

Agency Discretion to Manage Appropriated Funds: The WHO Funding Announcement

May 15, 2020

On April 14, 2020, President Donald J. Trump [announced](#) that his Administration would “halt” funding to the World Health Organization (WHO) while it investigates the WHO’s Coronavirus Disease 2019 (COVID-19) response effort. This “investigation,” the President stated, may last “60 to 90 days.” As observed in CRS Insight IN11369, *U.S. Funding to the World Health Organization (WHO)*, by Luisa Blanchfield and Tiaji Salaam-Blyther, Congress has not appropriated funds specifically for the WHO in recent appropriations acts. Instead, Congress has appropriated funds for executive branch agencies to address topics such as international disaster and famine assistance, and the recipient agency may have opted to obligate such funds for [projects that involved the WHO](#). It is too early to tell how the Trump Administration’s announcement might affect agency action, if at all. It is possible to construe the Administration’s statements as signaling that agencies might proceed with obligating funds by working with “[different partners](#)” instead of the WHO. But [some observers](#) have questioned whether agencies might temporarily delay obligating funds pending the Administration’s investigation. Conceptually, these two general possibilities—obligating funds or temporarily delaying obligation—raise questions about agency discretion to manage appropriated funds.

This Sidebar provides a general discussion of an agency’s authority to obligate its appropriations or, alternatively, temporarily delay the obligation of budget authority, noting, along the way, potentially relevant considerations in the case of the WHO funding announcement.

Appropriations Law Concepts

The Appropriations Clause of the U.S. Constitution [provides](#) that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” An appropriation is a type of [budget authority](#), which is authority for an individual to incur an obligation on behalf of the United States. An obligation [includes](#) a “definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received.” What sets an appropriation apart from other types of budget authority (such as [borrowing or contract authority](#)) is that only an [appropriation](#) allows an agency to both “incur obligations” *and* “make payments from the Treasury for specified purposes.”

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To withdraw funds from the Treasury, then, an agency must have an appropriation set forth in statute. Congress provides appropriations in regular appropriations acts, supplemental appropriations acts, and other statutes. Read in light of the [general provisions](#) that follow in the appropriations act and any relevant provisions in other statutes, the language of each unnumbered paragraph of an appropriations act identifies the purposes for which the budget authority provided in that paragraph may be obligated, the amount of budget authority provided, the time period in which it is available, and any conditions imposed on its availability.

In recent fiscal years, the U.S. Agency for International Development (USAID), the Department of State (State Department), and the Department of Health and Human Services, among others, have used their appropriations to support the WHO. In [FY2016](#), [FY2017](#), and [FY2018](#) (the most recent years for which data are publicly available), these agencies collectively used more than a dozen accounts to obligate funds for WHO purposes. Congress granted these appropriations using varying language when describing the purpose, amount, time period, and conditions attached to use of that authority.

Obligating Budget Authority

On the one hand, it is possible to construe Trump Administration statements during and following the WHO funding announcement as signaling that agencies might proceed with obligating funds by working with “[different partners](#)” instead of the WHO. Agency discretion to obligate such budget authority is controlled by statute and case law.

Key Concepts

Congress has [directed](#) that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” [Courts](#) and the [Government Accountability Office](#) (GAO) interpret an appropriation to grant an agency not just the authority to obligate funds for the activities or programs stated in the appropriation, but also for expenses necessary to accomplish the appropriation’s stated objects. Using the “necessary expense test,” which is a “[rule of construction for appropriations statutes](#),” an agency may use a particular appropriation for an expense [if](#), among other things, (1) there is a logical relationship between the expense and the appropriation; (2) the expense is not prohibited by law; and (3) no other appropriation more specifically provides for the expense.

Thus, an appropriation [usually](#) “encompasses a number of activities or projects.” The text of the appropriation and any other relevant statutes determine the extent of an agency’s discretion to decide which portions of the budget authority provided in a single appropriation should go to one particular activity or project over another. When Congress does not specify in statute the amount available for a particular activity, project, or recipient, courts view Congress as having [delegated](#) that allocation choice to the agency. By leaving it up to the agency, Congress gives the “agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.”

Congress has multiple means for limiting an agency’s allocation discretion. *First*, Congress may limit the agency’s discretion by setting aside, in statute, some portion of the appropriation for a particular activity, project, or recipient. For example, Congress might specify in the text of an appropriation that an agency may dedicate “[not less than](#)” a specified amount to a particular use. If Congress uses this language or its legal equivalent, it specifies “a minimum for the particular object.” *Second*, according to GAO, a committee report or explanatory statement may, under certain circumstances, dictate how an agency is to allocate a particular appropriation. On its own, a committee report or explanatory statement does not “[establish any legal requirements](#)” on an agency regarding funds allocation. However, GAO has [opined](#) that when such committee report directives are expressly incorporated into a statute so that the agency and

others can look to the incorporated material to “ascertain with certainty the amounts and purposes for which . . . appropriations are available,” the committee report allocations bind the agency.

Thus, an agency’s allocation decision is proper if it “meet[s] permissible statutory objectives” and comports with any provisions of statute designating funds for particular objects. At least one other type of statutory provision may affect how an agency sets funding priorities: reprogramming notice provisions. Each year, the President submits a budget to Congress and agencies likewise submit justification materials. These materials may describe the programs, projects, or activities that comprise each requested appropriation so that Congress has “a meaningful representation of the operations financed by a specific” appropriation. A committee report that accompanies an appropriations act might also specify how the committee expects the agency will divide the budget authority made available in a given appropriation (though not necessarily in a manner that meets GAO’s express-incorporation test). An agency reprograms when it shifts funds within an appropriation account to obligate more or less budget authority for a given program, project, or activity than was contemplated in the agency’s justification materials, a committee report, or other relevant reference document.

Congress typically monitors reprogramming through reprogramming notice provisions. Congress phrases such provisions as setting conditions that an agency must satisfy before budget authority is available for a reprogramming. Such provisions may state that “[n]one of the funds made available” by all or part of the appropriations act “shall be available for obligation” “unless” the agency notifies certain committees “in advance of such reprogramming of funds.” An agency may not obligate budget authority without providing the required notice because without the notice, no funds are “legally available for obligation.”

Potential Considerations for the WHO Funding Announcement

For those agencies that have funded WHO programs in the past, the general framework discussed above helps describe discretion to obligate budget authority to work with “different partners” instead of the WHO. Of course, the text of the relevant appropriation is key for defining the range of an agency’s discretion to obligate funds available in that appropriation. To take an example of one possible source of funding, USAID’s Global Health Programs (GHP) appropriation is available for “necessary expenses to carry out the provisions of chapters 1 and 10 of part I of the Foreign Assistance Act of 1961, for global health activities.” Those portions of the Foreign Assistance Act, in turn, authorize assistance to combat HIV/AIDs, tuberculosis, and malaria, to name a few permitted activities. Other appropriations, used in past fiscal years to support WHO programs, use different language to describe available budget authority and are subject to different conditions.

When setting this range of agency discretion (which differs appropriation to appropriation), Congress did not choose to use either of the two means mentioned above to designate funds for the WHO. Congress did not set aside, in statute, any portion of budget authority for WHO projects. And though, in certain appropriations acts, Congress incorporated by reference explanatory statement allocation tables, these tables do not appear to require that any particular amount of budget authority be made available for the WHO, but instead speak in more general terms. For instance, the tables allocate funds within the GHP appropriation to such programs as “Maternal and Child Health” and “Nutrition.”

Finally, Congress decided to monitor, subject to waiver, reprogramming of foreign assistance funds using statutory notice requirements. Whether any particular use of funds constitutes reprogramming, though, will depend on the programs and appropriation at issue as well as how the agency justified that appropriation and any relevant provisions of committee reports. Even if proposed action would be a reprogramming, that fact alone does not require notice to relevant committees. For example, for the GHP appropriation notice is not required if a reprogramming would be an increase of “less than 10 percent of the amount previously justified to Congress.” Different appropriations may be subject to different notice requirements.

Delaying Use of Budget Authority

On the other hand, as noted above, [some observers](#) have questioned whether agencies might temporarily delay obligating funds pending the Trump Administration’s “investigation” into WHO matters.

Key Concepts

Congress monitors and responds to agency delay in making funds available for obligation under the [Impoundment Control Act of 1974 \(ICA\)](#). According to GAO, the ICA [operates](#) “on the premise that when Congress appropriates money to the executive branch, the President is required to obligate the funds.” But the ICA also provides “[mechanism\[s\]](#),” subject to congressional notice, for the executive branch to “deviate from this requirement.”

When an agency [impounds](#), it acts or fails to act in a way that precludes budget authority from being obligated or expended. When identifying an impoundment, the question is whether an agency [intends](#) “to refrain from obligating or expending available budget authority, based on the facts and circumstances present.”

The ICA permits two budget actions that may temporarily delay budget authority from being available for obligation, provided Congress receives the required notice of the action.

- *First*, the President may send a special message to Congress proposing that Congress [rescind](#), or cancel, budget authority. Once the President sends the special message, the affected budget authority may be withheld from obligation for 45 legislative days ([equivalent](#) to 45 calendar days, given Congress’s current practice of holding *pro forma* sessions). If Congress passes a rescission bill in that time, the budget authority is canceled; if Congress does not, the budget authority “shall be made available for obligation.”
- *Second*, the President, the Director of OMB, or a department or agency head or employee may send a special message to Congress proposing a [deferral](#). The ICA lists when budget authority may be deferred: (1) “to provide for contingencies,” (2) “to achieve savings” through changed requirements or efficiencies, or (3) “as specifically provided by law.” The ICA [states](#) that “[n]o officer or employee of the United States may defer any budget authority for any other purpose.” As OMB generally [recognizes](#), the “President may not defer funds simply because he disagrees with the policy underlying a statute.”

It is important to note, though, that the ICA does not impose “[any specific requirements](#)” as to the rate at which an agency must obligate, [much less establish a rule](#) that budget authority must be “fully obligated as soon as [it] first becomes available, regardless of any necessary programmatic or administrative considerations.” The ICA [permits](#) an agency to take “steps [that] it reasonably believes are necessary to implement a program efficiently and equitably.” GAO has construed the ICA not to apply to [programmatic delay](#), which arises when funds “temporarily go unobligated” because the agency is taking “necessary steps to implement a program.” GAO [stresses](#) that “the reason for a delay in obligating, not the delay alone,” distinguishes delay that must be reported under the ICA from programmatic delay. If an agency is “[making all efforts to](#)” obligate available budget authority, any resulting delay may not need to be reported to Congress.

Potential Considerations for the WHO Funding Announcement

Though [some observers](#) have questioned whether the Administration’s plan to “halt” WHO pending its “investigation” may result in the withholding of budget authority, it is too early to tell whether relevant agencies intend to delay the availability of budget authority at all. On May 4, 2020, a senior State

Department official [commented](#) that the unpaid half of the United States' [WHO assessed contributions](#) is not "[due until the end of the fiscal year](#)." And on the question of delay, as noted above, the ICA applies only where an agency intends "to refrain from obligating or expending available budget authority." This is a program-specific inquiry. GAO often considers "[program needs and historical practices](#)" by asking (for example) whether an agency's rate of obligation is "[comparable](#)" to [past fiscal years](#). If the answer to this question is "yes," then that fact suggests that the agency administering the program is not delaying obligations pending the outcome of the Administration's investigation. But if the answer to this question is "no" and obligation rates lag as compared to prior years, further scrutiny may be warranted.

Conclusion

The Trump Administration's WHO funding announcement has raised questions about agency discretion to manage appropriated funds. At this early stage, it appears that agencies might have leeway in directing funding to "new partners" instead of the WHO, as Congress did not specifically require that appropriated funds be obligated with or for the WHO. And delay in obligating appropriated funds, if any, may be subject to scrutiny under the ICA if it appears that an agency intends to refrain from making budget authority available. But reporting under the ICA would not be required if it appears that an agency is making all efforts to obligate budget authority. For future fiscal years, and depending on its policy judgment, Congress may limit agency discretion to either support, or not support, WHO projects by appropriating funds for such uses with more particularity.

Author Information

Sean M. Stiff
Legislative Attorney

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