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United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

July 23, 2020

The Honorable Steven Mnuchin
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, DC 20220

Dear Secretary Mnuchin,

On June 30, 2020, the U.S. Government Accountability Office (GAO) informed the leaders of the U.S. House of Representatives and the U.S. Senate that your department had violated the Antideficiency Act¹ by undertaking activities during the 2019 government shutdown for which it did not have funding. Specifically, GAO notified you that the unprecedented decision by the Trump Administration to direct the Internal Revenue Service (IRS) to process tax returns and issue tax refunds during the lapse in appropriations was in violation of the law.² In addition, the GAO concluded that your Department is also in violation of the section of the Act that requires it to immediately report such violations to the Congress.³ Since the specific violations, as determined by GAO, relate to tax administration and are within the jurisdiction of the Senate Committee on Finance, I am requesting that you immediately provide the report required by law, a description of the personnel actions that you intend to take regarding officers and employees responsible for those unauthorized actions, and an explanation for why the department refused to make the required report to Congress.

On October 22, 2019, GAO determined that the Treasury Department had violated the Act when it conducted activities to issue tax refunds despite the fact that the appropriations for

¹ 31 USC §1341(a)

² GAO letter to The Honorable Michael R. Pence, President of the Senate The Honorable Nancy Pelosi, Speaker of the House of Representatives; *U.S. Department of the Treasury—Tax Return Activities during the Fiscal Year 2019 Lapse in Appropriations*, June 30, 2020

³ 31 USC §1351

the department, as well as most of the rest of the government, had lapsed. Simply put, if Congress has not provided funding for a government activity the law prohibits Federal agencies from continuing to engage in those activities. While there are government activities which are allowed to proceed even if Congress has not provided continuing funding, processing tax returns and the issuance of tax refunds is not one of them according to GAO.

We conclude that the exception in the Antideficiency Act for emergencies to protect property does not provide authority for IRS to incur obligations to process tax remittances during a lapse in appropriations. The Antideficiency Act states that the exception only extends to situations in which suspension of the activity would “imminently threaten . . . the protection of property.”⁴

Prior to the 2019 shutdown, it had long been understood that processing tax returns did not fit the definition of an excepted activity under the Act. As noted in a separate GAO report prepared for me, in 2011 the Office of Management and Budget (OMB) specifically directed the IRS to refrain from issuing tax refunds during a lapse in appropriations.⁵ In fact, the original 2019 shutdown plan prepared by the IRS did not authorize these activities during the shutdown. However, faced with the prospect of unhappy taxpayers, and at the request of Treasury and IRS, the Trump OMB “...revisited this position and, on January 7, 2019, OMB informed Treasury that tax refunds may be paid during a lapse in appropriations. As a result of this determination, IRS added approximately 16,000 additional excepted positions to its filing season contingency plan for the purpose of issuing refunds.”⁶

As noted above, GAO disagreed with the OMB on whether or not this activity was legally allowed, and concluded that it was not.

When a Federal agency violates the Act, as GAO concluded Treasury did in its October 22, 2019 determination, that agency is required by law to immediately provide a report to the President and the Congress and to GAO describing all relevant facts and actions by the agency related to the violation. However, Treasury never filed this report and on June 9, 2020 it informed GAO that it would not do so. In its letter last week to Congressional leadership, GAO noted even if the agency disagrees with the finding it is not absolved from its statutory requirement to report to Congress.

Finally, the Act contains both administrative and criminal penalties for violations. An officer or employee of the U.S. Government “...shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal

⁴ GAO letter to Congressional Requesters, *U.S. Department of the Treasury—Tax Return Activities during the Fiscal Year 2019 Lapse in Appropriations*, B-331093, October 22, 2019

⁵ GAO 20-377, *FY2019 Shutdown, Selected Agencies Could Improve Contingency Planning for Potential Shutdown Scenarios and Strengthen Some Internal Controls*, June 2020, p. 16

⁶ GAO, p. 16

from office.”⁷ If the violation is willful and knowing, those individuals are subject to criminal penalties of up to \$5000 in fines and up to two years of imprisonment or both.⁸

I am therefore requesting that you immediately provide the report required by law regarding the use of Federal resources to process tax returns and issue tax refunds contrary to the requirements of the Antideficiency Act. I also request that you describe the personnel actions that you intend to take regarding officers and employees responsible for those actions. Finally, I am requesting that you provide an explanation for why the department refused to make the required report to Congress.

Sincerely,



Ron Wyden
Ranking Member

⁷ 31 USC §1349

⁸ 31 USC §1350