasury, the Office of Management and Budget (OMB) had previously directed that IRS not pay tax refunds in the event of a lapse in appropriations. Response Letter, at 2. At the request of Treasury and IRS, OMB revisited this position and, on January 7, 2019, OMB informed Treasury that tax refunds may be paid during a lapse in appropriations.<sup>5</sup> *Id.* Accordingly, IRS announced that it would “process tax returns beginning January 28, 2019 and provide refunds to taxpayers as scheduled . . . [and would, therefore,] be recalling a significant portion of its workforce . . . [back] to work.” IRS, *IRS Confirms Tax Filing Season to Begin January 28*, IR-2019-01 (Jan. 7, 2019), available at <https://www.irs.gov/newsroom/irs-confirms-tax-filing-season-to-begin-january-28> (last visited Oct. 10, 2019) (IR-2019-01). As the lapse continued into the tax filing season (defined as January 1, 2019, through April 30, 2019), IRS issued its Filing Season Lapsed Appropriations Contingency Plan, which reflected that IRS would both process tax remittances as well as issue tax refunds during a lapse. IRS, *IRS Fiscal Year 2019 Filing Season Lapsed Appropriations Contingency Plan*, 5, 6, 12 (Jan. 15, 2019), available at [https://home.treasury.gov/system/files/266/IRS-Lapse-in-Appropriations-Contingency-Plan\\_Filing-Season\\_2019-01-15.pdf](https://home.treasury.gov/system/files/266/IRS-Lapse-in-Appropriations-Contingency-Plan_Filing-Season_2019-01-15.pdf) (last visited Oct. 10, 2019) (Filing Season Contingency Plan).

## DISCUSSION

At issue here is whether IRS, during the lapse in appropriations, could incur obligations to process tax remittances or to issue tax refunds.

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. 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—that is, authority to incur obligations. Such authority may derive from multiple year or no-year appropriation carryover balances, or otherwise available

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<sup>5</sup> We are not aware of any written legal justification prepared by OMB to support its previous position that tax refunds may not be paid in the event of a lapse in appropriations, or its recent position that tax refunds may be paid during a lapse in appropriations.

balances from other authorities, such as from fee income that Congress made available for obligation. B-330720, Feb. 6, 2019, 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. *Id.* at 3. Such statutory authorities provide agencies with budget authority allowing them to incur obligations.<sup>6</sup> 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. *Id.*

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).

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.* Determining which agency activities may be excepted under the Antideficiency Act requires a case-by-case analysis of the particular program or circumstances at issue, as well as of the relevant statutes. *Id.*

Here, IRS experienced a lapse in appropriations from December 22, 2018, through January 25, 2019. Accordingly, IRS implemented its orderly shutdown procedures, which included the initial furlough of most employees. *See Non-Filing Season Contingency Plan*, at 9, 15 (noting that 12% of IRS's workforce would be retained

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<sup>6</sup> Such statutory authorities, on their own, provide agencies with budget authority to incur obligations. Additionally, the Antideficiency Act specifically states that its prohibitions apply “unless authorized by law.” 31 U.S.C. § 1341(a)(1)(B).

during a non-filing season shutdown); see also B-330720, Feb. 6, 2019, at 5 (if an agency lacks sufficient funds to continue operating, as in the case of a lapse in appropriations, the Antideficiency Act generally requires that the agency commence an orderly shutdown of affected functions). Despite its lack of available appropriations, once the lapse continued into the tax filing season,<sup>7</sup> IRS recalled over half of its employees to perform functions including processing remittances and issuing tax refunds. See IR-2019-01; *Filing Season Contingency Plan*, at 6, 9 (noting that 57.4% of IRS’s workforce would be retained during a filing season shutdown).

For the functions at issue—processing tax remittances and issuing tax refunds—IRS stated that during a lapse in its annual appropriations, it did not have multiple-year or no-year appropriations, otherwise available balances from other authorities, or express authority permitting obligations in advance of an appropriation to carry out these functions. See *Filing Season Contingency Plan*, at 11. In other words, IRS lacked budget authority to incur obligations for these functions. Therefore, at issue here is whether an exception to the Antideficiency Act provided IRS with authority to continue these functions during the lapse in its annual appropriations. Below, we consider whether IRS had authority to incur obligations for (1) processing tax remittances, and (2) issuing tax refunds.

#### (1) Processing tax remittances

IRS considered processing remittances to be an excepted function under the Antideficiency Act. Specifically, IRS asserted that tax revenues constitute government property which IRS must safeguard during a lapse in appropriations and, accordingly, IRS may incur obligations to process tax returns to ensure protection of returns containing remittances pursuant to the Antideficiency Act’s exception for “emergencies involving . . . the protection of property.” 31 U.S.C. § 1342; *Non-Filing Season Contingency Plan*, at 6; *Filing Season Contingency Plan*, at 6.

The first question is whether tax remittances constitute property within the meaning of the Antideficiency Act. To constitute property under the Antideficiency Act, the property must be either government-owned property or property for which the government has a responsibility.<sup>8</sup> 9 Comp. Dec. 182, 185 (1902). Here, individuals are required by law to pay federal taxes and where an individual’s withholdings or submission of estimated taxes is less than their tax liability, the taxpayer owes a

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<sup>7</sup> IRS defined the tax filing season as January 1 through April 30. *Filing Season Contingency Plan*, at 5.

<sup>8</sup> For a discussion of property within the meaning of the Antideficiency Act, see GAO, *Principles of Federal Appropriations Law*, Vol. II, 3rd Ed., ch. 6, § C.3.d(2), GAO-060382SP (Washington, D.C.: Feb. 2006).

balance to the government. 26 U.S.C. §§ 1, 6012(a)(1). Since the government has an interest in collecting balances due and a responsibility over remittances submitted, we conclude that tax remittances constitute government property within the meaning of the Antideficiency Act.

The next question is whether the Antideficiency Act's exception for "emergencies involving the . . . protection of property" provides authority for IRS to incur obligations to process tax remittances during a lapse in appropriations. The Antideficiency Act provides that an emergency involving the protection of property does not include functions that, if suspended, would not "imminently threaten" the protection of property. 31 U.S.C. § 1342. Where, as here, the language of the statute is unambiguous, the ordinary meaning of the statute controls. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); B-329603, Apr. 16, 2018. The ordinary meaning of the term "imminent" is "ready to take place," and the ordinary meaning of "threat" is "expression of intention to inflict evil, injury, or damage." Merriam-Webster Dictionary Online, *Definition of imminent*, *Definition of threat*, available at <https://www.merriam-webster.com/> (last visited Oct. 10, 2019).

Whether the exception applies requires a case-by-case analysis, based on the specific circumstances at hand. In one case, a mechanical failure forced a Navy airplane to land in coastal waters. 10 Comp. Gen. 248 (1930). The sea conditions were not rough, so a crewmember recalled that "there was no danger either to plane or personnel." *Id.* at 249. Accordingly, we concluded that no emergency threatened government property (that is, the airplane) and, therefore, that no exception to the Antideficiency Act applied. *Id.* at 250. By contrast, fighting a fire on government property did constitute an emergency involving protection of property because the fire would have almost certainly destroyed most of the property. 3 Comp. Gen. 979 (1924). We concluded that the Antideficiency Act's exception for emergencies involving the protection of property applied. *Id.*

Because the Antideficiency Act is central to Congress's constitutional power of the purse, we interpret exceptions narrowly and in a manner to protect congressional prerogative. For example, where a statute directed an agency to implement a certain statute "notwithstanding any other provision of law," we concluded that this language does not waive the Antideficiency Act. B-303961, Dec. 6, 2004. Our decision was that the agency had to move forward with implementing the statute in a manner that did not violate the Antideficiency Act, and we noted various ways this could be done. *Id.*

With the foregoing in mind, here we consider whether a suspension in processing tax remittances would imminently threaten the protection of the remittances. In our view, there are ways that IRS might easily have discharged its responsibility to protect the property at hand—that is, the tax remittances—while at the same time respecting congressional funding prerogatives. For example, IRS might have taken



steps necessary to ensure the physical security of tax returns that contained remittances within the IRS facilities that received the returns from taxpayers.<sup>9</sup> These necessary steps would, of course, include storing the remittances in a secure manner. However, IRS has not explained why ensuring the physical security of remittances necessitates the processing of the remittances.

Because, as we noted above, the Antideficiency Act is critical to Congress's core constitutional power of the purse, an agency that asserts an exception from the Antideficiency Act must justify its use of the exception with particularity. In this case, IRS asserts an exception that Congress, in the Antideficiency Act, clearly states does not apply to the ongoing, regular functions of government unless suspension of that function would pose an *imminent* threat to the protection of property. Processing tax remittances is an ongoing, regular function of government. Suspension in processing does not pose ready injury or damage to the remittances. Failing to physically secure the remittances would.

Whenever an agency validly asserts an Antideficiency Act exception during a lapse in appropriations and incurs obligations, those obligations become legal liabilities of the United States government that Congress must cover by enacting appropriations. Congress enacted the Antideficiency Act precisely to prevent agencies taking actions (i.e., incurring obligations) coercing Congress into enacting appropriations. See 42 Comp. Gen. 272, 275 (1962). Consistent with both the text and purpose of the Antideficiency Act, an exception applies only when established by a narrowly-tailored application of the relevant statutory framework to the facts and circumstances at hand. To suggest that the processing of tax remittances, without clear direction from Congress, is necessary to protect the remittances, shows a disregard for congressional funding prerogatives and flies in the face of the Antideficiency Act's clear admonition that the exception not extend to the "ongoing, regular functions of government." 31 U.S.C. § 1342.

IRS bases its position, in part, on a 1981 OMB memorandum, which states that in the absence of appropriations, "activities essential to the preservation of the essential elements of the money and banking system of the United States, including . . . tax collection activities of the Treasury" may continue. OMB, Memorandum for Heads of Executive Departments and Agencies, *Agency Operations in the Absence of Appropriations* (Nov. 17, 1981), at 1–2. This memorandum predates the 1990 amendment to the Antideficiency Act that clarified that the exception does not cover situations in which the suspension of the ongoing, regular function at issue "would not *imminently threaten* . . . protection of property." 31 U.S.C. § 1342 (emphasis added). Here, as in our decision regarding the disabled Naval airplane, the

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<sup>9</sup> Further, concern that a taxpayer's check will not clear if IRS delays deposit of payments due to a lapse in appropriations is addressed by the statute regarding dishonored payments. 26 U.S.C. § 6657 (financial penalties may be imposed for dishonored payments, such as bad checks).



government certainly has responsibility to safeguard the government property at hand, but only by taking actions that minimize obligations necessary to avoid imminent threat to the property.

We conclude that the exception in the Antideficiency Act for emergencies to protect property does not provide authority for IRS to incur obligations to process tax remittances during a lapse in appropriations. The Antideficiency Act states that the exception only extends to situations in which suspension of the activity would “imminently threaten . . . the protection of property.” 31 U.S.C. § 1342. A suspension in processing tax remittances and a delay in the deposit of payments does not imminently threaten property. IRS can and should take those limited actions necessary to ensure the physical security of this government property during a lapse in appropriations.

## (2) Issuing tax refunds

Budget authority to make tax refund payments was available during the lapse in appropriations from the permanent and indefinite appropriation providing for tax refund payments. 31 U.S.C. § 1324. However, IRS lacked budget authority for the salaries and expenses of the employees necessary to issue refund payments. See Response Letter, at 2. IRS nevertheless asserts that the agency had authority to continue this function during the lapse. The question, therefore, is whether an exception to the Antideficiency Act provided IRS with authority to incur obligations to issue tax refunds.

One factor to consider is whether there is clear statutory indication that the activity with budget authority is to continue without regard to the availability of funds for a related activity. In this regard, we have declined to interpret general language, such as “notwithstanding any other provision of law” clauses, as implying a waiver of the Antideficiency Act. “The Antideficiency Act is one of the fundamental statutes by which Congress exercises its constitutional control of the public purse . . . [and] represents Congress’s strongest means to enforce the constitutional command that ‘[n]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.’” B-303961, Dec. 6, 2004, at 8 (citing U.S. Const. Art. II, § 9, cl. 7). To infer a broad exception to the Antideficiency Act for activities that lack budget authority but are related to other activities that do have budget authority would have “profound implications for federal fiscal control.” See *id.* at 8–9. While specific circumstances and statutes may clearly indicate that an activity with budget authority is to continue without regard to availability of budget authority for a related activity, any determination of whether an exception to the Antideficiency Act exists must carefully consider the Act’s central role in carrying out Congress’s constitutional prerogatives.

IRS asserts that the permanent and indefinite appropriation providing for tax refund payments supports a “necessary implication” that Congress intended such payments to continue on a permanent basis notwithstanding a lapse in annual appropriations,

and that IRS, therefore, may incur obligations to issue tax refunds. Response Letter, at 2. IRS cites a 1981 opinion from the Attorney General as the basis for its position. *Id.* There, 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). The 1981 opinion applied this exception to only one situation: the administration of Social Security payments. The opinion explained that while the payments themselves, made pursuant to an entitlement formula, were funded through trust funds into which amounts were automatically appropriated, the costs connected with administration of the trust funds and processing the payments were subject to annual appropriations *Id.* at 5 n.7. The Attorney General stated that “[i]n the absence of a contrary legislative history to the benefit program or affirmative congressional measures to terminate the program, I think it is proper to infer authority to continue the administration of the program to the extent of the remaining benefit funding.”<sup>10</sup> *Id.*

For tax refund payments, the law provides budget authority in an indefinite amount which can be used without further congressional action. 31 U.S.C. § 1324(a)(2)(E). However, activities necessary to issue refund payments are funded by annual appropriations. See Response Letter, at 2. There is no indication in the permanent, indefinite appropriation or annual appropriation language itself, or other statutory requirements, showing that Congress intended for IRS to incur obligations during a lapse in order to carry out the activities necessary to issue refund payments.

Furthermore, the legislative history of the permanent and indefinite appropriation for tax refund payments does not support IRS’s view. Instead, it illustrates congressional concern over difficulty in budgeting for a proper amount. H.R. Rep. No. 2089, at 3–4 (June 1, 1948) (“The amount of funds required for this purpose will be contingent upon a number of unrelated factors which are not susceptible of measurement in advance . . . the calculation of the sum necessary for this purpose cannot be made in advance”). The concern being addressed was, therefore, one over amount, and not over timing of payments.

Referring to the 1981 opinion, IRS asserts that three other tax statutes also support a “necessary implication” that issuing tax refunds is authorized in a lapse in appropriations: (1) taxpayers are subject to a statutory deadline for filing returns; (2) IRS must refund any overpayment of tax to the taxpayer; and (3) IRS must pay interest on tax refunds not issued within 45 days of the tax filing deadline or the filing date, whichever is later. 26 U.S.C. §§ 6072(a), 6402(a), 6611(a), (e)(1); Response Letter, at 3. These provisions set forth a framework of reciprocal requirements and

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<sup>10</sup> While GAO has never opined on the issuance of the benefit payments under the Social Security entitlement program during a lapse in appropriations, GAO has never objected to the views expressed specifically about Social Security payments in the Attorney General’s 1981 opinion.

processes between taxpayers and IRS. However, IRS receives annual appropriations to carry out these requirements, and there is nothing about the circumstances of the tax return process or relevant statutes that serves as authority under the Antideficiency Act for IRS to continue to incur obligations during a lapse in appropriations in order to issue refunds. In addition, although the government may incur interest for the late issuance of tax refunds, this additional expense does not grant IRS statutory authority to incur obligations to pay the salaries and expenses necessary to issue refunds during a lapse.<sup>11</sup>

Based on the foregoing, we conclude that no exception to the Antideficiency Act applies to authorize IRS to issue tax refunds during a lapse in appropriations. There is nothing we can glean from construction of the laws governing tax refunds to suggest the existence of an exception. There is no clear congressional intent in the relevant statutes or the permanent, indefinite appropriation for tax refunds evidencing that IRS should continue to make tax refund payments when annual appropriations for the costs of issuing refunds are not available. We cannot infer such an exception to the Antideficiency Act without more affirmative statutory authority. Although it is based on an inference, we accept the Attorney General's statement in the 1981 opinion that Social Security payments could continue even though the appropriation for the salaries of those who made the payments had lapsed. This statement has become entrenched in practice for almost 40 years, and Congress is aware of this position. To revisit that position now would be tumultuous.

Nevertheless, with regard to tax refund payments, Congress should be provided the opportunity to decide. IRS engaged in a new practice during the fiscal year 2019 lapse in appropriations, without congressional permission. If IRS wants to continue this practice in the case of future shutdowns, IRS should seek legislation permitting its activities.

#### Corrective action

No exception to the Antideficiency Act permitted IRS to incur obligations during the lapse in appropriations to process tax remittances and to issue tax refunds. Therefore, Treasury violated the Antideficiency Act when it incurred these obligations.

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<sup>11</sup> In a similar context—interest penalties incurred due to delay in payment to a federal contractor or grantee during a lapse in appropriations—OMB has directed that the penalties do not provide a legal justification under the Antideficiency Act for an agency to continue making the payments during the lapse. OMB, Director Memorandum for the Heads of Executive Departments and Agencies, M-18-05, *Planning for Agency Operations during a Potential Lapse in Appropriations*, Attachment, § II.C.A9 (Jan. 19, 2018).

Treasury received appropriations for IRS activities 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; Pub. L. No. 116-6, 133 Stat. at 144. When IRS 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, Treasury'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. 5, 2019. Though Treasury had no available budget authority when it incurred the obligations at issue, the proper corrective action in this case is for Treasury to record the obligations against the proper appropriations that Congress subsequently made for IRS's expenses for fiscal year 2019.

## CONCLUSION

Treasury violated the Antideficiency Act when it incurred obligations during the lapse in appropriations to process tax remittances and issue tax refunds. Treasury has not explained why suspending remittance processing—an ongoing, regular function of government—would pose an imminent threat to the physical security of the remittances. Also, we cannot infer from the statutory scheme for tax refunds any authorization to continue issuing refunds during a lapse.

The Antideficiency Act is one of the fundamental statutes by which Congress exercises its constitutional control of the public purse, and Congress enacted it to prohibit agencies from incurring obligations in the absence of available appropriations. Consistent with the text and purpose of the Antideficiency Act, exceptions exist only where established by a narrowly-tailored application of the relevant statutory framework to the facts and circumstances at hand. Such a narrowly-tailored application must respect both the explicit text of the Antideficiency Act itself and the congressional prerogative that the Act embodies. In this vein, we cannot infer a broad exception to the Antideficiency Act for activities that lack budget authority.

Treasury must report its Antideficiency Act violation as required by 31 U.S.C. § 1351. When Treasury submits its Antideficiency Act report to Congress, it should describe actions taken to prevent recurring violations in similar circumstances 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. In order to process remittances and issue refunds during a

lapse in IRS's annual appropriations, IRS should seek legislation permitting these activities to continue.

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.

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the first few letters.

Thomas H. Armstrong  
General Counsel

*List of Requesters*

The Honorable Thomas R. Carper  
Ranking Member  
Permanent Subcommittee on Investigations  
Committee on Homeland Security and Governmental Affairs  
United States Senate

The Honorable Gary C. Peters  
Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate