



United States Government Accountability Office
Washington, DC 20548

B-331094

September 5, 2019

The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Reform
House of Representatives

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

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

Subject: *U.S. Department of Agriculture—Early Payment of SNAP Benefits*

This responds to your request for our opinion concerning the Department of Agriculture (USDA) and obligations it incurred and expenditures it made for the early payment of Supplemental Nutrition Assistance Program (SNAP) benefits during a recent lapse in appropriations.¹ USDA asserted that section 110(b) of the Continuing Appropriations Act, 2019 authorized it to incur these obligations. USDA, *USDA Announces Plan to Protect SNAP Participants' Access to SNAP in February*, Press Release No. 0002.19, available at <https://www.usda.gov/media/press-releases/2019/01/08/usda-announces-plan-protect-snap-participants-access-snap-february> (last visited Aug. 7, 2019) (Press Release). Section 110(b) of the Continuing Appropriations Act, 2019 authorizes obligations for mandatory payments due on or about the first day of any month that begins between October 2018 and

¹ Letter from Representative Elijah Cummings, Chairman of the House Committee on Oversight and Reform, Senator Thomas Carper, Ranking Member of the Senate Permanent Subcommittee on Investigations, Senator Gary Peters, Ranking Member of the Senate Homeland Security and Governmental Affairs Committee, to Comptroller General (May 23, 2019).

30 days after the continuing resolution expired. Pub. L. No. 115-245, div. C, § 110(b), 132 Stat. 3123, 3124 (Sept. 28, 2018). You asked whether USDA's actions were consistent with section 110(b) and with other appropriations laws.

Based on our statutory construction analysis and USDA's historical pattern of obligations, we conclude that section 110(b) did not authorize USDA to obligate amounts for the early payment of February SNAP benefits. Because the continuing resolution expired on December 21, 2018, section 110(b) authorized payments that were due on or about November 1, 2018, December 1, 2018, and January 1, 2019. The February benefits did not fall within this timeframe. In addition, USDA had no basis to alter its pattern of obligations so that it could pay the February benefits earlier. If USDA had other amounts available for the obligations, it should adjust its accounts accordingly. If sufficient amounts are not available, and if USDA had no other authority to obligate and expend these amounts, USDA should report a violation of the Antideficiency Act.² 31 U.S.C. §§ 1341, 1351. Congress would need to enact legislation to authorize USDA to make payments in similar circumstances in the future.

In accordance with our regular practice, we contacted USDA 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; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USDA (June 19, 2019). In response, USDA provided its explanation of the pertinent facts and its legal analysis. Letter from Associate General Counsel, USDA, to Assistant General Counsel for Appropriations Law, GAO (July 24, 2019) (Response Letter).

BACKGROUND

SNAP provides monthly food assistance to about 42 million people. GAO, *Supplemental Nutrition Assistance: Actions Needed to Better Measure and Address Retailer Trafficking*, GAO-19-167 (Washington, D.C.: Dec. 14, 2018), at 1. The funds for these payments are appropriated each year to USDA through the regular appropriations process. See, e.g., Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2018, Pub. L. No. 115-141, div. A, title IV, 132 Stat. 351, 374 (Mar. 23, 2018); Agriculture, Rural

² USDA must limit the issuance of SNAP benefits to the amount appropriated by Congress, and must reduce benefit allotments where they would otherwise exceed the appropriation. 7 U.S.C. § 2027. Congress therefore maintains control over the level of SNAP spending through the appropriations process. Because USDA may not exceed its appropriation for SNAP benefits, we need only determine whether USDA had funds available for the payment of February benefits. We need not address whether the government would incur liability for not making SNAP payments during a lapse in appropriations.

Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2019, Pub. L. No. 116-6, div. B, title IV, 133 Stat. 13, 68 (Feb. 15, 2019). Each state has developed its own procedures and timelines for distributing SNAP payments. Response Letter, at 1. The issuance schedules vary widely, but all states and territories begin issuing benefits for a particular month on or after the first of that month. See USDA, *Supplemental Nutrition Assistance Program (SNAP): When Are Benefits Available?*, available at <https://www.fns.usda.gov/snap/recipient/eligibility/benefit-availability> (last visited Aug. 6, 2019) (Benefit Issuance Schedule).

On September 28, 2018, the President signed a continuing resolution (CR), appropriating funds for USDA's operations through December 7, 2018. Pub. L. No. 115-245, div. C, §§ 101(1), 105(3). Section 110(b) of the CR stated:

“[n]otwithstanding section 105, obligations for mandatory payments due on or about the first day of any month that begins after October 2018 but not later than 30 days after the date [on which the CR expires] may continue to be made, and funds shall be available for such payments.”

Id. at § 110(b). After an extension on December 7, 2018, the CR expired on December 21, 2018. See Pub. L. No. 115-298, 132 Stat. 4382, 4382 (Dec. 7, 2018). Accordingly, USDA experienced a lapse in appropriations through January 25, 2019.³

On January 8, 2019, USDA announced plans to issue February SNAP benefits early due to the lapse in appropriations. In its press release, USDA stated it was relying on section 110(b) to issue SNAP benefits early. Press Release. Notwithstanding its historical pattern of obligations, USDA advised states to request and issue their February SNAP benefits by January 20, 2019, 30 days after the expiration of the CR on December 21, 2018. *Id.*; Response Letter, Exhibit 1. In addition, USDA issued a blanket waiver for the requirement that states issue benefits “on or about the same day each month” to eligible households. Response Letter, at 3.

During the funding gap, USDA may have had some or all of a \$3 billion contingency fund available to pay for SNAP benefits.⁴ See Pub. L. No. 115-141, 132 Stat. at 374; Response Letter, at 6. USDA's 2018 appropriation established this fund by directing that \$3 billion be “placed in reserve for use . . . as may become necessary

³ On January 25, 2019, the CR was extended through February 15, 2019. Pub. L. No. 116-5, 133 Stat. 10, 10 (Jan. 25, 2019). Fiscal year 2019 appropriations were enacted on February 15, 2019. Pub. L. No. 116-6, 133 Stat. at 13.

⁴ In its response, USDA mentioned that it could have relied on the emergency fund to pay February benefits. Response Letter, at 6. However, USDA did not indicate how much of that fund was available to it during the lapse in appropriations.

to carry out program operations.” *Id.* USDA estimated the cost of February SNAP benefits, including administrative costs, at \$5.1 billion. Press Release. USDA obligated these amounts against its CR appropriation, which expired on December 21, not to the contingency fund.

DISCUSSION

At issue here is whether section 110(b) authorized USDA to incur obligations for the early payment of SNAP benefits during the lapse in appropriations. To evaluate whether section 110(b) conferred such authority, we must examine both the text of section 110(b) and USDA’s pattern of obligations under the CR.

Section 110(b)

Section 110(b) authorized mandatory payments if they were due within a particular time frame—that is, “on or about the first day of any month that begins after October 2018 but not later than 30 days after [December 21, 2018].” Therefore, the key question is whether the SNAP payments at issue were due within this time frame.

To determine the duration of the allowable time frame, we turn first to the text of the statute. Where a statute is clear on its face, the plain meaning of the statutory language controls. *See, e.g., Carcieri v. Salazar*, 555 U.S. 379 (2009) (where statutory text is “plain and unambiguous,” the statute must be applied “according to its terms”). In this case, the text first provides in general terms that payments due on or about the first day of “*any month* that begins after October 2018” may be made (emphasis added). However, the text then has a limiting phrase: “but not later than 30 days after [December 21, 2018].” Clearly, section 110(b) does not allow all payments at any point in the future. Instead, this phrase limits the time frame of mandatory payments that section 110(b) permits. The key question is the meaning of the limiting phrase “but not later than 30 days after [December 21, 2018].”

To ascertain the plain meaning of statutory text, we turn to commonly-used principles of statutory interpretation. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 112 (2014); *Lamb v. Thompson*, 265 F.3d 1038, 1051 (10th Cir. 2001). Here, the relevant principle is known as the “rule of the last antecedent.” Under this rule, a limiting clause or phrase “should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Reading a statute in this way is “quite sensible as a matter of grammar.” *Nobelman v. American Savings Bank*, 508 U.S. 324, 330 (1993). Here, the limiting clause “but not later than 30 days after [December 21, 2018]” modifies “any month,” the last antecedent before it appears.

Section 110(b) therefore allowed USDA to make obligations for SNAP payments that were due on or about the first day of any month that began between October 2018 and January 20, 2019. The authority conferred by section 110(b) is therefore limited to obligations for payments that were due on or about November 1, December 1, and January 1. In making early payments to states for February SNAP benefits

during the lapse in appropriations, USDA made obligations for mandatory payments that were due on or after February 1. February 1 is not “on or about” November 1, December 1, or January 1.

Section 110(b)’s history further supports this conclusion. The current language of section 110(b) first appeared in 2007. Pub. L. No. 110-92, § 111(b), 121 Stat. 989, 991 (Sept. 29, 2007). CRs prior to 2007 contained a substantively similar provision that allowed agencies to incur obligations for mandatory payments due on the first of a specified month or months. For example, in 2006, a CR authorized obligations for mandatory payments due on or about November 1, 2006 and December 1, 2006. Pub. L. No. 109-289, div. B, § 114(b), 120 Stat. 1257, 1314 (Sept. 29, 2006). Thus, similarly to language that appeared in CRs prior to 2007, section 110(b) specifies the months for which mandatory payments may be made after the expiration of the CR.

USDA’s SNAP Issuance Procedure

It is commonly understood that the purpose of a CR is to maintain the *status quo* with regard to government funding and operations. See, e.g., B-324481, Mar. 21, 2013. Agencies have some discretion in determining their pattern of obligations under a continuing resolution, but where an agency usually obligates funds uniformly over the entire year, it is limited to that pattern under the continuing resolution, unless it presents convincing reasons why its pattern must be changed in the current fiscal year. See B-255529, Jan. 10, 1994; B-152554, Feb. 17, 1972. In evaluating a pattern of obligations under a continuing resolution, we look to the agency’s normal practice. See, e.g., B-255529, Jan. 10, 1994 (evaluating whether an early obligation of funds deviated from the “normal pattern of obligations”).

In its press release, USDA stated that February SNAP benefits would be issued “earlier than usual.” Press Release. USDA’s normal practice with respect to SNAP benefits is to obligate funds on a daily basis based on SNAP issuances and redemptions on that day. Response Letter, at 2. Each state sets its own issuance schedule so that households receive their benefits on or about the same date each month. *Id.* at 1; see also 7 C.F.R. § 274.2(d). However, none of the 54 states, districts, and territories that receive funds for SNAP issue benefits for a particular month before the first of that month. See Benefit Issuance Schedule. Therefore, under USDA’s normal benefit issuance procedure, the earliest date at which February benefits could have been issued was February 1. See *id.* USDA instead obligated funds for February benefits payments during the month of January.

As explained above, the plain text of section 110(b) only authorized obligations for mandatory payments due on or about the first day of a month that began between October 2018 and within 30 days of the CR’s expiration—January 20, 2019. USDA’s interpretation would allow the agency to incur any program obligation during the 30 days after the CR expired, even if such a payment was not due within the time period set forth in section 110(b). USDA improperly extended the availability of funds appropriated under the CR in order to make February payments earlier than

normal. The SNAP program is characterized by regulations, formulas, and a regimented procedure for issuing benefits that ensures households receive benefits around the same time each month. We do not question USDA's authority to revise its procedures and its Benefit Issuance Schedule, but here, USDA, as stated in its press release and in its response to us, altered its practice only because funding for SNAP had lapsed and to circumvent restrictions enacted into law. Taken to its logical conclusion, USDA's rationale would allow the agency to circumvent the CR's restrictions by obligating up to a full year of SNAP payments, so long as the obligations were made during the 30-day period following expiration of the CR. This would contravene Congress' power of the purse and is therefore untenable. Had Congress intended such an interpretation, it would have so provided in the text of the statute. USDA's action inappropriately infringes on Congress' constitutional prerogatives and implicates its latitude in making final fiscal year 2019 funding determinations in subsequent legislation.

USDA's reliance on section 110(b) to make February SNAP payments early goes beyond the limited flexibility Congress provided. Therefore, USDA's actions when it issued the benefits early were inconsistent both with section 110(b) and, more generally, with the limited authority that a continuing resolution vests in agencies.

Application of the Antideficiency Act

An agency violates the Antideficiency Act if it incurs an obligation in excess of legally available amounts. 31 U.S.C. § 1341(a); B-329955, May 16, 2019; B-329603, Apr. 16, 2018; B-327432, June 30, 2016. If a program has no available appropriations, and no exception to the Antideficiency Act applies, the agency must commence an orderly shutdown and suspend its normal operations. B-330720, Feb. 6, 2019. The agency may only resume its activities once Congress has enacted an appropriation. *Id.*

As established above, section 110(b) did not confer authority to USDA to incur obligations for the early payment of February SNAP benefits. USDA could properly incur obligations for the early issuance of February benefits only if it had available budget authority to make the payments, such as remaining funds in the SNAP contingency fund, or if it properly relied on an exception to the Antideficiency Act. In its response to us, USDA noted the legal availability of the contingency fund, but did not provide us with the balance of that fund, and we note that USDA obligated its early February SNAP payments to its CR appropriation, not the contingency fund. Also, USDA did not identify, nor are we aware of, an Antideficiency Act exception on which USDA could have relied. In the event that USDA did not have sufficient budget authority or a proper exception to the Antideficiency Act, USDA should report an Antideficiency Act violation as required by law. 31 U.S.C. § 1351.

In addition to reporting an Antideficiency Act violation, USDA also should correct any violation it may have incurred when it improperly charged obligations to its CR appropriation in an attempt to issue February SNAP benefits early. USDA typically would have charged the February SNAP benefits to amounts made available in its

annual appropriations act. USDA received a full-year appropriation for fiscal year 2019 on February 15, 2019. Pub. L. No. 116-6, 133 Stat. at 13. In addition to the contingency fund, this appropriation is available for the fiscal year 2019 payments of SNAP benefits, and, as such, USDA should correct any Antideficiency Act violation incurred because obligations exceed amounts available in the contingency fund by adjusting its fiscal year 2019 appropriation to reflect the obligations incurred for the February SNAP payments.

When USDA submits its Antideficiency Act report to Congress, it should explain the adjustment of accounts necessitated by its violation of the Act; and it should enumerate actions taken to prevent recurring violations in similar circumstances in the future. With this decision, we will consider any future, similar action to be a knowing and willful violation of the Antideficiency Act. The Act provides, in that event, that USDA 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.

CONCLUSION

Section 110(b) of the Continuing Appropriations Act, 2019 authorized USDA to incur obligations for mandatory payments due on or about a limited range of dates: November 1, 2018; December 1, 2018; and January 1, 2019. SNAP benefit payments due in February 2019 did not fall within this range. Had Congress intended to allow USDA to make these early payments, it would have provided that authority in the text of the CR. If USDA had other available budget authority against which to record these obligations, it should adjust its accounts accordingly. Otherwise, if USDA lacked other available budget authority and if it did not properly rely on an exception to the Antideficiency Act, it should report a violation of the Antideficiency Act as required by 31 U.S.C. § 1351. Congress would need to enact legislation to authorize USDA to make payments in similar circumstances in the future.

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



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