



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

December 11, 2019

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

RE: B-331564, *Office of Management and Budget – Withholding of Ukraine Security Assistance*

Dear Mr. Armstrong:

This responds to your letter of November 25, 2019, seeking the Office of Management and Budget's (OMB) views on its apportionment of funds for security assistance for Ukraine during the fourth quarter of fiscal year (FY) 2019.

Background

For FY 2019, Congress appropriated \$250 million to the Department of Defense (DOD) for the Ukraine Security Assistance Initiative (USAI).¹ On June 19, 2019, OMB learned that the President had asked about DOD's plans for USAI. At that time, OMB began discussions with DOD regarding DOD's plans for obligating the USAI funds. In response to the Administration's directive that USAI funds not be obligated for Ukraine pending a policy decision, on July 25, 2019, OMB, following discussions with DOD, including DOD's Office of General Counsel, placed a footnote on the apportionment for the account that includes the USAI funds (Operation & Maintenance, Defense-wide, Treasury Appropriation Fund Symbol (TAFS) 97-0100/2019) that stated:

Amounts apportioned, but not yet obligated as of the date of this reapportionment, for the Ukraine Security Assistance Initiative (Initiative) are not available for

¹ That appropriation provided, in relevant part:

For the "Ukraine Security Assistance Initiative", \$250,000,000 is hereby appropriated, to remain available until September 30, 2019: *Provided*, That such funds shall be available to the Secretary of Defense, in coordination with the Secretary of State, to provide assistance, including training; equipment; lethal assistance; logistics support, supplies and services; sustainment; and intelligence support to the military and national security forces of Ukraine, and for replacement of any weapons or articles provided to the Government of Ukraine from the inventory of the United States: *Provided further*, That of the amounts made available in this section, \$50,000,000 shall be available only for lethal assistance described in paragraphs (2) and (3) of section 1250(b) of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114– 92; 129 Stat. 1068)....

Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. A, § 9013, 123 Stat. 2981, 3044-45 (2018).

obligation until August 5, 2019, to allow for an interagency process to determine the best use of such funds. Based on OMB's communication with DOD on July 25, 2019, OMB understands from the Department that this brief pause in obligations will not preclude DOD's timely execution of the final policy direction. DOD may continue its planning and casework for the Initiative during this period. (emphasis added)²

The action of adding the footnote to the apportionment made approximately \$214 million in unobligated USAI funds legally unavailable for obligation, but still permitted DOD to engage in any needed activities up to the point of obligation. Each time this temporary pause in obligations was extended, OMB emphasized (in either the apportionment footnote itself or in subsequent conversations with DOD) that the apportionment would permit DOD to engage in all of the activities short of actual obligation that were necessary to ensure that, following a policy decision, DOD would not be precluded from obligating the USAI funds prior to their expiration on September 30, 2019. In fact, at no point during the pause in obligations did DOD OGC indicate to OMB that, as a matter of law, the apportionments would prevent DOD from being able to obligate the funds before the end of the fiscal year. Based on data OMB received from DOD in August, DOD did not plan to obligate most of the USAI funds until September, and much of that amount in mid-to-late September. OMB removed the footnote from the USAI funds following a policy decision on September 12, 2019.³

Additionally, in FY 2019, \$ 5.9 billion was provided to State in a lump sum appropriation for the Foreign Military Financing Program (FMF) account (TAFS 11-1082/2019).⁴ Within this total, \$115 million was earmarked for Ukraine in the conference report for the State and Foreign

² The pause in obligations was extended on August 6, 15, 20, 27, and 31; and on September 5, 6, and 10, 2019. The third sentence in the original footnote was deleted beginning with the August 20 footnote. See Attachment.

³ Approximately 84% of the USAI funds were obligated at the end of FY 2019. Based on data provided by DOD, the adjusted FY 2018 obligations for USAI are currently at 83%. In other words, of the \$200 million appropriated for USAI that year, \$34 million was never spent. With respect to the last year of the previous Administration, current data for FY 2016 shows that the adjusted obligations for that year are at 79%, meaning that, of the \$231 million appropriated for USAI, more than \$43 million were never spent. The FY 2020 continuing resolution (CR) rescinded and reappropriated approximately \$35 million in USAI funds at the end of FY 2019. Continuing Appropriations Act, 2020, and Health Extenders Act of 2019, Pub. L. No. 116-59, div. A, § 124, 133 Stat. 1093, 1098 (2019). OMB understands that, of the amounts reappropriated on September 27, 2019, approximately \$20 million remains unobligated as of November 29, 2019—a period of time from the reappropriation that is more than 10 days longer than the period of the hold.

⁴ That appropriation provided, in relevant part:

For necessary expenses for grants to enable the President to carry out the provisions of section 23 of the Arms Export Control Act, \$5,962,241,000: *Provided*, That to expedite the provision of assistance to foreign countries and international organizations, the Secretary of State, following consultation with the Committees on Appropriations and subject to the regular notification procedures of such Committees, may use the funds appropriated under this heading to procure defense articles and services to enhance the capacity of foreign security forces: ... *Provided further*, That funds made available under this heading shall be obligated upon apportionment in accordance with paragraph (5)(C) of section 1501(a) of title 31, United States Code.

Operations appropriations bill. FMF funds are obligated upon apportionment, consistent with the proviso under the FMF heading in the annual appropriations acts providing that “funds made available under this heading shall be obligated upon apportionment in accordance with paragraph (5)(C) of section 1501(a) of title 31, United States Code.” However, the funding cannot be obligated and, therefore, cannot be apportioned until after the statutory Congressional Notification (CN) period of 15 days is complete. The CN for this \$115 million was submitted to Congress on September 11, 2019, and the funds were apportioned and obligated on September 30, 2019. The timing of the obligation of conference report language earmarked Ukraine FY 2019 funding was similar to the timing of the earmarked FY 2018 Ukraine funding, which was obligated on September 28, 2018.

In FY 2018, \$0.46 billion was appropriated to State in the FMF Overseas Contingency Operations account (TAFS 11-1082 2018/2019).⁵ Within this amount, during the fourth quarter of FY 2019, State decided to allocate \$26.5 million of this funding to Ukraine. Note that an August 3, 2019, letter apportionment made this \$26.5 million in funding temporarily unavailable until OMB received an accounting of the unobligated balances in the fifteen accounts affected by that letter apportionment. This funding was made available in an August 9, 2019, letter apportionment, but each account was made subject to an even daily rate for the remainder of the year. On August 29, 2019, a final letter apportionment made the remaining unobligated balances in the affected accounts subject to a weekly rate, instead of a daily rate, effective on September 1, 2019. The CN for the \$26.5 million in funding was submitted to Congress on September 11, 2019, and the funds were apportioned and obligated on September 27, 2019.

OMB’s Apportionment Authority

The President of the United States is required to “take Care that the Laws be faithfully executed.” U.S. Const. Art. II, Sec. 3. As part of carrying out this duty, the Executive branch must ensure that Federal agencies spend appropriated funds in an efficient and effective manner, consistent with the purpose for which the funds were appropriated.

OMB is charged by law to assist the President in carrying out this constitutional duty by apportioning funds to Executive branch agencies. When funds are appropriated by Congress, they are provided for particular purposes, for a specified time period, and in a specified amount. Consistent with 31 U.S.C. §§ 1512 and 1513,⁶ OMB is required to apportion funds appropriated for a definite period to ensure that they last for the entirety of the period for which they were appropriated by Congress, and to apportion funds appropriated for an indefinite period to achieve the most effective and economical use.⁷ Those same laws expressly provide OMB with the authority to apportion funds for any time period (*e.g.*, days, months, quarters) or purpose authorized by the appropriation.⁸

OMB apportions funds by time period in many different ways, in accordance with 31 U.S.C. § 1512(b). For apportionments of funds with a definite period of availability (*i.e.*, for

⁵ Consolidated Appropriations Act, 2018, Pub. L. No. 115-41, div. K, 132 Stat. 348, 970 (2018).

⁶ Under the Antideficiency Act, the President is required to apportion funds to agencies. 31 U.S.C. §§ 1512-13.

⁷ 31 U.S.C. § 1512(a).

⁸ *Id.*

funds that “expire”), OMB often spreads the funds across the period of availability, dividing the funds evenly by quarters, months, days, or other time periods. Accordingly, OMB, through its apportionment authority, routinely makes annual funds unavailable for obligation for parts of that particular fiscal year. In other cases, such funds are not apportioned equally across the period of availability, typically because the program in question does not require that funds be obligated in that manner. Many programs, for example, obligate funds seasonally (*e.g.*, based on weather patterns, school years, grant cycles, or other considerations). When funds are appropriated for multiple years (or indefinitely) it is not uncommon for OMB to apportion amounts as unavailable for more than a year, to comply with § 1512. In other words, it is inherent to OMB’s apportionment authority that not all appropriated funds must be immediately available for obligation. Pauses in obligational authority are necessary for proper stewardship of taxpayer funds.

OMB’s role in apportioning funds is in part to prevent agencies from exhausting appropriated funds prior to the expiration of the period of availability of such funds; however, that is not the extent of OMB’s apportionment authority. OMB has significant discretion in determining how and when funds are released to an agency.⁹ Often, in managing appropriations, OMB must briefly pause an agency’s legal ability to spend those funds for a number of reasons, including to ensure that the funds are being spent efficiently, that they are being spent in accordance with statutory directives, or to assess how or whether funds should be used for a particular activity. For decades, OMB has routinely used its apportionment authority to prevent funds from being used: (1) during certain time periods, (2) for certain programs and activities, or (3) without adequate assurances from Federal agencies that the funds will be used effectively, consistent with law, and in accordance with programmatic need.

During a continuing resolution (CR), for example, OMB restricts agency obligations to a “daily rate” provided as a lump sum based on the length and other terms of the CR.¹⁰ Depending on what OMB projects is the likely outcome of the next fiscal year’s appropriations for an account (based on reported House and Senate bills) OMB may further restrict an agency’s spending during a CR, so as not to impinge on Congress’s final funding prerogatives for that fiscal year.¹¹

⁹ 31 U.S.C. § 1512(b)(2) (“The official designated in section 1513 of this title to make apportionments shall apportion an appropriation under paragraph (1) of this subsection as the official considers appropriate.”).

¹⁰ See, *e.g.*, OMB Bulletin No. 19-04, *Apportionment of the Continuing Resolution(s) for Fiscal Year 2020* (September 30, 2019).

¹¹ *Id.* (“You or your RMO may determine that an amount for a TAFS should be less than the amount automatically apportioned to ensure that an agency does not impinge on the final funding prerogatives of the Congress. In these cases, an account-specific apportionment may also be required.”) OMB Bulletin No. 19-04 also excludes certain accounts from the automatic apportionment under the CR and requires agencies to seek an account-specific apportionment before they may obligate CR funds:

If either the House or Senate has reported or passed a bill that provides no funding for a TAFS at the time the CR is enacted or extended, this automatic apportionment does not apply to that account. Reported bills are those that have been filed by the full House or Senate Appropriations Committee for floor action. You may request that OMB provide an account-specific apportionment for such TAFS during the period of the CR (including any extensions thereof), if needed.

Additionally, OMB apportions carryover balances at the beginning of a fiscal year at zero dollars, and that apportionment remains in effect until the agency requests an account-specific apportionment for those funds and OMB makes a new apportionment. OMB Circular A-11 expressly provides that:

[w]hen budgetary resources remain available (unexpired) beyond the end of a fiscal year, [an agency] must submit a new apportionment request for the upcoming fiscal year.... Until [the agency] receive[s] an account-specific apportionment from OMB, the amount of carryover apportioned is zero dollars. In addition, apportioned anticipated or estimated resources are not available for obligation until the resources are realized.¹²

In other words, OMB may temporarily pause an agency's ability to incur obligations until the need for the obligation arises.

In fact, OMB regularly uses this apportionment authority to temporarily pause agency obligations to obtain additional information needed to determine the best possible use of the funds consistent with the law. Pausing before spending is a necessary part of program execution: before obligating appropriated funds, it is incumbent upon the Executive branch to understand how an agency intends to execute a program—and whether that option is the best use of those funds within the program authorization—before granting it the authority to spend taxpayer resources. Most commonly, OMB executes this action by placing a footnote on the apportionment that suspends obligations for a period pending receipt from an agency of a “spend plan” from an agency, or pending a policy determination, including an interagency process, on the most efficient and effective use of the funds consistent with the law.

Deferrals

OMB's exercise of its statutory authority, pursuant to 31 U.S.C. § 1512, to apportion funds to ensure that they are spent in accordance with statutory directives and last for the period of availability is different than a “deferral” under the Impoundment Control Act of 1974 (ICA), which requires that a President not “defer” funds without prior notice to Congress. “Deferral” of budget authority is defined as:

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law.¹³

Under the ICA, “[d]eferrals shall be permissible only:

Id.

¹² OMB Circular A-11, *Preparation, Submission, and Execution of the Budget*, § 120.57 (June 2019).

¹³ Congressional Budget and Impoundment Control Act of 1974 (ICA), Pub. L. No. 93-344, tit. X, § 1011(1) (2 U.S.C. § 682(1)).

- (1) to provide for contingencies;
- (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or
- (3) as specifically provided by law.

No officer or employee of the United States may defer any budget authority for any other purpose.”¹⁴

In enacting the ICA’s deferral provisions it appears that Congress was primarily concerned with preventing so-called “policy” deferrals, in which the intent behind the deferral is to substitute Executive branch policies for those established in the statute.¹⁵ Under the ICA, the President may only defer funds to provide for contingencies or achieve savings, so long as such deferrals are consistent with statutory intent, and the President reports such deferrals to Congress. In other words, under the ICA the President may not defer funds simply because he disagrees with the policy underlying a statute (assuming that the statute could be executed consistent with the President’s constitutional authorities).

The definition of “deferral” under the ICA should be interpreted in a manner that is consistent with OMB’s independent statutory requirement under § 1512 to ensure that funds are, at a minimum, apportioned by:

- (A) months, calendar quarters, operating seasons, or other time periods;
- (B) activities, functions, projects, or objects; or
- (C) a combination of the ways referred to in clauses (A) and (B) of this paragraph.

This section also requires OMB to ensure that funds appropriated for a definite period are apportioned so as to avoid a deficiency appropriation and that funds appropriated for an indefinite period are apportioned to achieve the most efficient and economical use.¹⁶ In other words, OMB in many cases *must* apportion the appropriation in a manner that temporarily precludes some portion of the funds from being available for obligation—in some cases, for more than a year—as OMB “considers appropriate.”¹⁷

Both OMB and GAO have over the years read the two requirements—“deferrals” under the ICA and OMB’s statutory apportionment authority—in a manner that gives effect to both provisions of law. In so doing, both agencies have long concluded that, despite the apparent breadth of the definition of “deferral” under the ICA, there is necessarily a distinction between “deferrals”—which require the President to report to Congress pursuant to the ICA—and what have come to be known as “programmatic delays,” which do not.

¹⁴ ICA § 1013(b) (2 U.S.C. § 684(b)).

¹⁵ See H.R. REP. NO. 100-313 at 67 (1987) (Conf. Rep.).

¹⁶ 31 U.S.C. § 1512(b).

¹⁷ *Id.* at § 1512(b)(2).

Programmatic Delays

Before continuing, it is important to clarify our terminology. “Policy deferrals” must be distinguished from “programmatic delays due to policy development.” Policy deferrals (which are not permitted by the ICA) occur when the intent behind withholding funds is *contrary* to the intent of the statute that provided the funds. By contrast, there is regularly a need for the Executive branch to conduct a process to determine the best policy for the efficient and effective use of funds *consistent with* the intent of the statute. This policy development process is a fundamental part of program implementation, and constitutes a type of programmatic delay. Similarly, a pause in spending to assess facts and ensure programmatic effectiveness is not a deferral of funds.

The ICA’s restrictions do not—and, logically, cannot—extend so far as to preclude OMB from performing its other statutorily required duty to ensure the effective management of funds through apportionments. GAO has long recognized this reality, stating:

There is also a distinction between deferrals, which must be reported, and ‘programmatic’ delays, which are not impoundments and are not reportable under the Impoundment Control Act. A programmatic delay is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency’s reasonable and good faith efforts to implement the program... Since intent is a relevant factor, the determination requires a case-by-case evaluation of the agency’s justification in light of all of the surrounding circumstances.¹⁸

As GAO notes, “programmatic delay” can take many forms, including conditions on the availability of funds not being met, contracting delays, time required to set up a program, delay due to pending issuance of necessary regulations, delay due to certain administrative determinations.¹⁹ Another form that programmatic delay may take is when the Executive branch needs time to develop or change policy. When the Executive branch is executing the laws, it is routinely necessary to reassess policy goals based on program effectiveness and other factors. Ensuring that there is time to conduct a meaningful process that results in successful policies (and that funds are not used in opposition to such policies in the meantime) often requires that obligations pause until that policy process is concluded.

GAO has recognized that policy considerations can equate to programmatic delay, concluding at one point that an agency’s failure to obligate funds due to its compliance with

¹⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-464SP, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2-50 (4th ed. 2016) (internal citations omitted). There are, of course, significant challenges presented by the ICA’s structure, which makes the “intent” of the President the relevant factor in determining whether an Executive action that delays obligations constitutes a deferral. Most obviously, as is clear from the experience of decades of litigants and legal scholars in other contexts who have attempted to discern Congressional intent from legislative text and history, determining a single “intent” of a large body composed of many individuals is an exceedingly complex and often impossible endeavor. When attempting to discern Executive intent, the task is made even more challenging by the fact that unearthing such “intent” often requires disclosing pre-decisional and deliberative information to the Legislative branch to persuade it that the Executive action was proper. Such a scenario is not appropriate under principles of constitutional separation of powers.

¹⁹ *Id.* at 2-50 to -51.

directives from Congressional committees not to spend funds constituted “programmatic delay” and not a “deferral.”²⁰ Appropriations Acts often require that agencies: (1) notify Congress in advance of obligating funds for particular purposes, and (2) wait a specified number of days prior to obligating such funds. This is sometimes referred to as the “statutory notice period.” Congress, however, has a history of insisting that the Executive branch withhold spending on certain programs or projects long beyond such statutory notice period, pending Congress’s often protracted review of an agency’s planned spending, or because a Congressional committee has placed a “hold” on such spending for its own purposes. The Executive branch, of course, is under no legal obligation to comply with such Congressional “holds” beyond the period specified in statute, following the Supreme Court’s decisions regarding the Constitutional doctrine of separation of powers in *Bowsher v. Synar*,²¹ and *INS v. Chadha*.²² Nevertheless, agencies are acutely aware of Congress’s power to control their funding, and therefore generally comply with Congressional directives.²³ When the agencies do, no one—certainly not their committees—accuses them of impounding funds.²⁴

In fiscal years 2017-2019 alone, OMB is aware of Congressional committees directing that billions of dollars of funds appropriated to State and the U.S. Agency for International Development (USAID) be withheld 10 days or more beyond the statutory notice period:

- In FY 2017, Congressional committee holds of 10 days or more beyond the statutory notice period affected more than \$6.7 billion in State and USAID funds. This included one hold of 321 days, one hold of 228 days, and three holds of more than 100 days past the statutory notice period. In total, there were at least 115 instances of Congressionally-directed holds in foreign aid funds in FY 2017 that extended 10 days or more past the statutory notice period.

²⁰ *Id.* See also B-221412 (Feb. 12, 1986). OMB’s position that programmatic delays, including programmatic delays that require the use of its apportionment authority, do not constitute deferrals is not new. That distinction was made in 2002. As a result, no President since that time has reported such actions as deferrals.

²¹ 478 U.S. 714 (1986).

²² 462 U.S. 919 (1983).

²³ As the Supreme Court has noted:

[A]n agency’s allocation of funds from a lump-sum appropriation requires “a complicated balancing of a number of factors which are peculiarly within its expertise”: whether its “resources are best spent” on one program or another; whether it “is likely to succeed” in fulfilling its statutory mandate; whether a particular program “best fits the agency’s overall policies”; and, “indeed, whether the agency has enough resources” to fund a program “at all.” ...Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes (though not, as we have seen, just in the legislative history). ...And, of course, we hardly need to note that an agency’s decision to ignore congressional expectations may expose it to grave political consequences.

Lincoln v. Vigil, 508 U.S. 182, 193 (1993) (internal citations omitted).

²⁴ OMB is aware of instances in which Members of Congress demanded that agencies withhold funds for months—and even years—beyond the period required by statute for reasons wholly unrelated to the purpose of the appropriation. OMB respectfully suggests that GAO take an interest in this practice, as well.

- In FY 2018, Congressional committee holds of 10 days or more beyond the statutory notice period affected more than \$3.5 billion in State and USAID funds. This included one hold of 201 days and four holds of more than 100 days past the statutory notice period. In total, there were at least 148 instances of Congressionally-directed holds in foreign aid funds in FY 2018 that extended 10 days or more past the statutory notice period.
- In FY 2019, Congressional committee holds of 10 days or more beyond the statutory notice period affected more than \$762 million in State and USAID funds. In total, there were at least 31 instances of Congressionally-directed holds in foreign aid funds in FY 2019 that extended 10 days or more past the statutory notice period.

If compliance with constitutionally non-binding directives from Congressional committees to “hold” funds is not a deferral, then certainly a delay in obligating funds arising from a Presidential direction that a policy process is necessary prior to making obligations cannot be. As stated above, it is the President’s constitutional role to faithfully execute the laws. The President has an obligation to ensure that funds are being spent prudently.

The pause in obligations of the Ukraine funds at issue here is an example of programmatic delay. By its terms, OMB’s apportionment footnote expressly provided that DOD could continue all necessary activities—short of the final action obligating the funds—until there was a policy decision on the use of the funds. The statutory language of the USAI and FMF appropriations provided the Executive branch broad discretion to determine how these particular funds should be spent. It was OMB’s understanding that a brief period was needed, prior to the funds expiring, to engage in a policy process regarding those funds. OMB took appropriate action, in light of a pending policy process, to ensure that funds were not obligated prematurely in a manner that could conflict with the President’s foreign policy.

In its letter, GAO also requested that OMB provide copies of certain apportionments for the security assistance funding for Ukraine. Those apportionments are attached.²⁵

The Executive branch has a duty to taxpayers to ensure that appropriations are spent wisely, in accordance with statutory requirements. As stewards of taxpayer funds, OMB always has and will continue to take seriously its legal duty to oversee agency spending, and apportion funds appropriately, in accordance with the ICA and all other applicable laws.

Sincerely,



Mark R. Paoletta
General Counsel

Attachment

²⁵ See Attachment.