(Slip Opinion)

Treasury's Cash Balance and the August 1, 2021 Debt Limit

The Bipartisan Budget Act of 2019 suspended the debt limit through July 31, 2021. Starting August 1, 2021, that Act will raise the debt limit by an amount equal to certain new debt issued since passage of the Act. New debt counts toward the forthcoming debt limit only if it "was necessary to fund a commitment incurred pursuant to law by the Federal Government that required payment before August 1, 2021." This provision does not prevent the Department of the Treasury from applying to the forthcoming debt limit the debt it plans to issue to provide a prudential buffer of funds raised for pre-August 1 expenses, even if some or all of that buffer remains unspent at the end of the debt-limit suspension.

July 8, 2021

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

For more than a century, the United States government has had some form of statutory limit on the size of the national debt—commonly known as the debt limit or debt ceiling. *See* 31 U.S.C. § 3101. On seven occasions since 2013, Congress has enacted legislation temporarily suspending that limit. Most recently, the Bipartisan Budget Act of 2019 suspended the debt limit through July 31, 2021. That Act will then raise the debt limit starting August 1 by an amount equal to certain new debt issued since passage of the Act in August 2019.

You have asked about section 301(c) of the Bipartisan Budget Act, which, like similar provisions of the six suspension laws before it, states that new debt counts toward the new limit only if it "was necessary to fund a commitment incurred pursuant to law by the Federal Government that required payment before August 1, 2021." In particular, you have asked about the relationship between section 301(c) and the normal cash-operating reserve of the Department of the Treasury ("Department" or "Treasury"), which Treasury maintains under a prudential practice that has been in place since 2015. *See* Letter for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Laurie S. Schaffer, Acting General Counsel, Department of the Treasury (May 11, 2021) ("Opinion Request"). Under this established practice, Treasury typically issues debt obligations so that it will have enough cash on hand to cover the anticipated outlays of the federal government over the next week, and also so that it will be able to respond to particular uncertainties.

Treasury holds such a buffer because its expenditures vary in unforeseen ways—from familiar uncertainties over tax revenues and refunds to unprecedented uncertainties over spending needs in a pandemic—and because it is concerned about emergency events that may temporarily interrupt the Department's ability to raise funds. Treasury must issue debt to raise such funds because authorized federal spending exceeds federal revenue, and because such revenue arrives unevenly throughout the year.

Historically, Treasury has read provisions like section 301(c) to permit the Department to count toward a post-suspension debt limit all debt issued to raise funds and meet anticipated expenses—including funds that remained unspent when the suspension ended. Treasury has regularly finished previous suspension periods with a buffer of unspent funds on hand. Nevertheless, immediately before the six previous deadlines on which a suspension period has ended, Treasury has reduced its cash holdings considerably, based on uncertainty about the scope of cash reserves it could hold under section 301(c)'s predecessor statutes. This year, however, Treasury believes that a similar reduction would carry significant and unprecedented risks due to the Department's substantially increased cash needs and financial uncertainties—needs and uncertainties that increased chiefly because of the COVID-19 pandemic and that remain elevated today. For this reason, you have requested our views on whether section 301(c) would prohibit the Department from counting toward the debt limit the debt issued pursuant to its established prudential cash-management practices. In particular, you have outlined a scenario, which you believe is lawful, by which Treasury would raise and hold an estimated $465 billion on August 1—a scenario that closely tracks Treasury's ordinary prudent practices. Under this approach, Treasury would begin the last week of July with its standard one-week cash balance, adjusted for uncertainty and risk. But it would issue no net new debt in the final week of July—that is, no net new debt that would be attributable to planning for expenditures after August 1.

We agree with you that section 301(c) does not prohibit this approach. We do not read section 301(c) to prevent Treasury from applying to the forthcoming debt limit the debt it plans to issue to provide a prudential buffer of funds raised for pre-August 1 expenses, even if some or all of that buffer remains unspent at the end of the debt-limit suspension. Section 301(c) affords Treasury reasonable flexibility in counting toward the new debt limit debt that it has issued pursuant to its traditional prudential practices. A prudential buffer is a reasonable response to the uncertainties in the government's expenses that the Department must cover through the end of the suspension period, and we see no basis for concluding that Congress forbade that practice. Accordingly, we agree with you that Treasury may permissibly count toward the August 1 limit debt issued to fund its cash reserves under the scenario you have described.

I.

Your question implicates both the statutory history of the debt limit and Treasury's long-established practice of maintaining a cash reserve. Because the details are important to the question you have presented, we recount the history of each in turn.[1]

A.

The Constitution grants Congress the power "[t]o borrow Money on the credit of the United States." U.S. Const. art. I, § 8, cl. 2. Before the twentieth century, Congress generally exercised its borrowing power by specifically designing, through legislation, each debt instrument that the government issued, and each debt instrument was tied to a specific spending project.[2] In the early twentieth century, however—under pressure to respond more swiftly to the wartime exigencies of the day—Congress began delegating more borrowing authority to Treasury, while maintaining broader statutory limits on the amount of public debt. In 1917, a few months after the United States entered World War I, the Second Liberty Bond Act, Pub. L. No. 65-43, 40 Stat. 288 (Sept. 24, 1917), consolidated unused borrowing capacity from prior acts and also aggregated the limits

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[1] We have relied on the representations and review of your office in describing the background that follows.

[2] The early history of American debt practice and the rise of the debt limit is retold in a number of academic and government sources on which we have relied. *See* Andrew Austin, Cong. Research Serv., RL31967, *The Debt Limit: History and Recent Increases* (Nov. 2, 2015) ("*Debt Limit*"); George J. Hall & Thomas J. Sargent, *Brief History of US Debt Limits Before 1939*, 115 Proceedings Nat'l Acad. Sci. 2942 (2018); George J. Hall & Thomas J. Sargent, *A History of U.S. Debt Limits*, NBER Working Paper No. 21799 (Dec. 2015); *see also* Marshall A. Robinson, *The National Debt Ceiling: An Experiment in Fiscal Policy* (1959).

of those acts. During World War II, the Public Debt Act of 1941, Pub. L. No. 77-7, 55 Stat. 7 (Feb. 19, 1941), created what has since become a staple of American public finance: a single statutory limit on total public debt. These shifts in debt management were accompanied by a broader statutory expansion of Treasury's authority and responsibility. Congress has now tasked the Secretary of the Treasury with making "plans for improving and managing receipts of the United States Government and managing the public debt." Pub. L. No. 97-258, § 321(a)(1), 96 Stat. 877, 880 (Sept. 13, 1982) (codified at 31 U.S.C. § 321(a)(1)). And it has given the Secretary the broad authority to "borrow on the credit of the United States Government amounts necessary for expenditures authorized by law." *Id*. § 3104(a), 96 Stat. at 939 (codified at 31 U.S.C. § 3104(a)).

Since 1941, Congress has repeatedly increased—and, though less frequently, decreased—the overall statutory debt limit. According to the Office of Management and Budget, Congress has enacted almost 100 separate measures altering the debt limit between World War II and today.[3] Such alterations can be controversial. Because Treasury must comply with the statutory debt limit, a failure to increase the debt limit can produce a failure to pay the government's expenses. When the debt limit is about to be reached, Treasury may resort to certain short-term "extraordinary measures," such as redeeming investments in the Civil Service Retirement and Disability Fund, in order to avoid exceeding the limit. *See* 5 U.S.C. § 8348(j). But such extraordinary funding measures typically do not last for more than a period of months. In 2013, a particularly contentious legislative disagreement involving the debt limit resulted in a lapse in appropriations and a sixteen-day shutdown of the federal government. *See* Government Accountability Office ("GAO"), GAO-15-476, *Debt Limit: Market Response to Recent Impasses Underscores Need to Consider Alternative Approaches* at 10 (July 2015) ("GAO Report").

Ever since the 2013 shutdown, Congress has departed from the approach of raising the debt limit by a specific dollar amount. Instead, Congress has elected to temporarily suspend the debt limit until a specific calendar date, thus creating a window during which Treasury may issue

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[3] *See* Office of Management and Budget, Historical Tables, Table 7.3—Statutory Limits on Federal Debt: 1940–Current, https://www.whitehouse.gov/omb/historical-tables/ (lasted visited July 8, 2021); *see also* Austin, *Debt Limit* at 8 & n.46.

new debt without being subject to the limit of 31 U.S.C. § 3101.[4] When the suspension deadline arrives, the debt limit springs back into effect, increased by an amount equal to certain "necessary" debt that Treasury issued during the suspension period. Starting in 2013, Congress has adopted this same basic structure—temporary suspension followed by automatic increase—seven times.[5]

The most recent of these suspend-and-increase provisions was section 301 of the Bipartisan Budget Reform Act of 2019, Pub. L. No. 116-37, 133 Stat. 1049, 1057–58 (Aug. 2, 2019). Section 301(a) suspended the debt limit from the date of the Act's enactment until July 31, 2021. Effective on August 1, 2021, sections 301(b)(1) and (b)(2) will then raise the debt limit by an amount equal to the "the face amount of obligations issued under [Treasury's statutory borrowing authority] and the face amount of obligations whose principal and interest are guaranteed by the United States Government . . . outstanding on August 1, 2021," less "the face amount of such obligations outstanding on the date of the enactment of this Act." Section 301(c) then imposed an additional limit on the debt that can be added to the new August 1 limit: "An obligation shall not be taken into account under [section 301](b)(1) unless the issuance of such obligation was necessary to fund a commitment incurred pursuant to law by the Federal Government that required payment before August 1,

[4] *See* GAO Report at 9 ("The suspension was a new approach for adjusting the debt limit.").

[5] *See* Pub. L. No. 116-37, § 301, 133 Stat. 1049, 1057 (Aug. 2, 2019) (suspending the debt limit until July 31, 2021, and raising the debt limit on August 1, 2021); Pub. L. No. 115-123, § 30301, 132 Stat. 64, 113 (Feb. 9, 2018) (suspending the debt limit until March 1, 2019, and raising the debt limit on March 2, 2019); Pub. L. No. 115-56, § 101, 131 Stat. 1129, 1139 (Sept. 8, 2017) (suspending the debt limit until December 8, 2017, and raising the debt limit on December 9, 2017); Pub. L. No. 114-74, § 902, 129 Stat. 584, 621 (Nov. 2, 2015) (suspending the debt limit until March 15, 2017, and raising the debt limit on March 16, 2017); Pub. L. No. 113-83, §§ 2–3, 128 Stat. 1011, 1011–12 (Feb. 15, 2014) (suspending the debt limit until March 15, 2015, and raising the debt limit on March 16, 2015); Pub. L. No. 113-46, § 1002, 127 Stat. 558, 566–67 (Oct. 17, 2013) (suspending the debt limit starting on the date of a presidential certification that the Secretary of the Treasury "would be unable to issue debt to meet existing commitments" and extending that suspension until February 7, 2014, raising the debt limit on February 8, 2014); Pub. L. No. 113-3, § 2, 127 Stat. 51, 51 (Feb. 4, 2013) (suspending the debt limit until May 18, 2013, and then raising the debt limit on May 19, 2013).

2021.” Previous suspend-and-increase provisions contained identical or similar provisions.[6]

B.

Treasury has a statutory responsibility to pay the obligations of the United States government in a manner that is “consistent with appropriations.” 31 U.S.C. § 321(a)(3). The Department occupies a uniquely important role in managing the public fisc. *See id.* § 3321(a) (“Except as provided in this section or another law, only officers and employees of the Department of the Treasury . . . may disburse public money available for expenditure by an executive agency.”).

Treasury meets its payment responsibilities by making payments out of a single account—the Treasury General Account—held at the Federal Reserve Bank of New York. The account is funded by a combination of debt issuance and tax payments, as well as other, smaller revenue sources. Because federal spending typically exceeds federal revenues—and because revenues are paid into the account at irregular intervals and in varying amounts throughout the year—Treasury auctions securities several times each week to raise funds. This regular, scheduled securities issuance is the standard means by which Treasury ensures it can cover the costs of the government, consistent with its core responsibilities. Thus, while no provision of law directly addresses the size of Treasury’s cash holdings, there is a straightforward connection between those holdings and laws that directly or indirectly limit Treasury’s ability to issue debt, including section 301(c). Treasury must obey the debt limit. It thus cannot raise adequate funds to pay the costs of government if the only way to do so is by issuing debt that would exceed that limit.

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[6] Identical language—“necessary to fund a commitment incurred pursuant to law by the Federal Government that required payment before” the suspension deadline—was included in the four suspension provisions that immediately preceded the 2019 Act. In 2013 and 2014, the language varied slightly: “necessary to fund a commitment incurred by the Federal Government that required payment before” the deadline. *See* Pub. L. No. 113-46, § 1002(c)(2)(B), 127 Stat. at 567; Pub. L. No. 113-3, § 2(b), 127 Stat. at 51. As discussed below, *see infra* Part I.B, four of the seven suspend-and-increase provisions also contained a separate prohibition on the creation of additional cash reserves above “normal operating balances.”

Treasury has not always had an explicit policy of managing the cash account prudentially—that is, holding cash to mitigate risk and uncertainty—nor has it always issued debt at such regular intervals to fund its balance. Several decades ago, Treasury in fact sought to minimize its cash holdings in light of the opportunity cost of holding a large balance that does not earn interest. *See* Office of Debt Management, Department of the Treasury, *Presentation of U.S. Treasury's Debt Issuance Framework* at 5 (Nov. 19, 2015), https://home.treasury.gov/system/files/276/Debt-Issuance-Modeling-Framework-version-7.pdf. It was not until the twenty-first century that Treasury—aware of new financial and operational risks—began more systematically to increase its cash holdings for prudential reasons.

In August of 2014, the Treasury Borrowing Advisory Committee, a federal advisory committee that meets quarterly and makes technical recommendations to the Department, suggested that Treasury explicitly revise its approach to cash-balance management in response to these recently evident risks. In May of 2015, Treasury announced that it had accepted the Borrowing Committee's advice and would adopt a new cash-management practice going forward. The statement announcing the change noted that "[e]vents that have occurred over the last 15 years, such as the terrorist attacks on September 11th and Superstorm Sandy, have caused disruptions to the broader financial system and Treasury's auction capabilities." Department of the Treasury, Press Release, Quarterly Refunding Statement (May 6, 2015), https://www.treasury.gov/press-center/press-releases/Pages/jl10045.aspx. "To help protect against a potential interruption in market access," the statement concluded, "Treasury will hold a level of cash generally sufficient to cover one week of outflows in the Treasury General Account, subject to a minimum balance of roughly $150 billion." *Id.*

Treasury does not simply hold only enough cash to cover the anticipated week of outflows, but also increases its holdings to provide an additional buffer when faced with particular uncertainties and risks. Although Treasury can predict many near-term financial needs with relative confidence, it often lacks certainty about overall inflows and outflows for several reasons. Many expenses and revenue streams depend on individual behavior—tax filings, Social Security claims—that can be estimated, but only imperfectly. In addition, large-scale exogenous events—such as a pandemic or economic crisis—may substantially increase risks and uncertainties and thereby warrant a precautionary increase in Treasury's funds. For example, a large increase in unemployment may both reduce tax revenues and require an urgent change in spending priorities.

Treasury also adjusts its cash balance and debt issuance smoothly over time—a practice that has been a mainstay of federal debt-management for decades. Such regular and predictable debt issuance lowers the cost of government borrowing;[7] by contrast, sudden, sizable swings in debt issuance would risk the sort of volatility in the Treasury securities market that the prudential cash practice is designed to forestall. You have advised us that such "smoothing" is an essential part of Treasury's cash-management practice, and that it would be impractical for Treasury to regularly make more dramatic week-to-week adjustments in holding and issuance.

Treasury's cash-management practices are known to the public. Treasury reports its cash balance—along with deposits, withdrawals, and debt transactions—each business day.[8] You have also informed us, and Treasury has informed the public, that the Department's cash-management goals have not changed since they were announced in 2015.[9] Congress, moreover, is aware of Treasury's cash-reserve practices. GAO, an agent of Congress, follows those practices and has in the past informed Congress of aspects of the relationship between the debt limit and Treasury's cash balance.[10] And four of the seven suspend-and-increase laws have contained an express reference to Treasury's cash reserve, in the form of a prohibition on increasing the cash reserve above "normal operating balances": "The Secretary of the Treasury shall not issue obligations during

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[7] *See* Kenneth D. Garbade, *The Emergence of "Regular and Predictable" as a Treasury Debt Management Strategy*, 13 Fed. Res. Bank N.Y. Econ. Pol'y Rev. 53 (2007).

[8] This is reported as part of the Daily Treasury Statement, https://fiscal.treasury.gov/reports-statements/dts/ (lasted visited July 8, 2021).

[9] *See* Opinion Request at 3; *see also* Department of the Treasury, Press Release, Quarterly Refunding Statement (Aug. 5, 2020), https://home.treasury.gov/news/press-releases/sm1081 ("This policy was implemented in 2015 and its objective has not changed.").

[10] *See, e.g.*, GAO Report at 8 n.8 ("Whether or not Treasury can draw down on its operating cash balance depends on both the level of Treasury's current cash balance and on what Treasury's payment obligations are. Treasury must maintain an adequate cash balance in its account at the Federal Reserve Bank of New York to accommodate large swings in daily deposits and withdrawals. Treasury cannot risk an overdraft because the Federal Reserve is not authorized to lend to Treasury.").

the [suspension period] for the purpose of increasing the cash balance above normal operating balances in anticipation of the expiration of such period."[11] Congress did not include this limitation in the Bipartisan Budget Act of 2019, however.[12]

A logical consequence of Treasury's cash-reserve practice is that the Department's cash holdings rise with federal spending and financial uncertainty—both of which have increased considerably over the past 16 months. Treasury's May 2020 Quarterly Refunding Statement noted that its "borrowing needs have increased substantially as a result of the federal government's response to the COVID-19 outbreak," and stated that Treasury "raised an unprecedented $1.464 trillion" since March. Department of the Treasury, Press Release, Quarterly Refunding Statement (May 6, 2020), https://home.treasury.gov/news/press-releases/sm1001. Treasury's cash reserve peaked at approximately $1.8 trillion in July 2020. Opinion Request at 2. Since that time, Treasury has reduced its cash reserves steadily and substantially; while they remain elevated by historical standards, you have reported that the difference between Treasury's anticipated one-week outflows and cash holdings is now returning to a more typical level.

You have advised us that at the end of the previous six debt-limit suspensions Treasury has spent down its cash balance "to or below the level that existed at the time the debt [limit] was suspended," *id.*, though it has still finished previous suspension periods with a buffer of unspent funds. You have further advised us that these prior spend-downs were not based on any formal understanding that a statute required this result, but rather on an "informal view" that a higher cash balance might be "construed to suggest that Treasury had issued . . . securities that were not necessary to fund commitments that required payment before the debt limit was reimposed." *Id*. While Treasury still attempted to mitigate risk and uncertainty even during these periods, your office has informed us that these spend-downs were regarded internally as departures from the Department's prudential practices, and have been the only deviations from those prac-

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[11] Pub. L. No. 115-123, § 30301(c)(2), 132 Stat. at 133; Pub. L. No. 115-56, § 101(c)(2), 131 Stat. at 1139; Pub. L. No. 114-74, § 902(b), 129 Stat. at 621; Pub. L. No. 113-83, § 3(b), 128 Stat. at 1011–12.

[12] We have located no legislative history on why this provision appeared in 2014 and then disappeared in 2019.

tices since the practices have been in place. You have also informed us that, in certain instances, Treasury has overshot the amount of pre-suspension cash holdings and, in those cases, counted the debt issued to fund the additional holdings toward the new debt limit.

Were Treasury to reduce its cash holdings in the same fashion this year, it would hold no more than $118 billion on August 1. You have advised us that a change of such magnitude would carry significant risks at this time. A sudden drawdown to this amount could result in substantial market disruption, and would leave the government highly vulnerable to an emergency and at great risk of default—even if the Department immediately resorted to "extraordinary measures." *Id.* As noted above, Treasury's weekly spending needs are substantially higher than they were in the summer of 2019. You have advised us, for example, that Treasury anticipates known one-week obligations of more than $500 billion as of August 1, including a single-day payment of more than $150 billion.

In light of the rapidly approaching deadline and these substantial practical exigencies—which could quickly result in Treasury being unable to meet its statutory obligation to make payments consistent with appropriations—you have requested our advice on what section 301(c) requires. You have also described how you believe Treasury may lawfully and prudentially proceed—including a scenario under which the Department would hold an estimated $465 billion as of August 1—and thus count the debt needed to raise those funds toward the new debt limit.[13] *Id.* Under this approach, which closely tracks Treasury's ordinary prudent practices, Treasury would begin the final week of July with its standard one-week minimum holdings, increased slightly to address short-term uncertainties and risks. But Treasury would issue no net new debt in the final week of July—that is, Treasury would issue securities only to the extent that previously issued securities are maturing.[14] The idea of this approach is to hold the ordinary prudential buffer for pre-August 1 expenses—Treasury would hold an ordinary level of cash as of the end of July 23—but to issue no net new debt based on post-August 1 expenses. Although the projected

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[13] You have advised us that this is an estimate (as of July 6, 2021), and may change very slightly as the deadline approaches.

[14] Because matured securities are subtracted from the government's total outstanding debt, Treasury may replace such securities without increasing "the face amount of obligations . . . outstanding on August 1." Pub. L. No. 116-37, § 301(b)(1), 133 Stat. at 1057.

$465 billion is below Treasury's estimated one-week needs as of August 1, you have informed us of the Department's view that it falls within the range of workable and prudential approaches that comply with Treasury's statutory obligations and that responsibly manage the government's financial demands.

II.

Section 301(c) requires that, when the new debt limit is calculated on August 1, "[a]n obligation shall not be taken into account . . . unless the issuance of such obligation was necessary to fund a commitment incurred pursuant to law by the Federal Government that required payment before August 1, 2021." The central question here is what it means for a debt obligation to be "necessary to fund a commitment incurred pursuant to law by the Federal Government that required payment before August 1, 2021." As noted above, because Treasury relies on debt to fund the government—and cannot exceed the debt limit—its available cash balance depends on the scope of this provision.

Your request focuses on three aspects of section 301(c), which we consider in turn: to be counted toward a higher debt limit on August 1, (1) an obligation must have been for a lawfully incurred "commitment"; (2) the obligation must have been "necessary to fund" that commitment; and (3) the commitment must have "required payment before August 1, 2021." We conclude that section 301(c) gives Treasury reasonable flexibility in counting toward the new debt limit debt that it has issued pursuant to its usual prudent practices, and we agree with you that the Department may permissibly count toward the August 1 limit the debt it will have issued to fund its cash reserves under the expected late-July scenario you have described.[15]

A.

An initial question concerns whether Treasury will have incurred its pre-August 1 debt in order to "fund a *commitment* incurred pursuant to

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[15] Because we conclude that this scenario is lawful, we do not address your alternative theories or scenarios by which Treasury may retain a workable and prudential cash balance on August 1.

law by the Federal Government" (emphasis added). We conclude that that it will have done so. The term "commitment" is broad enough to encompass the numerous spending responsibilities, certain and uncertain, that Treasury is and will be obliged to meet.

In appropriations contexts, GAO has noted that "commitment" is a "somewhat cryptic term." GAO, 1 *Principles of Federal Appropriations Law* at 5-40 n.26 (3d ed. 2004) ("*Red Book 3d*"). GAO's glossary defines a "commitment" in rather general terms that emphasize a contrast with the concept of an obligation: a commitment is "[a]n administrative reservation of allotted funds, or of other funds, in *anticipation of* their obligation." GAO, *A Glossary of Terms Used in the Federal Budget Process* 32 (Sept. 2005) ("*GAO Glossary*") (emphasis added). An obligation, in turn, is "[a] *definite* commitment that creates a legal liability of the government for the payment of goods and services ordered or received." *Id.* at 70 (emphasis added); *see also* 2 *Red Book 3d* at 7-3 ("[I]n very general and simplified terms, an 'obligation' is some action that creates a legal liability or definite commitment on the part of the government.").

Treasury's cash reserve practice fits well with how GAO understands the term "commitment."[16] When Treasury raises funds for its cash reserve—even though it does not have perfect information about future obligations and expenditures—it is adding to a "reservation of . . . funds . . . in anticipation of their obligation." *GAO Glossary* at 32. Treasury's practice of holding a cash reserve is anticipatory: the Department knows to a certainty that it will have substantial expenditures each and every week, but the range is uncertain. Nothing about the term "commitment," moreover, requires a one-to-one relationship between funds that are raised and those that are ultimately spent; Treasury may fairly anticipate uncertainty and commit a prudential buffer of funds to meet the government's

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[16] We note that the interpretations of GAO are not binding on the Executive Branch; GAO is an agent of Congress. *See Comptroller General's Authority to Relieve Disbursing and Certifying Officials from Liability*, 15 Op. O.L.C. 80, 82–83 (1991); *Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986). We do, however, consider GAO opinions "useful sources on appropriations matters." *Authority of the Environmental Protection Agency to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property*, 32 Op. O.L.C. 79, 85 n.5 (2008). Courts have likewise found the expertise of GAO useful on appropriations matters. *See U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1349 (D.C. Cir. 2012) (Kavanaugh, J.).

future obligations. We thus agree with your view that issuing debt pursuant to Treasury's prudential cash practices is a funding of "commitments."[17]

B.

As you note, section 301(c) does not vest Treasury with unlimited discretion to count debt toward the August 1 debt limit. Counted debt obligations must be "*necessary* to fund a commitment . . . that required payment before August 1, 2021" (emphasis added). As your request suggests, there is a sense in which Treasury's current cash-balance practice cannot be regarded as a *sine qua non* of American public finance; before 2015, after all, the federal government endured for more than two centuries without it. Moreover, when Treasury looks back from the end of a given week, it generally will not have expended all of the funds it raised for that week. Indeed, Treasury explicitly intends to retain an unspent buffer.

We agree with you that the term "necessary" does not impose so rigid a constraint on Treasury's cash practice as to disallow counting debt issued to raise a prudential buffer of funds in order to make good on the federal government's obligations. We conclude that the term "necessary," consistent with how all three branches have read the word in analogous contexts, gives the Department a degree of flexibility in selecting the means best suited to the ends that Congress has established. Treasury's prudential cash-management practice—adopted on the basis of external policy advice, crafted to respond to new risks, and implemented since 2015—is a legitimate means by which Treasury plans for its compliance with future expenditures, and may be fairly regarded as "necessary" to pay for those expenses.

The task of interpreting the term "necessary" is as old as the republic. In 1791, Alexander Hamilton put before the First Congress a plan for the creation of the First Bank of the United States, arguing, *inter alia*, that it was a "necessary and proper" exercise of Congress's Article I authority.

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[17] You have not raised the question whether the relevant commitments are "incurred pursuant to law," and we do not think there is much doubt on that score. Here, Treasury must satisfy its general statutory obligation to pay the bills "consistent with appropriations," *see* 31 U.S.C. § 321(a)(3), as well as its innumerable specific statutory spending obligations.

President Washington, eventually persuaded that the plan was constitutional, signed it into law.[18] A generation later, in the landmark case of *McCulloch v. Maryland*, the Supreme Court considered whether Congress had the power to charter the Second Bank of the United States. In a famous opinion by Chief Justice Marshall, the Court rejected an interpretation by which the word "necessary" in the Necessary and Proper Clause allowed Congress to authorize only those means that were "absolutely indispensable" to the exercise of Congress's enumerated powers and to the exercise of the powers vested in the U.S. Government more broadly. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 325 (1819). Instead, Chief Justice Marshall concluded that "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id*. at 421. This remains the contemporary Court's approach to the word "necessary" in the context of the Necessary and Proper Clause. *See United States v. Comstock*, 560 U.S. 126, 134 (2010).

A similarly pragmatic reading of the term "necessary" has been a staple of the Supreme Court's jurisprudence even when it is not a Constitution that the Court is expounding. In interpreting the Internal Revenue Code, for example, the Court has consistently read the term "necessary" in the context of a "necessary expense" as "imposing only the minimal requirement that the expense be appropriate and helpful for the development of the [taxpayer's] business." *Comm'r v. Tellier*, 383 U.S. 687, 689 (1966) (citation omitted); *see also INDOPCO, Inc. v. Comm'r*, 503 U.S. 79, 85 (1992) (relying on the interpretation of "necessary" in *Tellier*). More generally, the Court has noted that the term can be read to denote what is "merely important or strongly desired." *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018) (Alito, J., for a unanimous Court).

The Court's reasoning concerning the Necessary and Proper Clause and in other contexts also squares with interpretations on the spending side of public finance—namely, how "necessary expenses" are treated in appropriations law. Under the long-standing necessary expense doctrine, an

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[18] For a description of the debates over the constitutionality of the First Bank, *see* Stanley Elkins & Eric McKitrick, *The Age of Federalism: The Early American Republic, 1788-1800* at 226–33 (1993); *see also* Act of Feb. 25, 1791, ch. 10, 1 Stat. 191 (Feb. 25, 1791).

agency is permitted to spend from a general appropriation "'[i]f the agency believes that the expenditure bears a logical relationship to the objectives of the general appropriation, and will make a direct contribution to the agency's mission.'" *Authority of the Department of Health and Human Services to Pay for Private Counsel to Represent an Employee Before Congressional Committees*, 41 Op. O.L.C. __, at *6 (Jan. 18, 2017) (quoting *Indemnification of Department of Justice Employees*, 10 Op. O.L.C. 6, 8 (1986)); *see generally* GAO, *Principles of Federal Appropriations Law* at 3-14 to 3-25 (4th ed. 2017). The necessary expense doctrine is in large part an implementation of the Purpose Act, 31 U.S.C. § 1301(a), which does not itself contain the word "necessary."[19] But the doctrine also represents GAO's established interpretation of a commonly recurring term—"necessary expenses"—used throughout appropriations laws. *See, e.g.*, *Refreshments at Awards Ceremony*, 65 Comp. Gen. 738, 740 (1986) (construing the phrase "necessary expenses" and noting that "[w]e have dealt with the concept of 'necessary expenses' in a vast number of decisions over the decades"). Our Office, relying on and summarizing the long-standing position of GAO, has expressed a similar view: "[U]se of the term 'necessary' in appropriation acts requires that the funds appropriated in those acts be spent only for purposes reasonably related to the general governmental functions for which they were appropriated." Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Reimbursement of 1976 Democratic Presidential Campaign Committee* at 3 (July 21, 1978). In our view, the reasoning of the three branches in these analogous contexts—where agencies and other actors face an inevitable degree of choice in pursuing statutory ends—is highly instructive here.

This is not to suggest that it is always appropriate to read "necessary" in such a flexible way. Courts have observed that "necessary" is "a chameleon-like word whose meaning . . . may be influenced by its context." *Cellco P'ship v. FCC*, 357 F.3d 88, 96–97 (D.C. Cir. 2004); *see also AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 399 (1999) (Souter, J.,

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[19] The relevant provision states: "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a).

concurring in part and dissenting in part); *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 504 (D.C. Cir. 2003) ("The statutory term 'necessary' does not have a plain meaning under Step One of *Chevron*."). As *Black's Law Dictionary* has noted, the term "may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought." *Black's Law Dictionary* 928 (5th ed. 1979); *see also Ayestas*, 138 S. Ct. at 1093.

Here, however, there are at least two context-specific reasons that counsel in favor of the flexible interpretation of "necessary" that has commonly been applied in appropriations contexts. First, if section 301(c) allowed Treasury to raise only the minimum funds without which government expenditures would be logically impossible—because otherwise Treasury would violate the debt limit come August 1—then that section would risk obstructing the discharge of Treasury's statutory obligation to spend funds consistent with appropriations, even before the debt-limit suspension ends. *See* 31 U.S.C. § 321(a)(3). If "necessary" were read to require that the amount of debt incurred as of a particular date exactly match the commitments that Treasury is required to pay by that date, Treasury would not be able to respond to its ever-varying and uncertain spending needs—all of which ultimately flow from statutory commands. Were an emergency then to occur, Treasury could be left unable to pay the expenses that Congress has obliged it to pay and would risk default on its debts that are outstanding. "The canon against reading conflicts into statutes is a traditional tool of statutory construction," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018), and inclines us to think Congress did not intend to put Treasury at risk of such conflict.

Second, Congress is aware of Treasury's standard cash balance practice, and has a history of writing provisions that deal with it specifically. As noted above, *see supra* note 11 & accompanying text, four of the seven suspend-and-increase provisions since 2013 expressly prevented the Secretary of the Treasury from issuing debt during the suspension "for the purpose of increasing the cash balance above *normal operating balances* in anticipation of the expiration of such period" (emphasis added). We are reluctant to divine too much meaning from the disappearance of this provision in the 2019 Act; as noted above, we know of no legislative history to explain the absence, and various theories appear plausible.[20] But the existence of such a provision—across four separate public laws—indicates that Congress is aware of Treasury's normal cash operating balance and knows how to address the relationship between that balance and the impending debt limit directly when it wishes to do so. *Cf., e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so."). The fact that Congress did not address the cash balance in the 2019 Act may suggest a reluctance to countermand Treasury's public and prudential cash practices.

Guided by the interpretive approaches of all three branches and the specific statutory context at hand, we conclude that the term "necessary" in section 301(c) cannot be read to require needlelike exactness from the Department. Like all institutions and individuals, Treasury must live with uncertainty and risk. Creating a prudential buffer of funds is necessary to meet the range of uncertain-but-required expenses, even if it turns out that, after the fact, not all the prudential funds are spent when originally expected. Even if Treasury does not spend the entire buffer by August 1, that buffer will still have been "necessary"—properly understood, and in light of the formidable risks and uncertainties that Treasury faces—to make required payments. Treasury's practice of smoothing between week-to-week holdings is likewise justified by similar prudential concerns: a more volatile Treasury securities market—rocked by large and unanticipated swings in Treasury's debt issuance—would put at risk Treasury's ability to raise the funds necessary to meet the government's imminent obligations.

It is not feasible to scrutinize the wisdom or details of each individual cash-management decision or attach specific dollar boundaries to necessity. Instead, we think the term "necessary" gives Treasury reasonable flexibility in selecting means that are best suited to satisfy the spending

[20] For example, in removing the provision, Congress might have intended to give Treasury *more* discretion—or Congress might simply have viewed the provision as superfluous. We also note that the interpretation of section 301(c) we offer here would still comply with the absent restriction. This is because Treasury does not intend to raise funds "for the purpose of increasing the cash balance above normal operating balances." Treasury is simply trying to maintain its normal operating balance (which typically increases proportionally with Treasury's spending).

obligations that Congress has given it. Exercising this flexibility, Treasury has established its current prudential cash-management practice. Far from being anomalous, extravagant, or disproportionate, such a practice is standard operating procedure for planning in the face of uncertainty. Ordinary financial-planning wisdom generally suggests, for instance, that a private organization hold between three and six *months* of operating expenses. *See, e.g.*, John Zietlow et al., *Financial Management for Non-profit Organizations: Policies and Practices* at 282, 484 (2018). Although the federal government is of course not easily comparable to a private organization, Treasury's basic prudent practices—the decision to hold one week's worth of expenses, to avoid disruptive fluctuations, and to make reasonable upward adjustments in light of the many uncertainties associated with the financial obligations of the U.S. government—are a sensible means by which Treasury responds to uncertainty and plans ahead. Treasury may thus regard debt issued in accord with its reasonable and existing prudential cash-management practices as "necessary" to meet the government's expenses.

C.

We conclude by evaluating the last phrase of section 301(c): "necessary to fund a commitment . . . that *required payment before August 1, 2021*" (emphasis added). As your opinion request notes, this portion of the provision raises difficult issues, especially in the final days of July. But because you have described a lawful scenario that takes a restrained approach to debt issuance in those final days, we do not need to arrive at a decisive interpretation of this phrase.

You note, *see* Opinion Request at 6, and we agree, that Treasury's cash reserve is for spending obligations that will have "required" payment. As described above, Treasury is tasked by law with spending funds in a fashion that is "consistent with appropriations." 31 U.S.C. § 321(a)(3). In keeping with this requirement, Treasury does not use its cash balance as anything other than a commitment of funds to pay the expenses of the federal government that federal law requires to be paid. Looking back from the end of any given week, Treasury will have made many billions of dollars of incontestably required payments—federal wages, Social Security payments, tax credits, interest payments, and so forth—all of which flow from the same fungible commitment of funds for which Treasury plans for such expenditures.

The more difficult issue, however, is whether the cash reserve will be for commitments that "required payment *before August 1, 2021*." Treasury's usual process of planning for future expenditures raises a distinct question with respect to the final days of July, as the statutory deadline approaches. As described above, Treasury's prudent cash-management practice typically involves raising funds to cover the range of reasonably possible expenses over the next week. Accordingly, up until the end of July 24, 2021, Treasury's ordinary prudent cash balance will be "necessary" to ensure that Treasury can make expenditures that must be satisfied before August 1. As your request acknowledges, however, *see* Opinion Request at 6, implementing Treasury's standard cash-management practice in the final week of July would involve Treasury's raising some amount of funds based on government obligations that will come due after August 1.

As described above, however, *see supra* Part I.B, you have outlined a scenario whereby Treasury would hew closely to its ordinary prudent cash-management practices, but would not issue net new debt to raise funds for post-August 1 expenses in the last week of July. That is, during the last week of July, Treasury would issue no net new debt or engage in any other adjustments or smoothing that would raise Treasury's holdings with an eye to expenditures after August 1. Because you have indicated that this approach is workable and reasonably prudent, and because we agree with you that it is lawful, we need not decide whether Treasury could issue net new debt during the last days of July—in preparation for post-August 1 expenses—that could be applied to the post-August 1 debt limit.[21]

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[21] In particular, as you note, *see* Opinion Request at 9, whether such advance planning is permissible in late July may turn on the meaning of the term "payment"—a term that, like "commitment" and "necessary" before it, can vary with its statutory surroundings. The Supreme Court has observed that payment "is not a talismanic word"; instead, "[i]t may have many meanings depending on the sense and context in which it is used." *United States v. Consol. Edison Co. of New York*, 366 U.S. 380, 391 (1961). One meaning of the term "payment" is simply "[t]he action, or an act, of paying." 11 *Oxford English Dictionary* 379 (2d ed. 1989). Federal law contemplates "payments" from one agency or component of an agency to another. *See* 31 U.S.C. § 1535; *see also* 3 *Red Book 3d* at 12-33

III.

For the reasons described above, we conclude that the scenario you have outlined comports with the requirements of section 301(c) of the Bipartisan Budget Act of 2019. Therefore, under this scenario, Treasury may permissibly count toward the August 1 limit debt issued to fund its cash reserves.

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Acting Assistant Attorney General
Office of Legal Counsel

(discussing interagency payments in this context). Arguably, when Treasury begins to plan for the period that extends past August 1—implementing a long-standing cash practice that Treasury has concluded is necessary to cover its potential short-term obligations—Treasury requires the "payment" of funds into its General Account before August 1. The term "payment" does have other meanings, however—meanings that emphasize the satisfaction of a specific financial obligation. *See, e.g.*, *Black's Law Dictionary* 1363 (11th ed. 2019) ("Performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation."); 11 *Oxford English Dictionary* at 379 ("[T]he giving of money, etc. in return for something or in discharge of a debt."). This second account of the term payment is more difficult to square with the notion that "payment" occurs when funds enter Treasury's General Account. Instead, it fits more comfortably with the notion that payments by Treasury to a third party, in satisfaction of a specific and known obligation that has come due, are the types of "required payment" that section 301(c) contemplates. Because you have described a scenario in which Treasury does not look past July 31 in planning for future expenditures—and thus issues net new debt only to fund commitments that required payment before August 1 under either definition—we need not definitively resolve the meaning of the term "payment" at this time.