



B-331132

August 6, 2020

The Honorable Michael R. Pence
President of the Senate

The Honorable Nancy Pelosi
Speaker of the House of Representatives

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

This letter is to inform you that the Office of Information and Regulatory Affairs (OIRA) in the Executive Office of the President's Office of Management and Budget (OMB) violated the Antideficiency Act, 31 U.S.C. § 1341(a), when it obligated funds in a manner prohibited by law. Notwithstanding the Act's reporting requirement, 31 U.S.C. § 1351, OMB failed to report this violation.

In a December 19, 2019 decision, GAO concluded that OMB through OIRA violated the Antideficiency Act when, during a lapse in appropriations, it incurred obligations to review a Department of Labor final rule and notice of proposed rulemaking. B-331132, Dec. 19, 2019. In that decision, GAO found that OMB lacked available budget authority for these activities, that no exception to the Antideficiency Act permitted OMB to incur these obligations, and that it must report the violation as required by 31 U.S.C. § 1351. *Id.*

By law, agencies must immediately report Antideficiency Act violations to the President and to Congress, and must transmit a copy of the report to the Comptroller General. 31 U.S.C. § 1351. The report must state all relevant facts and actions taken. *Id.* This reporting requirement protects Congress's power of the purse while promoting sound funds control throughout government. Senate Committee on Government Operations, *Financial Management in the Federal Government*, S. Doc. No. 87-11, at 45 (1961) (stating that one of the principal purposes of the Antideficiency Act is to provide effective control over the use of appropriations).

GAO has notified agencies that if an agency fails to report a violation that GAO finds, GAO will report the violation, noting the agency's failure to report. B-331295, Sept. 23, 2019. The Antideficiency Act serves to protect and underscore Congress's

constitutional power of the purse. See U.S. Const., art. I, § 9, cl. 7 (power of the purse, statement and account of public money); B-328450, Mar. 6, 2018; B-317450, Mar. 23, 2009.

OMB has informed GAO that it does not plan to report the Antideficiency Act violation identified in the December 19, 2019 decision. Letter from General Counsel, OMB to General Counsel, GAO (June 8, 2020). OMB's letter asserts that ". . .no [Antideficiency Act] violation occurred related to OIRA's regulatory review activities during the fiscal year 2019 funding lapse. . ." *Id.*, at 5. In its June 8, 2020 letter, OMB argues that, during a lapse in an agency's appropriations, an unfunded agency may incur obligations to support the funded activities of another agency. *Id.*, at 1-5. GAO addressed this argument in the December 2019 decision, and OMB offered no additional information in its June 2020 letter that was not available in December 2019.

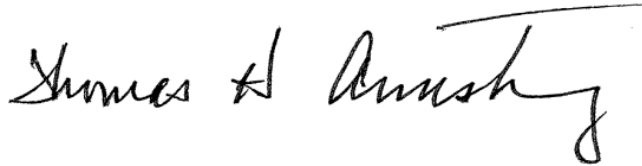
OMB, apparently misunderstanding the reach of GAO's December 2019 decision, mischaracterizes it, saying: "[u]nder GAO's opinion, however, interactions between a funded Congress and [] unfunded executive branch agencies that are not compelled by subpoena would need to be significantly curtailed or stopped, potentially delaying or depriving the Congress of important information necessary to its own constitutional functions." *Id.*, at 2-3. OMB's mischaracterization is inaccurate because GAO has stated that "Congress and the Executive may incur obligations to carry out core constitutional powers," and we have repeatedly used this as an express example of a limited exception to the Antideficiency Act. B-331132, Dec. 19, 2019, at 6; B-331093, Oct. 22, 2019, at 5; B-330720, Feb. 6, 2019, at 4.

Noting that we interpret exceptions to the Antideficiency Act narrowly and in a manner to protect congressional prerogative, the December 2019 decision addressed only obligations incurred by an unfunded OMB to review two regulatory actions proposed by the funded Department of Labor. Neither OMB nor the Department of Labor established a legal basis rooted in the Antideficiency Act to permit continuation of OMB's review. It is inappropriate to extrapolate from the decision to hypothetical circumstances not addressed in the decision.

Where an agency disagrees with GAO's conclusion that an Antideficiency Act violation has occurred, the agency, nevertheless, should submit a report explaining the agency's position. B-331295, Sept. 23, 2019. Reporting enhances transparency and accountability to the President, Congress, and the American people. We send you this information because the reporting of Antideficiency Act violations is critical

to congressional oversight of executive use of public money and central to Congress's constitutional power of the purse.

Sincerely,

A handwritten signature in black ink, reading "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the last name.

Thomas H. Armstrong
General Counsel

Enclosure

cc: Mark R. Paoletta
General Counsel, Office of Management and Budget