



September 26, 2019

Congressional Proposals Related to a Lapse in Appropriations

Association for Budgeting and Financial Management
2019 Annual Conference

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Appropriations

Principles of Appropriation Law

The Constitution empowers the Congress with the power of the purse: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹

To maintain that power, the Congress imposes limits on the money that it provides in appropriations—whether they be in annual discretionary appropriation acts or in permanent organic statutes for programs. Generally, an appropriation contains restrictions on its:

- Purpose, which may be explicitly stated in the appropriation or incorporated by reference to another statute;
- Time, which may be a specified number of years, no year, or (in the case of a continuing resolution) a portion of a year; and
- Amount, which may be either indefinite or clearly defined in the statute.

1. U.S. Constitution, Article I, section 9.

An Example of an Appropriation

“**For necessary expenses** of the Management Directorate for procurement, construction, and improvements, **\$175,920,000** . . .

“. . . of which **\$55,920,000** shall remain available until **September 30, 2021**; and . . .

“. . . of which **\$120,000,000** shall remain available until **September 30, 2023**, and shall be transferred to and merged with the General Services Administration’s Federal Buildings Fund **for Department of Homeland Security headquarters consolidation at St. Elizabeth’s.**”¹

1. Procurement, Construction, and Improvements Appropriation, title I of division A of the Consolidated Appropriations Act, 2019, P.L. 116-6.

The Antideficiency Act

The Antideficiency Act generally prohibits:

- Making or authorizing an expenditure **in excess of the amount available** in the appropriation or fund unless authorized by law;
- Involving the government in any obligation **before funds have been appropriated** for that purpose; and
- Accepting voluntary services, **except in cases of emergency involving the safety** of human life or the protection of property.¹

1. 31 U.S.C. §§1341–1342 and §1517.

Congress Has Various Ways of Making an Appropriation

Certain programs have permanent appropriations enacted in their authorizing statutes. These programs are generally referred to as mandatory programs. They are not subject to the annual appropriation process.

By design, the Congress passes annual appropriations in 12 different bills. Those appropriation bills generally provide discretionary appropriations. The default assumption is that the appropriations are available only for a single fiscal year.

When discretionary appropriations are about to run out, but the Congress has yet to enact appropriations for the next fiscal year, the Congress may enact a continuation of current appropriations for a specific time. It is typically called a continuing resolution (or CR).

A “Shutdown”

In a series of opinions in the 1980s and 1990s, the Office of Legal Counsel in the Department of Justice determined that the Antideficiency Act required agencies to suspend—or “shut down”—their functions if they had no funding.

Typical discussions of a shutdown or “lapse in appropriations” involve discretionary annual appropriations, but other appropriations can lapse as well.

Executive branch agencies must submit plans for agency operations during a lapse in appropriations. The plans must identify employees, if any, who are exempt from the Antideficiency Act’s prohibition on agencies’ accepting voluntary services, as well as which employees will be furloughed during the lapse.¹

During a lapse in appropriations, some agencies or offices have balances in their accounts to continue operations for some time before having to shut down. Other agencies or offices have special authorities to continue operations.

1. See Office of Management and Budget, “Agency Contingency Plans” (accessed September 25, 2019), <https://go.usa.gov/xVdMB>.

History of Lapses in Appropriations Since Fiscal Year 1977

| Fiscal Year | Length of Lapse (Days) | Fiscal Year | Length of Lapse (Days) |
|-------------|------------------------|-------------|------------------------|
| 1977 | 10 | 1988 | 1 |
| 1978 | 12 | 1991 | 3 |
| | 8 | 1996 | 5 |
| | 8 | | 21 |
| 1979 | 17 | 2014 | 16 |
| 1980 | 11 | 2018 | 2 |
| 1982 | 2 | 2019 | 34 |
| 1983 | 1 | | |
| | 3 | | |
| 1984 | 3 | | |
| 1985 | 2 | | |
| | 1 | | |
| 1987 | 1 | | |

Enacted Authorities That Address a Lapse in Appropriations

Paying Federal Employees for a Previous Lapse in Appropriations

In the past, appropriation acts that were enacted after a lapse have authorized the payment of federal employees' salaries for the period of the lapse.

Those acts have also directed that the corresponding obligations and outlays be executed as if regular appropriations had been available during the lapse.

For example: "Employees furloughed as a result of any lapse in appropriations which begins on or about February 9, 2018, shall be compensated at their standard rate of compensation, for the period of such lapse in appropriations, as soon as practicable after such lapse in appropriations ends . . ."¹

The Congressional Budget Office has estimated that such provisions have negligible budgetary effects; the budget authority provided in the subsequent appropriation act provides the resources to liquidate all obligations incurred for the lapse.

1. See §166 of division D of the Continuing Appropriations Act, 2018, P.L. 115-56, as amended by Continuing Appropriations Amendment Act, 2018, P.L. 115-124, 132 Stat. 314.

Government Employee Fair Treatment Act of 2019, P.L. 116-1

The law permanently amended the United States Code so that each employee furloughed as a result of a lapse in appropriations will be paid for the period of the lapse at the earliest possible date after the lapse ends.

That authority covers only lapses in appropriations that started after December 22, 2018.

The bill was not reported out of committee before it was enacted, so CBO did not produce a formal cost estimate for it.

Proposals for Automatic Appropriations in the Event of a Lapse in Annual Discretionary Appropriations

Budgetary Treatment of Automatic Appropriations

Generally, proposals to provide an automatic appropriation if there is a lapse in annual discretionary appropriations provide agencies an appropriation in a new fiscal year equal to the prior year's appropriation. Some of the proposals would apply to all discretionary programs; others would apply only to specific programs or activities.

Providing an automatic appropriation would be a major departure from current law, which requires annual action by the Congress to provide discretionary funding.

If agencies were able to continue to spend money without action from the Congress, CBO would consider it mandatory spending.

Providing an automatic appropriation would mean that annual discretionary appropriations (which are subject to statutory limits) would no longer be necessary to pay for the affected activities.

Discretionary appropriations could still be provided for other purposes up to the statutory limits.

Prevent Government Shutdowns Act of 2019, S. 1877, 116th Cong.

In the event that annual appropriation acts are not enacted by October 1 (the first day of the fiscal year), S. 1877 would provide mandatory appropriations to continue federal government operations at the same rate as in the previous fiscal year.

Federal agencies could thus continue operations without requiring the Congress to pass annual appropriation acts.

CBO estimates that the bill could increase mandatory spending by up to \$12.6 trillion over the 2019–2029 period.¹

1. See Congressional Budget Office, cost estimate for S. 1877, the Prevent Government Shutdowns Act of 2019 (July 25, 2019), www.cbo.gov/publication/55496.

**Other Examples of Proposals
Introduced in the 116th Congress to
Provide Spending Authority When
There Is a Lapse in Appropriations**

Proposals for Government Contractors' Back Pay

Generally, these bills would allow federal agencies to make an upward adjustment to the cost of contracts. That adjustment would pay for the salaries of certain sets of government contractors' employees who were not paid because the government issued stop-work orders when appropriations lapsed.

Some examples of these bills are:

- The Low-Wage Federal Contractor Employee Back Pay Act of 2019, H.R. 339
- The Fairness for Federal Contractors Act of 2019, H.R. 824
- The Fair Compensation for Low-Wage Contractor Employees Act of 2019, S. 162

Proposals for Other Authorities

All of these bills have been introduced and referred to committees of jurisdiction, but they have not been reported out of committee.

- H.R. 672, a bill to require the Secretary of Education to provide a deferment for certain student loans of federal employees subject to a lapse in discretionary appropriations, and for other purposes.
- S. 72, the Federal Employees Civil Relief Act, a bill that would temporarily suspend administrative and judicial actions against federal employees during a lapse in appropriations. For example, its provisions would halt eviction proceedings, foreclosures, enforcement of liens, payments of student loans, and payments of income taxes.
- H.R. 720, a bill to deem federal employees excepted from furlough during a government shutdown in fiscal year 2019 to be eligible for unemployment compensation, and for other purposes.

Fiscal Year 2020 Appropriations

Status of Appropriations

Current appropriations for most federal agencies run through September 30, 2019, which is the end of fiscal year 2019. No annual appropriation acts have been enacted for fiscal year 2020.

The House and Senate are in the process of marking up and reporting out of committee the 12 annual appropriation acts for fiscal year 2020.

- In the House:
 - Number of acts reported out of the appropriations committee: 2
 - Number passed in the House: 10
- In the Senate:
 - Number of acts marked up by the appropriations subcommittee: 7
 - Number reported out of the appropriations committee: 5
 - Number passed in the Senate: 0

Questions?