



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

June 8, 2020

The Honorable Brian Callanan
General Counsel
Department of the Treasury
Washington, D.C. 20220

RE: B-331093, *U.S. Department of the Treasury – Tax Return Activities during the Fiscal Year Lapse in Appropriations*

Dear Mr. Callanan:

This responds to your request for the Office of Management and Budget (OMB) to provide a letter opinion on whether the Department of the Treasury (Treasury) is required to report an Antideficiency Act (ADA) violation related to Internal Revenue Service (IRS) tax return activities that took place during the fiscal year 2019 partial government shutdown.¹ In a recent opinion, the Government Accountability Office (GAO) concluded that Treasury violated the ADA when it incurred obligations to process tax remittances and issue tax refunds during the lapse in appropriations that occurred from December 22, 2018, through January 25, 2019.² According to GAO, Treasury lacked available budget authority to support these activities, and no exception to the ADA permitted Treasury to incur these obligations.

I have reviewed the GAO’s opinion, as well as the 2011 and 2019 legal opinions from the IRS Office of Chief Counsel, which concluded that the administrative activities necessary to process and make refund payments are “authorized by law” to continue even in the absence of available budget authority for such activities. As explained below, based on our review of long-standing Department of Justice (DOJ) determinations and consistent with our previous guidance to Treasury on this matter, OMB’s Office of General Counsel (OGC) concurs in the conclusions reached by the IRS Chief Counsel. Therefore, it is my opinion that no ADA violation occurred related to such activities. Accordingly, Treasury is under no legal obligation to report the underlying actions.

As you know, an agency without budget authority may continue to incur obligations only where an exception to the ADA allows an agency to do so.³ The ADA itself expressly

¹ We note that during the 2019 partial government shutdown, prior to Treasury taking any action to process or issue tax refunds, OMB advised Treasury via email that it concurred with Treasury that such activities fall within the ADA’s “authorized by law” exception. This letter confirms our earlier view.

² *U.S. Department of the Treasury—Tax Return Activities during the Fiscal Year Lapse in Appropriations*, B-331093, Oct. 22, 2019.

³ 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.

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.”⁴ DOJ’s Office of Legal Counsel (OLC) long ago recognized that the “authorized by law” exception exempts from the ADA not just those obligations for which express authority is found in enactments of Congress, but obligations necessarily implied by those enactments as well.⁵ In a 1981 legal opinion, OLC wrote that the “authorized by law” exception to the ADA would permit an agency to continue the obligation of funds to the extent such obligations are “authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency.”⁶ Nearly fifteen years later, OLC reiterated in a subsequent memorandum to the Director of OMB 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.”⁷

To illustrate the application of the necessary implication exception, OLC principally invoked the administration of Social Security benefits. In its 1981 opinion, OLC found that “the responsible departments are ‘authorized by law’ to incur obligations in advance of appropriations for the administration of benefit payments under entitlement programs when the funds for the benefit payments themselves are not subject to a one-year appropriation.”⁸ In OLC’s view, Congress’ decision to fund the various Social Security programs through “continuing” or “permanent” appropriations that do not lapse supports a necessary implication that the unfunded activities required to implement such programs are authorized to continue as well.⁹ For more than 40 years, executive branch agencies have relied on OLC’s 1981 opinion interpreting the ADA’s “authorized by law” exception.¹⁰

Like Social Security benefits, tax refunds are paid from a permanent indefinite appropriation.¹¹ As the IRS legal opinions point out, the same necessary implication that OLC relied on to support the continuation of Social Security benefits administration—and, in a later opinion, executive branch participation in funded legislative branch hearings—applies equally to the administration of tax refunds. Just as Congress’s decision to fund Social Security payments through permanent appropriations gave rise to a legitimate inference that Congress intended for Social Security benefits to continue regardless of the funding status of the rest of the federal government, so Congress’s decision to fund tax refunds through a permanent indefinite

⁴ See 31 U.S.C. §§ 1341-1342.

⁵ 5 Op. O.L.C. 1, 5 (1981) (“1981 opinion”).

⁶ *Id.* at 5. See also 19 Op. O.L.C. 337 (1995) (explaining that this exception includes “unfunded functions that enable other funded functions to be executed”).

⁷ 1995 OLC LEXIS 57, at *9.

⁸ 5 Op. O.L.C. at 5. n.7.

⁹ *Id.*; 19 Op. O.L.C. 337 (1995).

¹⁰ As GAO notes in its own opinion, since OLC issued the 1981 opinion, the authority of Social Security programs to continue in the absence of appropriations to fund the costs associated with administering such programs has not been questioned.

¹¹ 31 U.S.C. § 1324

appropriation gives rise to a valid inference that Congress intended for tax refunds to continue to be paid even in instances where other Treasury functions must be suspended due to a lack of available appropriations to support them.¹² Because the distribution of tax refunds requires the services of employees whose salaries are paid by annual appropriations, Treasury's authority to incur obligations for such employees' salaries in the absence of available appropriations arises by necessary implication from Treasury's authority to make tax refund payments out of a permanent indefinite appropriation that does not lapse.

After reviewing OLC's opinions interpreting the ADA's "authorized by law" exception, and as OMB communicated to Treasury during the 2019 lapse in appropriations, Treasury's position, as reflected in the 2011 and 2019 IRS legal opinions, is consistent with those earlier OLC opinions.¹³ Therefore, OMB OGC agrees with Treasury that no ADA violation occurred as a result of Treasury's decision to continue processing and issuing tax refunds during the fiscal year 2019 partial government shutdown. The ADA requires agencies to promptly report to the President, Congress, and GAO any instance in which they have determined an ADA violation occurred.¹⁴ However, an executive branch agency is under no obligation to report an activity it has determined does not constitute an ADA violation. Accordingly, Treasury is not required to report an ADA violation in this instance.

Sincerely,



Mark R. Paoletta
General Counsel

¹² As IRS notes in its 2011 legal opinion, the statutory scheme governing tax refunds and its legislative history provide further evidence that Congress intended for the tax refund process to continue regardless of whether annual appropriations had been enacted. *See* 26 U.S.C. § 6402; H. Rept. No. 80-2089, at 4 (1948).

¹³ Opinions issued by OLC are binding on executive branch agencies.

¹⁴ 31 U.S.C. §§ 1351, 1517(b). *See also* OMB Circular No. A-11, § 145.8 (2019).