



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

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MEMORANDUM FOR AGENCY GENERAL COUNSELS

FROM: Mark Paoletta *MSP*
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SUBJECT: Reminder Regarding Non-Binding Nature of GAO Opinions

Recently, the Office of Management and Budget (OMB) completed its annual update to OMB Circular A-11, *Preparation, Submission, and Execution of the Budget* (June 28, 2019). Circular A-11 provides Executive Branch agencies with a comprehensive compendium of formal, written guidance addressing the preparation, submission, and execution of the President's Budget for each fiscal year.

The June 28, 2019, version of Circular A-11 updated section 145.8, which discusses what an agency should do if the Government Accountability Office (GAO) determines that an agency has committed an Antideficiency Act (ADA) violation. The purpose of this update was to better align Executive Branch processes for reporting ADA violations with the principle of separation of powers under the U.S. Constitution. When an agency of the Legislative Branch interprets a law differently than the Executive Branch, the Executive Branch is not bound by its views. ADA reporting requirements should reflect this principle.

OMB respects GAO's opinions as those of an agency of a coequal branch of government. However, under the constitutional doctrine of separation of powers, a legal opinion by a Legislative Branch agency cannot bind the Executive Branch.¹ The Executive Branch is responsible for interpreting and carrying out the laws (subject, of course, to a controlling interpretation by the Judicial Branch, which does not exist in this case). The Legislative Branch can override the Judicial or Executive Branch's interpretation of a law only through further legislation, subject to bicameralism and presentment.² As the Department of Justice has directly affirmed: "[b]ecause GAO is part of the Legislative Branch, Executive Branch agencies are not bound by GAO's legal advice."³ GAO reports its views on the application of the ADA directly

¹ See generally *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983).

² See generally *id.*

³ Memorandum for the General Counsels of the Executive Branch, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Whether Appropriations May be Used for Informational Video News Releases at 1 (Mar. 11, 2005) (disagreeing with GAO's interpretation of appropriations law and reminding Executive Branch agencies that GAO's opinion is not controlling on the Executive Branch). See Office of Management and Budget, Memorandum for Heads of Departments and Agencies, Use of Government Funds for Video News Releases, M-05-10, Mar. 11, 2005 (reminding agencies that the Mar. 11, 2005, OLC appropriations opinion, and not the conflicting GAO opinion, controls for the Executive Branch). See also *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 136 (1996) ("[W]e think that the

to Congress, so there is no concern that the Congress will not be apprised of them.⁴ But an Executive Branch agency is under no obligation to report an action it has determined does not constitute an ADA violation.

The updated Circular A-11 better reflects the separation of powers, while fully complying with the ADA's command that "[i]f an officer or employee of an executive agency or an officer or employee of the District of Columbia government violates" the ADA the agency head must report to the President and Congress, and copy GAO.⁵ The language from the previous version of section 145.8 stated:

You should report to the President, the Congress, and the Comptroller General on violations reported by the Government Accountability Office in connection with audits and investigations, or otherwise formally communicated to your agency in writing. In these cases, the report to the President will indicate whether the agency agrees that a violation has occurred, and if so, it will contain an explanation as to why the violation was not discovered and previously reported by the agency. If the agency does not agree that a violation has occurred, the report to the President, the Congress, and the Comptroller General will explain the agency's position.

The language as revised in the June 28, 2019, version of section 145.8 reads:

If the Government Accountability Office finds that there has been an ADA violation and the agency, in consultation with OMB, agrees that a violation has occurred, the agency should report such violation to the President, the Congress, and the Comptroller General. In these cases, the report to the President will contain an explanation as to why the violation was not discovered and previously reported by the agency.

This change does not alter an agency's legal obligation to report promptly all instances in which an agency within the Executive Branch determines that an ADA violation has been committed, regardless of whether GAO has expressed the view that there was a violation. The process for reporting ADA violations is covered elsewhere within section 145. In sum, the revised language merely states that when GAO determines that an agency has committed an ADA violation, and the agency, in consultation with OMB, agrees that a violation occurred, the agency should report the violation. It is silent as to how an agency is to act when the agency disagrees with GAO's finding of an ADA violation. This silence does not constitute or equate to OMB directing the agency to refrain from responding to GAO or to Congress. Rather, the intent of the change was to emphasize the fact that providing a report to Congress under such circumstances is at the agency's discretion. The agency is free to correspond with Congress to address these matters, and Congress is free to inquire of the agency to ask for the agency's views on any such GAO report.

requirement of bicameralism and presentment is infringed whenever a single house, committee, or agent of Congress attempts to direct the execution of the laws . . . or to promulgate rules or standards intended to bind the actions of executive or administrative officials that have not been approved by both houses and presented to the President.").

⁴ See Memorandum to Agency General Counsels from Tom Armstrong, GAO General Counsel, *Agency Reporting of GAO Determinations of Antideficiency Act Violations* (September 23, 2019).

⁵ 31 USCS §§ 1351, 1517(b).