



B-330720

February 6, 2019

The Honorable Betty McCollum
Chair
The Honorable David Joyce
Ranking Member
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations
House of Representatives

Subject: *Testimony before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives—Application of the Antideficiency Act to a Lapse in Appropriations*

Chair McCollum, Ranking Member Joyce, and Members of the Subcommittee:

Thank you for the opportunity to discuss the Antideficiency Act and its application during a lapse in appropriations. A lapse in appropriations, also known as a funding gap, refers to a period of time between the expiration of an appropriation and the enactment of a new one during which an agency or program experiences a lapse in funding. For example, a fiscal year may end without the enactment of a full-year appropriation or a continuing resolution for the next fiscal year, or a continuing resolution may lapse without the enactment of a subsequent appropriation. Such a lapse may also occur if a particular appropriation becomes exhausted before the end of the fiscal year. A lapse in appropriations may vary in scope, and can affect individual agencies and programs or affect the federal government at large.

The Antideficiency Act

Through the Constitution, the framers of our government provided that the legislative branch – the Congress – has the power to control the government’s purse strings. The framers vested Congress with the power of the purse by providing in the Constitution that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const., art. I, § 9, cl. 7. Time and again, the Supreme Court has reaffirmed that this clause means exactly what its straightforward language suggests: “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.” *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

The Antideficiency Act is a major law in the statutory framework through which Congress exercises its constitutional control of the public purse. 31 U.S.C. §§ 1341, 1342, 1349–51, 1511–19. The Act prohibits agencies from obligating or expending in excess or in advance of an available appropriation unless otherwise authorized by law; accepting voluntary services for the United States, except in cases of emergency involving the safety of human life or the protection of property; and obligating or expending in excess of an apportionment, or in excess of the amounts permitted by agency regulation. 31 U.S.C. §§ 1341, 1342, 1517. Congress recently amended the Antideficiency Act to provide that, among other things, federal employees furloughed as the result of a lapse in appropriations shall be paid for the period of the lapse. Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, § 2, ___ Stat. ___ (Jan. 16, 2019); Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 103, ___ Stat. ___ (Jan. 25, 2019), *codified at* 31 U.S.C. § 1341(c)(2).

The Antideficiency Act is the only fiscal statute that includes both civil and criminal penalties for a violation. Those who violate the Antideficiency Act are subject to administrative discipline, such as suspension or removal from office, as well as criminal penalties in the case of a knowing and willful violation. 31 U.S.C. §§ 1349, 1350, 1518, 1519. Criminal penalties include a fine of not more than \$5,000, imprisonment for not more than 2 years, or both. 31 U.S.C. §§ 1350, 1519. In addition to these penalties, agencies must immediately report violations to the President and to Congress, and must also send a copy of the report to GAO. 31 U.S.C. §§ 1351, 1517(b). As of 2004, GAO serves as the repository for Antideficiency Act reports, and reports dating back to fiscal year 2005 can be accessed at GAO's website.¹ *Antideficiency Act Resources*, available at www.gao.gov/legal/appropriations-law-decisions/resources (last visited Jan. 29, 2019).

Application of the Antideficiency Act During a Lapse in Appropriations

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. Such authority may derive from multiple year or no-year appropriation carryover balances, or otherwise available balances from other authorities, such as from fee income that Congress made available for obligation. The source of these

¹ See Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title I, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004), *codified at* 31 U.S.C. §§ 1351, 1517(b).

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. In addition, certain statutory authorities may expressly authorize an agency to enter into obligations in advance of an appropriation. 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.

If an agency has available budget authority, programs within the agency may potentially operate using those available funds and, in general, the agency may incur and liquidate obligations, including those for employee salaries, as it normally would. However, an agency must still ensure that it adheres to all other applicable laws. For example, sometimes an agency may have two appropriations that may arguably be available for the same purpose. In those cases, an agency must elect to use a single appropriation. The agency may not switch to a different appropriation merely because the one it chose first is now depleted. B-307382, Sept. 5, 2006; B-272191, Nov. 4, 1997. This is sometimes known colloquially as the "pick-and-stick rule." This rule could be implicated if, while experiencing a lapse in appropriations, an agency begins to use a different appropriation than usual merely because the appropriation it would typically obligate for a given purpose has now lapsed.

Similarly, during a lapse in appropriations, agencies may potentially operate by exercising existing statutory authorities to transfer amounts between available appropriations or to reprogram amounts within the various purposes provided in an available appropriation. Agencies still must comply with statutory requirements contained in transfer or reprogramming authorities, including those requirements incorporated by reference into an appropriations act. Advance notification requirements, for example, provide a mechanism by which Congress may exercise its constitutional power of the purse. Where Congress conditions the availability of funding on advance notice to the appropriate congressional committees, such funding is not available until the agency provides the required notification. B-319009, Apr. 27, 2010. Congress may expressly include such a restriction in the statutory language itself, or it may incorporate the restriction by reference. See, e.g., B-329739, Dec. 19, 2018; B-323699, Dec. 5, 2012; B-316760, Feb. 19, 2009; B-183851, Oct. 1, 1975.

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).

GAO has 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. Agencies also may incur those limited obligations that are incident to executing an orderly shutdown of agency activity.

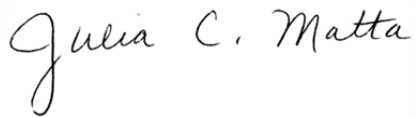
The Attorney General and the Office of Legal Counsel in the Department of Justice have also issued opinions describing other limited exceptions. As the Attorney General explained in a 1981 opinion, it is impossible to catalogue in advance all the agency activities that may fall within one of the exceptions to the Antideficiency Act. Instead, determining which activities may be excepted requires a case-by-case analysis of the particular program or circumstances at issue, as well as of the relevant statutes. For example, in that 1981 opinion, the Attorney General noted an exception to process Social Security payments. 5 Op. Off. Legal Counsel 1, 5 n.7 (1981). 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.” *Id.* at 5. This exception was applied to only one example in the 1981 opinion. In a footnote, the Attorney General explained that it was under the “necessary implication” basis that he authorized obligations “for the administration of benefit payments under entitlement programs when the funds for the benefits payments themselves are not subject to a one-year appropriation.” *Id.* at 5 n.7. The footnote highlighted that Social Security benefits were funded through trust funds into which amounts were automatically appropriated and that the “benefit payments are to be rendered, at Congress’ direction, pursuant to an entitlement formula.” *Id.*

Where an agency incurs obligations under an exception to the Antideficiency Act, Congress has not yet enacted an appropriation sufficient to liquidate the obligation. Therefore, the agency may not make a payment to liquidate the obligation during the lapse in appropriations; instead, the agency may make a liquidating payment only after Congress enacts sufficient appropriations to do so. Congress recognized this bedrock principle when it recently amended the Antideficiency Act to provide pay for federal employees affected by a lapse in appropriations: the amendment provides that payment to employees after the lapse in appropriations ends is subject to the enactment of appropriations ending the lapse. Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, § 2, ___ Stat. ___ (Jan. 16, 2019); Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 103, ___ Stat. ___ (Jan. 25, 2019), *codified at* 31 U.S.C. § 1341(c)(2).

Conclusion

The Antideficiency Act is one of the major laws through which Congress exercises its constitutional power of the purse. In general, the Act forbids agencies from incurring obligations unless Congress has enacted sufficient appropriations. Therefore, if a program has no available appropriations, and no exception to the Antideficiency Act applies, the agency must commence an orderly shutdown and normal operations may resume only after Congress enacts an appropriation to end the lapse.

Chair McCollum, Ranking Member Joyce, and members of the Subcommittee, this completes my prepared statement. I would be pleased to respond to any questions that you may have.

A handwritten signature in cursive script that reads "Julia C. Matta".

Julia C. Matta
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