



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

June 8, 2020

Mr. Tom Armstrong  
General Counsel  
Government Accountability Office  
Washington, D.C. 20548

RE: B-331132, *Office of Management and Budget – Regulatory Review Activities during the Fiscal Year 2019 Lapse in Appropriations*

Dear Mr. Armstrong:

This responds to your letter of March 6, 2020, in which you ask whether the Office of Management and Budget (OMB) intends to report an Antideficiency Act (ADA) violation related to Office of Information and Regulatory Affairs (OIRA) activities that took place during the fiscal year 2019 partial government shutdown. For the reasons that follow, OMB has determined that no such ADA violation occurred. Accordingly, OMB has no legal obligation to report the underlying action.

In a recently issued opinion, GAO concluded that OMB violated the ADA when OIRA, a component of OMB, incurred obligations in the absence of budget authority during the partial lapse in appropriations that occurred from December 22, 2018, through January 25, 2019.<sup>1</sup> Specifically, OIRA incurred obligations to complete its review of a Department of Labor (DOL) final rule and notice of proposed rulemaking, both of which were deemed significant regulatory actions. GAO’s conclusion rested on the premise that no legal exception permitted OMB to incur such obligations. Having reviewed long-standing Department of Justice (DOJ) determinations and past agency practices, OMB disagrees.

An agency without budget authority may continue to incur obligations only where an exception to the ADA allows an agency to do so.<sup>2</sup> The ADA itself expressly recognizes two exceptions: obligations “authorized by law” to be incurred before an appropriation is made, and emergencies that “imminently threaten the safety of human life or the protection of property.”<sup>3</sup> DOJ’s Office of Legal Counsel (OLC), whose opinions are binding on the executive branch, has historically recognized a limited number of activities that implicitly fall under the “authorized by

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<sup>1</sup> *Office of Management and Budget—Regulatory Review Activities during the Fiscal Year 2019 Lapse in Appropriations*, B-331132, December 19, 2019.

<sup>2</sup> Of course, where an agency or activity does have available budget authority—e.g., if the agency or activity is funded by a multi-year or indefinite appropriation—the agency or activity may continue operations without implicating the ADA.

<sup>3</sup> See 31 U.S.C. §§ 1341-1342.

law” exception because they are necessary to the orderly functioning of our constitutional republic. Among these are the widely accepted exceptions for activities minimally necessary for the orderly termination of agency functions, and activities necessary to the discharge of the President’s constitutional duties and powers.<sup>4</sup>

Another such exception long recognized by OLC is for obligations “authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, [an] agency.”<sup>5</sup> OLC has explained that “the Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well.”<sup>6</sup> Examples of such functions discussed by OLC include the check writing and distributing functions necessary to disburse social security benefits that operate under indefinite appropriations, and contracting for materials essential to the performance of emergency services that continue under ADA’s emergencies exception.<sup>7</sup>

OLC has also interpreted the necessary implication exception to allow, in certain circumstances, unfunded agencies to incur obligations to support the funded activities of another agency or branch of the U.S. Government. For example, one of its conclusions in a 1995 legal opinion was that DOJ staff could continue to prepare DOJ witnesses to appear for testimony at congressional hearings, even while the Department experienced a lapse in appropriations, where appropriations were available for the congressional hearings themselves and the DOJ’s participation was necessary for the hearing to be effective.<sup>8</sup> In support of its conclusion, OLC argued in an updated opinion issued later that year:

By enacting the legislative branch appropriations bill, Congress has now decided that the funded activities of the legislative branch for the current year should proceed (and the President has concurred). Should the Department again experience a funding lapse, that specific decision by the Congress to fund its own activities in the context of a funding lapse for other components of government will support an implication similar to the one drawn in the case of Social Security.<sup>9</sup>

OLC also authorized DOJ “to perform other services that bear a similar relation to other funded functions of the legislative branch.”<sup>10</sup> Under GAO’s opinion, however, interactions between a funded Congress and an unfunded executive branch agencies that are not compelled

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<sup>4</sup> 5 Op. O.L.C. 1 (1981) (“1981 opinion”); *see also* 1995 OLC LEXIS 57 (Aug. 16, 1995).

<sup>5</sup> 5 Op. O.L.C. at 5.

<sup>6</sup> 1995 OLC LEXIS 57, at \*9.

<sup>7</sup> *Id.*

<sup>8</sup> 19 Op. O.L.C. 301, 303 (1995); *see also* 19 Op. O.L.C. 337 (1995) (updating OLC’s initial 1995 opinion after appropriations were made for the Legislative Branch).

<sup>9</sup> 19 Op. O.L.C. at 338.

<sup>10</sup> *Id.*

by subpoena would need to be significantly curtailed or stopped, potentially delaying or depriving the Congress of important information necessary to its own constitutional functions.

Importantly, OLC's updated 1995 opinion did not limit its application of the necessary implication exception to inter-branch activities. Instead, OLC stated that "[a] similar implication can also be supported by the specific decisions that Congress has made to fund other agencies and departments of government so that their functions are to continue during a funding lapse."<sup>11</sup> In other words, where the activities of an unfunded agency are necessary to the effective execution of functions by a funded agency, such that a suspension of the former agency's functions for the duration of the funding lapse would "prevent or significantly damage" the execution of latter agency's activities, the narrow set of unfunded activities may continue.<sup>12</sup>

Here, Congress enacted appropriations for DOL for fiscal year 2019 on September 28, 2018.<sup>13</sup> In so doing, Congress made clear that the legally authorized and appropriated activities of DOL should proceed during fiscal year 2019, notwithstanding its failure to enact appropriations for other executive branch agencies. Among those authorized activities for fiscal year 2019 were the development of two significant regulatory actions—a final rule and notice of proposed rule-making—which were required to be reviewed by OIRA pursuant to the Congressional Review Act and Executive Order 12866.<sup>14</sup> DOL submitted these regulatory actions to OIRA two weeks before the partial lapse in appropriations began on December 22, 2018. Thus, once the lapse in appropriations occurred, OIRA was already in the process of reviewing these regulatory actions.

In deciding whether certain regulatory reviews would continue during the lapse in appropriations, OMB reached out to the sponsoring agencies to determine the consequences of pausing the regulatory review process in individual cases. For the DOL regulatory actions at issue, DOL made clear to OMB that the final rule was urgently needed to fix existing regulations that posed privacy and resource allocation concerns to the public, and the notice of proposed rule-making was necessary to preserve its current posture in existing litigation. On the basis of this information, OMB determined that pausing OIRA's review of the two DOL regulatory actions would significantly compromise the execution of DOL's legally authorized and funded programs as well as its litigating position. In light of this determination, OMB concluded that OIRA's continued review of the two DOL regulatory actions during the lapse was necessarily implied by Congress's decision to fully fund DOL for fiscal year 2019.

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* ("To the extent that any of the Department's functions are necessary to the effective execution of functions by an agency that has current fiscal year appropriations, such that a suspension of the Department's functions during the period of anticipated funding lapse would prevent or significantly damage the execution of those funded functions, the Department's functions and activities may continue.").

<sup>13</sup> 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).

<sup>14</sup> 5 U.S.C. §§ 601 *et seq.*

OMB's decision should be assessed in light of the unique circumstances in which the fiscal year 2019 lapse in appropriations occurred. By December 22, 2018, approximately 75% of the federal government had received appropriations from Congress. Thus, the clear will of the Congress, as expressed through the enactment of numerous appropriations Acts just a few months earlier, was that the departments and agencies for whom appropriations were made were to proceed with their authorized activities during fiscal year 2019. Reading the necessary implication exception so narrowly as to impair or preclude the execution of *funded* activities due to the lack of funding for other activities necessary to their effective execution would thwart Congress's intent in passing funding measures for large swaths of the federal government.<sup>15</sup>

GAO's interpretation would severely hamstring the executive branch's ability to carry out funded activities, and risks converting partial funding lapses into much broader government shutdowns, contrary to the will of Congress. GAO's opinion in B-331132 raises serious questions regarding the workability of the federal government during lapses in appropriations, especially partial lapses. As stated in OLC's 1981 opinion, our "Nation must rely initially for the effective operation of the government on the timely and responsible functioning of the legislative process."<sup>16</sup> In the absence of such action, "[t]he Constitution and Antideficiency Act itself leave the Executive leeway to perform essential functions and make the government workable."<sup>17</sup>

Relying on established principles of appropriations law and nearly 40 years of binding DOJ guidance, it is OMB's view that OIRA's regulatory review activities during the most recent lapse in appropriations were authorized by necessary implication as a result of Congress's specific decision to fund DOL for fiscal year 2019 and the disruptive consequences that would follow if such activities were halted. Consequently, OMB has determined that no ADA violation occurred relating to such regulatory review activities. GAO's legal opinions are not binding on the executive branch.<sup>18</sup> The ADA requires agencies to promptly report to the President, Congress, and GAO any instance in which they have determined an ADA violation occurred.<sup>19</sup>

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<sup>15</sup> 19 Op. O.L.C. at 338 (concluding that although "it could be argued that the failure to appropriate funds for the Department's activities expresses a congressional conclusion that the execution of activities of other agencies that have otherwise been funded should nevertheless either be suspended or significantly damaged by virtue of the lack of funding for the Department, we conclude . . . that the decision to fund those other activities in this fiscal year substantially belies this argument, and that the view presented here constitutes the better interpretation") (internal quotations and citations omitted).

<sup>16</sup> 5 Op. O.L.C. at 11.

<sup>17</sup> *Id.*

<sup>18</sup> 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 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.").

<sup>19</sup> 31 U.S.C. §§ 1351, 1517(b). See also OMB Circular No. A-11, § 145.8 (2019).

However, executive branch agencies are under no obligation to report an activity it has determined does not constitute an ADA violation. Because OMB has determined that no ADA violation occurred related to OIRA's regulatory review activities during the fiscal year 2019 funding lapse, OMB does not intend to report any such violation.

Sincerely,



Mark R. Paoletta  
General Counsel