

**NOMINATION OF THE HONORABLE
DEREK T. KAN, OF CALIFORNIA, TO BE
DEPUTY DIRECTOR OF THE OFFICE
OF MANAGEMENT AND BUDGET**

**HEARING & EXECUTIVE
BUSINESS MEETING**

BEFORE THE

**COMMITTEE ON THE BUDGET
UNITED STATES SENATE**

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

**June 24, 2020—HEARING ON THE NOMINATION OF THE HONORABLE
DEREK T. KAN, OF CALIFORNIA, TO BE DEPUTY DIRECTOR OF
THE OFFICE OF MANAGEMENT AND BUDGET**

**July 21, 2020—EXECUTIVE BUSINESS MEETING TO CONSIDER THE
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**THE NOMINATION OF DEREK T. KAN, OF
CALIFORNIA, TO BE DEPUTY DIRECTOR
OF THE OFFICE OF MANAGEMENT AND
BUDGET**

WEDNESDAY, JUNE 24, 2020

U.S. SENATE,
COMMITTEE ON THE BUDGET,
Washington, DC.

The Committee met, pursuant to notice, at 2:33 p.m., in Room SR-301, Russell Senate Office Building, Honorable Michael B. Enzi, Chairman of the Committee presiding.

Present: Senators Enzi, Grassley, Crapo, Toomey, Braun, Scott, Sanders, Whitehouse, and Van Hollen.

Staff Present: Doug Dziak, Republican Staff Director; and Warren Gunnels, Minority Staff Director

OPENING STATEMENT OF CHAIRMAN MICHAEL B. ENZI

Chairman ENZI. Good afternoon and welcome. I will call this hearing to order. I will make a few brief opening remarks then turn it over to Ranking Member Sanders to do the same.

We are here today to consider the nomination of Derek Kan to serve as the Deputy Director of the Office of Management and Budget. I hope we can agree a fully functioning team at OMB during these challenging times is better for our country.

We recently heard from Acting Director Vought on the important things OMB is doing as our nation continues to confront an unprecedented crisis, both health and economic, from the COVID virus. The role OMB is playing in responding to this crisis makes its work more important than ever. As a result of the government's response and closing America, today the Federal Government faces more than \$26 trillion in debt. I am hopeful that OMB, with a leadership team in place, will continue to help address these combined challenges of addressing COVID and the national debt.

During Acting Director Vought's confirmation hearing, we heard about the administration's response to the pandemic crisis along with other ways to make the nation more fiscally responsible. Mr. Kan, if confirmed, would serve a key role as OMB's Deputy Director as the agency continues its important oversight work in implementing the financial oversight over the recent legislation approved by Congress.

Today I look forward to hearing from Mr. Kan. Particularly, I am eager to know how his past positions working in public policy and the private sector will translate to enacting, implementing, and

overseeing COVID programs, providing general government oversight as well as ideas on how we get to the other side of this pandemic, and can start to address this fast-growing national debt.

Mr. Kan is not new to our nation's capital or even OMB, where he has served as the Executive Associate Director of the White House's Budget Office since last July. Prior to this, he served in the Department of Transportation in a Senate-confirmed position, as Under Secretary of Policy for Secretary Elaine Chao. Some on this Committee may have also worked with Mr. Kan during his years as a Senate staffer.

I believe his government and private sector work history provides Mr. Kan with the necessary experience to improve OMB, and I appreciate his willingness to serve his country at this time. I enjoyed talking with Mr. Kan prior to the hearing and I hope that many of my colleagues have had the chance to do the same.

And particularly, I am interested in learning Mr. Kan's views on the need for budget process reform as well as government-wide inventory of Federal programs that OMB is working on. Knowing exactly where the taxpayer's money is going is an important part of a working budget process. This inventory will help lawmakers make better informed spending decisions. This inventory can also help the government eliminate duplication and ensure programs are working as intended for the people who may need them.

Thank you again for joining us today, Mr. Kan. We look forward to hearing from you, and it is good to see your family here.

Ranking Member Sanders.

OPENING STATEMENT OF SENATOR BERNARD SANDERS

Senator SANDERS. Thank you very much, Mr. Chairman.

Let me thank Mr. Kan for being with us, and thank you for holding this hearing.

Mr. Chairman, today my views are a little bit—just a little bit different than yours, and I look at the world a little bit differently. And from my perspective, at this particular moment in American history, in fact in world history, we are experiencing an extraordinary series of crises unprecedented in the modern history of our country. In fact, we are in the midst of the worst public health crisis since the Spanish flu of 1918, and the worst economic crisis since the Great Depression of the 1930s. That is where we are.

As I am sure you know, sadly, over the last four months, more Americans have died from the coronavirus than were killed during World War I. Forty-six million Americans have filed for unemployment. In my state, a small state, over 70,000 people have applied for unemployment, which is just an incredibly large number. Over 16 million Americans have lost their health insurance as they have lost their jobs, because we are the only major country on Earth not to guarantee health care to all people as a right rather than as a job benefit.

And unbelievably, in this particular moment in American history, tens of millions of people across the country are in danger of going hungry and being evicted from their homes and literally thrown out into the streets. Further, as you are more than aware, over the last several weeks hundreds of thousands of Americans from all across this country have taken to the streets in opposition

to systemic racism and police brutality and police murder, and people want justice in this country.

Now given all of these unprecedented crises, we need personnel at the Office of Management and Budget, and, in fact, in every part of our government, who have the fortitude to stand up to a President who is far removed from reality in terms of his actions and his rhetoric.

At a time of massive wealth and income inequality, we need personnel at the OMB who will demand that in this country we have the wealthiest people in this country and the largest corporations start paying their fair share of taxes. Unbelievably, Mr. Chairman, as you may know, during this pandemic—during this pandemic, while the wealth of the average American household has plummeted, people on top have seen a huge increase in their wealth. At a time when millions have lost their health insurance, we need leadership in this government who understands that we have got to join every other major country on Earth and guarantee health care to all of our people as a right.

At a time when over 30 million Americans have lost their jobs and are suffering economic deprivation, we need governmental policy which protects workers, which protects low-income people. And to my mind that means making sure that we do what Europe does, guarantee workers a continuation of their paychecks, make sure that every adult in this country gets \$2,000 a month during this crisis, so that people are not pushed into absolute desperation.

We need personnel at the OMB who will work with Congress to provide the Postal Service with the emergency funding that it needs to avoid running out of money and laying off over 60,000 workers. And I simply have to say, with no personal animosity to Mr. Kan at all—I am not quite sure that I have ever met him—I would simply say that after reviewing your record at Eli Lilly, KPMG, McKinsey, and as a member of President Trump's Coronavirus Task Force, I do not believe that you are the kind of person we need in this position at this time, and therefore I will be opposing your nomination.

Mr. Chairman, I thank you very much for the opportunity and I yield back the balance of my time.

Chairman ENZI. Thank you, Senator SANDERS. Mr. Kan, we look forward to hearing from you today. Under the rules of the Committee, nominees are required to testify under oath, so would you please rise with me so I could administer the oath.

Do you swear that the testimony that you will give to the Senate Budget Committee will be the truth, the whole truth, and nothing but the truth?

Mr. KAN. Yes, I do.

Chairman ENZI. If asked to do so, and if given reasonable notice, will you agree to appear before this Committee in the future and answer any questions that members of the Committee might have?

Mr. KAN. Yes, I do.

Chairman ENZI. Thank you. Please be seated. And we will now have an opportunity to hear from Mr. Kan.

TESTIMONY OF THE HONORABLE DEREK T. KAN, OF CALIFORNIA, TO BE DEPUTY DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET

Mr. KAN. In the interest of time I will keep my statement brief by reading the first few and last few paragraphs of my prepared remarks.

Chairman Enzi, Ranking Member Sanders, and distinguished members of the Committee, I am honored by the opportunity to come before you as President Trump's nominee for the Deputy Director of the Office of Management and Budget. I am also thankful for Acting Director Vought's support of my nomination.

I am grateful to have my wife, Connie, here with me today, as well as my daughter, Avery, who turned six just a few days ago. Our two other boys are at home, watching TV, maybe this streaming video too. They all have made significant sacrifices in uprooting their lives to move out to D.C. three years ago so that I may serve this country and this Administration.

I am also thankful for my parents, Scott and Julie, who have worked so hard to give me plentiful opportunities throughout my life. They immigrated here from Taiwan over 40 years ago, to pursue the American dream. My mother, who never graduated from college, taught me the value of hard work and persistence, and my father, an engineer, taught me the value of rigorous analysis and that it is okay to be silly. Together, they taught me to have a deep respect for authority, a love for this incredible country that afforded us tremendous opportunities, and an unwavering faith in God. I hope to make them proud.

It is with a deep sense of humility and gratitude that I come before you today for this nomination. Having been a civil servant at the Office of Management and Budget, a Senate staffer working closely with the Senate Budget Committee and with OMB, and as a policy official at Department of Transportation (DOT) who worked closely to implement the guidance of OMB, I would be grateful for this opportunity to serve our nation as the Deputy Director of OMB, in an effort to improve the management of our agencies and the finances of our nation.

Each of you have my commitment that if I am confirmed I will work collaboratively with each and every one of you to address our nation's spending and improve our nation's finances.

Thank you for the opportunity to come before you, and I would be pleased to answer any questions you may have.

[The prepared statement of Mr. Kan follows:]

PREPARED STATEMENT OF DEREK T. KAN

Chairman Enzi, Ranking Member Sanders, and distinguished members of the committee, I am honored by the opportunity to come before you as President Trump's nominee for the Deputy Director of the Office of Management and Budget. I am also thankful for Acting Director Vought's support of my nomination.

I am grateful to have my wife here with me today. Our three kids are probably watching at home. They have made significant sacrifices in uprooting their lives to move out to DC three years ago so that I may serve in this Administration.

I am also thankful for my parents, Scott and Julie, who have worked so hard to give me plentiful opportunities throughout my life. They immigrated here from Taiwan over forty years ago to pursue the American dream. My mother, who never graduated from college, taught me the value of hard work and persistence. My father, an engineer, taught me the value of rigorous analysis and that it's okay to be silly. Together, they taught me to have a deep respect for authority, a love for this country, and unwavering faith. I hope to make them proud.

I began my career at the Office of Management and Budget as a civil servant in the Presidential Management Fellowship program working on Veterans Affairs Programs. OMB is comprised of the most talented civil servants in the Federal government. After starting my career at OMB, I moved over to the Senate and sitting here reminded me of the many budget and score keeping issues I have worked on with many of you and your staff. During my time in the Senate, I made recommendations on budget and appropriations legislation and worked with many of you to navigate budget issues across the Senate floor including budget resolutions, reconciliation bills, late night vote-a-ramas, and complex procedural issues and points of order. It was a privilege to work with many of the members and staff in this special chamber. So, it is with a deep sense of humility and gratitude that I come before you today for this nomination.

Since leaving the Senate, I worked in the private sector to learn how to manage and improve organizations, grow businesses, and help others. A few years ago, I came back to serve as Under Secretary for Policy at the Department of Transportation. I am grateful to the many members of this committee that supported my nomination. And I believe I faithfully served the nation in that capacity by improving safety, rebuilding our nation's infrastructure, and introducing the latest technology into the work of DOT.

The past six months have been a particularly trying time for the nation. We are dealing with a crisis that we have not seen in over a century. The decisions we are making now will have enormous ramifications for future generations, particularly as it pertains to the Federal budget. Thus, I am grateful for the way we all have worked together, and I hope we can eventually work together to put our nation's finances on a path of prudence.

Having been a civil servant at OMB, a Senate staffer working with OMB, and as a policy official who worked to implement the guidance of OMB, I would be grateful for this opportunity to serve as the Deputy to improve the management of our agencies and the finances of our

nation. You have my commitment that, if I am confirmed, I will work collaboratively with each and every one of you to address our spending and improve our finances.

Thank you for the opportunity to come before you and I would be pleased to answer any questions you may have.

Chairman ENZI. Thank you. Now we will begin questions but given our new COVID protocols I wanted to explain the process for all the Committee members before we start.

The hearing room has been configured to maintain the recommended six-foot physical distance between Senators, the nominee, and other individuals in the room necessary to operate the hearing. A number of Senators are joining us by video teleconferencing. For those joining by video conference, once you start speaking there will be a slight delay before you are displayed on the screen.

To minimize background noise, we are asking Senators who are using the video conference option to please click the mute button until it is their turn to ask questions. But when it is your time to speak, please remember to unmute yourself. If there is a technology issue we will move to the next Senator until it is resolved and come back to you.

I would remind all Senators and the nominee that the five-minute clock still applies. For Senators using the video option you will notice a screen labeled "timer" that will show how much time is remaining. At about 30 seconds remaining I will gently tap the gavel to remind Senators their time has almost expired.

To simplify the speaking order process, Senator Sanders and I have agreed to go by seniority, alternating between sides for this hybrid hearing.

With that I will start the questions.

An effective way of helping us to improve program conformance would be to have an inventory of all Federal programs. OMB should be a partner for us in this area with its work related to the Digital Accountability and Transparency (DATA) Act, USAspending.gov, and other transparency initiatives. I have strongly advocated for a program inventory and support Senator Lankford's Taxpayer's Right to Know Act.

What are OMB's goals for implementing a program inventory and improving Federal financial and performance data that way?

Mr. KAN. Thank you, Chairman Enzi. I am aware of your long experience in this area and we completely support this major priority of yours. If you look across government we have something like 120 economic development programs, and yet we are not sure if that is 140 or 110. In fact, if we ask how many programs there are, it is very difficult to track.

And so we are committed to working with you on this. Our staffs are in touch and we look forward to standing up a pilot program to really help build this out and scale it, to take a step beyond what USAspending.gov currently provides.

Chairman ENZI. Thank you. My staff and I will have some ideas on that too, that puts some of the burden on the departments themselves.

Changing the subject, the Chief Financial Officers (CFO) Act of 1990 created the OMB Office of Federal Financial Management to provide leadership and establish government-wide financial management policies for executive agencies. How will you work with the Office of Federal Financial Management and the larger CFO community to better integrate financial and performance data so that we can make informed decisions?

Mr. KAN. Thank you, Chairman Enzi. We are very familiar with the CFO Vision Act and we support a lot of the goals of the bill. I think there needs to be a clear discussion of what is the vision of CFOs in government. As folks around the table here know, CFOs serve a lot of functions in the private sector. Some are bookkeeping and budget accountings. Others do integral controls. Others do procurement. So as we think about the role of the CFO, it is a very important topic that we look forward to working with you on.

Chairman ENZI. Thank you. OMB has offered agencies flexibility in meeting audit and financial reporting deadlines so they can prioritize the COVID-19 work. What mechanisms are in place to ensure agencies will put out this information in a timely manner?

Mr. KAN. Sure. Within a few weeks of passing Phase 3 and Phase 3.5, OMB issued guidance around financial reporting in a guidance document called M-20-21. This document helped identify all—laid out best practices for tracking. Transparency is an important objective of the administration, and keeping clear track of all our finances and how we have been spending is something that Congress put into law. We share that objective and we are rapidly making sure that all agencies are in compliance with the law and with this guidance.

Chairman ENZI. Thank you. Earlier this month the Congressional Budget Office reported that the Federal deficit was already \$1.9 trillion for the first eight months of fiscal year 2020. One of my top priorities as Chairman of the Budget Committee has been to reform our broken budget process. How can this Committee work with OMB to improve our broken budget process?

Mr. KAN. Thank you, Chairman Enzi, and thank you for your leadership in the drafting and creating of the Bipartisan Congressional Budget Reform Act. I think this was the first reform bill we have seen in about 20 or 30 years that was passed by this Committee on a bipartisan basis.

If you look at budget reform history, a lot of these ideas evolve and turn into something that actually impacts baselines and spending in the out years. In 2005 and 2006, Judd Gregg and Kent Conrad in this Committee came up with a budget reform act, and it was Judd Gregg's bill, which ultimately became Murray-Ryan.

And so as we consider—and we will partner with you on the Bipartisan Congressional Budget Reform Act—a lot of the seeds that are developed here likely will turn into something that will help enforce discipline and set us on a better path in the future.

Chairman ENZI. Thank you. Instead of rapping my gavel softly I will yield the balance of my time and turn it over to Senator Sanders.

Senator SANDERS. Thank you very much, Mr. Chairman. Mr. Kan, at his rally in Tulsa on Saturday, President Trump said that he told his people to slow the testing down, with respect to the coronavirus. When asked by reporters if he was joking, the President said, quote, "I don't kid," end quote. As a member of the Coronavirus Task Force, would you recommend that the U.S. conduct fewer coronavirus tests?

Mr. KAN. Senator Sanders, thank you for the question and also thank you for your candor in your opening remarks.

Regarding testing, I will let the President speak for himself regarding his remarks. However, regarding testing broadly, in January we had no tests at all in this country. Today we have performed 26 million tests.

Senator SANDERS. I am just asking you your opinion, as a member of the Coronavirus Task Force. The President can speak for himself. I am just asking, do you agree with him? You are a member of the task force.

Mr. KAN. I think testing is important. I think testing has provided a lot of insight across the country regarding where hotspots are. Centers for Disease Control and Prevention (CDC) continually scales up testing across the country, and I think governors, public health leaders all find tremendous value in testing.

Senator SANDERS. Let me ask you another question, if I might. Senator Enzi, quite correctly, when he began the hearing, pointed out that he is doing social distancing. He is trying to protect the health of the members of the Committee and he is doing exactly the right thing. And yet at that same rally in Tulsa, the President did not have social distancing. People were packed right next to each other. People were not required to wear masks.

As a member of the Coronavirus Task Force, what would you say about the examples that the President is setting to the rest of the country when he ignores CDC guidelines?

Mr. KAN. Thank you, Senator Sanders. I think all of these types of questions around social distancing, around public hygiene, personal hygiene, we always look to the public health experts, at the CDC. On the task force, we look to the leadership of Dr. Birx, Dr. Fauci, and Dr. Redfield to help inform what are the best practices around social distancing and how to operate in large crowds.

So I would refer you to them, who are the—

Senator SANDERS. No, I know what they say. All I am giving—what they say is that you should do exactly what Senator Enzi is doing, that we should have social distancing, that people should wear masks. Yet the leader of our country rejected those guidelines. Is that a good example, in your view, as a member of the task force? Is that a good example for the rest of the country?

Mr. KAN. Senator Sanders, again I would refer you to the public health experts who have talked about this, who I think had a number of questions—

Senator SANDERS. I know it. I am quite aware of it, and it is an example Senator Enzi is following their guidelines. But the leader of our country did not. Do you think that that is setting a bad example for the people of our country?

Mr. KAN. At the risk of being redundant, Senator, I would suggest that this question is for the public health experts, and they speak—

Senator SANDERS. Well, you are a member of the task force and I am assuming that you are kind of a—you would not have that position if you did not know something about the issue, and I think you do know something about the issue. My guess is you are probably embarrassed about what the President of this country is doing.

Mr. KAN. That is not the case, Senator. It is just we all have roles on the task force. My role is not to provide any direction or

guidance on public health. We have demonstrated experts who have spent their careers in this who talk about what the Centers for Disease Control and Prevention should do. They help prepare the guidance and develop those. Those are the medical experts and from day one we look at the medical experts for——

Senator SANDERS. I apologize for putting you in a difficult position, but I think—my guess is that in your heart of hearts you probably understand how absurd the actions of the President, and dangerous the actions of the President are.

Just one last question. We are now looking, as I am sure you are aware, at massive levels of income and wealth inequality, and during the last several months that gap between the very, very rich and everybody else has grown wider. And yet it is my understanding now that the Trump administration believes we should pass another cut in capital gains taxes that would disproportionately benefit the top 1 percent. Does that make sense to you, Mr. Kan?

Mr. KAN. Senator, I would respectfully disagree with some of the premise of your question, and I am happy to follow up with you after. A lot of our, I think, Phase 4 discussions are still in the policy process and I do not want to get ahead of the team.

Senator SANDERS. Okay. Good. Thank you very much.

Mr. Kan.

Mr. KAN. Thank you, Senator.

Chairman ENZI. Senator Braun.

Senator BRAUN. Thank you, Mr. Chairman. So far the conversation seems to be off the subject of budget, in that since I have been here a year and a half we are now ingrained in trillion-dollar deficits, not considering what happened with coronavirus.

I am interested in somehow, for the sake of people that like government and those of us that even think it has gotten too large over time, what do we do to rein in a structural deficit? And we do know that so much of that has to do with entitlements. I am interested to see what the serious approach is going to be once we get the effect of coronavirus in the rearview mirror, to getting back to what is a structural problem that no one here in government should be proud of.

And I think it is an embarrassment to the people we represent that we cannot keep our house in order for the sake of a government that many people think should even do more of it. It seems like it ought to be, you know, closer to where we have our financial house in order, and it points back to entitlements.

What is your opinion there of reforming them?

Mr. KAN. I completely agree with your observations, Senator Braun. If you look at the budget today, we spend something like \$400 billion on interest. And if you look at, over the last 30 years, when we have had major budget process reforms, the last 40 years if you go back to the Greenspan Commission, it started with a clear focus of what the problem is. And I think you hit the nail on the head, that 60 or 70 percent of our budget is on autopilot.

And I think highlighting and focusing on the specific metric we need to solve is the first step. One metric that folks seem to be talking about these days is debt as a percentage of Gross Domestic Product (GDP), that as we begin to focus on that, potentially a fis-

cal rule that revolves around debt-to-GDP ratio could help crystallize where we need to focus and how we can get our finances back in order.

Senator BRAUN. What do you think of the idea of, probably the biggest driver within entitlements would be the rising cost of health care? And Medicare would be somewhere, if we could reform a broken health care system, whether you think there should be one payer for it or not. I think the President has tried, more than anyone, to make those basic reforms of transparency, competition, no barriers to entry, getting the consumer engaged in his or her own well-being.

Wouldn't that benefit probably the hardest item to solve that structurally drives these deficits, and will the administration be interested in, you know, putting out and keep driving on the idea of reforming health care to lower that part of the budget costs?

Mr. KAN. Absolutely, Senator. If you look at the trajectory of the budget, so much of it is driven by mandatory spending that has gone up. The President has committed that he will protect social security and Medicare.

And as you look at the budget, we have laid out a number of reforms. One of the reforms which I think, Senator, you are very familiar with, is around this concept of site neutrality, that individuals should not have to pay for the same service, whether it is in an outpatient clinic or in a hospital. And so we are working to try to reform some of the payment practices to create downward pressure on government spending. We spend \$4.7 trillion on everything under the sun, and I think, Senator, we completely applaud your observation and stand ready to work with you on bringing down spending.

Senator BRAUN. And to be fair to the other side, because it has come up in a back-and-forth shortly after I was here, and I remember Senator Warner mentioned, that we spend less than other developed countries. I brought up the point that whatever the tax rate has been over the years, we average, through the revenue that we create, about 17.5 percent of our GDP.

And I think you do need to ask the question, is there room to raise revenue, or is that statistic so compelling that generally along with lower tax rates we have higher economic growth, with higher tax rates it is lower economic growth, but through any tax rate it averages about 17.5 percent. Is there any way to go beyond that—and I am getting close here, so do you want me to come back to follow up later, because I am getting close to time expiring.

Chairman ENZI. If you are finished with the question we will let him answer.

Senator BRAUN. Okay. My question is, is there room to raise revenue in a way that would not hamper economic growth?

Mr. KAN. If you look at where revenue levels are, they are close to where historical norms are. On the spending side, spending as a percentage of GDP this year will likely be around 30 percent. Historically it has been around 20 percent. And so if one line has been 17 and we are at 16.5—16.3 percent—the other line historically has been 20 percent, and what, 30 percent. I think historical data, and most of the economists will point out that one side of the ledger probably needs a little more work than the other.

Senator BRAUN. Thank you.

Chairman ENZI. Thank you. Senator Whitehouse.

Senator WHITEHOUSE. Thank you. Mr. Kan, we have had a previous conversation that I would like to raise with you here because it involves a particular situation that we have had in Rhode Island. Medicare reimbursement levels are set by Center for Medicare and Medicaid Services (CMS), and some time ago they put together what they called an imputed rural floor, which is tedious bureaucratese. But it set a floor on how low hospital reimbursements could go. It left out some areas, like Rhode Island, because we do not have rural hospitals.

So we do not get the benefit of the rural floor. So for a long time CMS basically imputed a rural floor so we would stay even. Now Rhode Island has always been reimbursed at lower rates than nearby, but CMS Director Verma unilaterally, without procedure, undid the imputed rural floor. That affected Rhode Island, Delaware, and New Jersey hospitals. A bit of a redo adjustment was made in fiscal year 2020, for fiscal year 2020. That actually made it worse for Rhode Island. We went from a reimbursement rate of 1.0445 down to 1.0371.

So the situation that we face right now, this is Rhode Island, this is Connecticut, this is Massachusetts. In Connecticut, hospitals are paid at a reimbursement rate of 1.3525, and I hope I can ask you, Mr. Kan, to agree that 1.3525 compared to 1.0371 is about a 30 percent premium.

Mr. KAN. Yes.

Senator WHITEHOUSE. Mathematically. Am I correct?

Mr. KAN. Yes, sir.

Senator WHITEHOUSE. All right. And then you go over here to Bristol County, Massachusetts, and they are paid 1.2868, compared to 1.0371. That is about a 25 percent premium. Would you agree with me?

Mr. KAN. Yes, sir.

Senator WHITEHOUSE. Okay. So—and here is St. Anne's Hospital, which is five minutes from the Rhode Island border, in Massachusetts, and here is Backus Hospital, which is probably 20 minutes from our Westerly Hospital. So you have hospitals that are like 5 minutes to 20 minutes apart from our borders, and we are on the losing end of a 25 percent or 30 percent reimbursement gap.

I have spoken to Ms. Verma about it over and over again. We get no place. They have pretended that they are going through a process of reconsidering the whole thing, but you cannot do that in government without leaving a trail of administrative procedures and steps. There is no such trail. My belief is that I have just been lied to by Administrator Verma.

I have had her senior staff in, her career people in. They agree that they cannot justify this and that a discrepancy, so geographically close and so severe, is inexcusable and wrong. I have had political staff come through the Finance Committee and they have agreed that they cannot justify this, that it is wrong, that there is no excuse. I have gone over this with Secretary Azar in Finance Committee hearings, and he says, nope, there is no justification for this.

Could you, on behalf of OMB—I know you have had a few days to look into this—let me know, is there a justification you have for why Rhode Island hospitals should be paid 25 percent or 30 percent less than hospitals just right across the border in nearby Connecticut and Massachusetts? And what is OMB's stance in all of this? And what do you know about why Ms. Verma is making things worse and worse for Rhode Island, Delaware, and New Jersey hospitals, rather than correcting something that both Azar and career folks and political people passing through all agree is indefensible? Why is this not changing? What do you know about it?

And by the way, it is \$28 million for Rhode Island's hospitals in a single fiscal year that got knocked out by the imputed rural floor change. Twenty-eight million dollars is a lot, particularly while we are trying to keep hospitals afloat through the coronavirus. This is a real blow, and the fact that we cannot get taken seriously by Ms. Verma is—particularly when nobody defends her decision—is really tiresome.

So if you could answer that. Take your time.

Chairman ENZI. I will allow you to answer.

Mr. KAN. Thank you, Senator Whitehouse. I know that this is a very important issue for Rhode Island, and I have read many of the letters you have sent to the administration on this topic.

Senator WHITEHOUSE. I have been prolific. I will agree.

Mr. KAN. I am familiar with the nine hospitals you mentioned. I pulled up those comments that they have stated they lost \$28 million due to this wage index.

Our budget proposes comprehensive wage index reform, and we look forward to working with you to consider how we address some of these inequities in the Medicare hospital payment adjustments system. Regarding anything I know, I am not familiar with the specifics of what happened at CMS, but I commit, Senator, to working with you to getting to the bottom of this. And our budget proposes a reform proposal, and I would very much welcome working with you on how we modernize the hospital payment system here.

Senator WHITEHOUSE. Any chance we get any of the money back that you guys—this administration unilaterally knocked out of our—

Mr. KAN. I will check with CMS. I do not know the back-and-forth of what led to this, and I am not sure what legal authorities we have. But, Senator, you have my word that I will look into this and get back to you.

Senator WHITEHOUSE. All right. Well, Mr. Chairman, you can imagine how annoying and frustrating this is. I do not think there is a margin this big anywhere in the country. I do not think there is any excuse for it. The promise that somebody is going to work with me and get back to me—we hear that all the time and none of those promises mean a thing.

It is just immensely frustrating to me that I have to deal with this, and as you can imagine, if you are paid a 30 percent premium at Backus Hospital compared to Westerly Hospital, and they are 20 minutes apart, you are going to be able to pay nurses more. You are going to be able to invest more in new equipment. You are going to be able to keep up the hospital better. You are going to be able to pay doctors more. You are going to be able to support

the doctors who have hospital privileges better. You are going to be able to do all of that a lot better. And we are on the losing side of that, and there is no justification for it that anybody can offer. None. People admit that it is wrong, and this has been since October of '18—since October of '18.

So forgive me for being a little bit impatient, but our hospitals really need the revenue. We all need to be treated fairly at this time, and being spun and being told that we will get back to you is what I have had two years of now, so forgive my frustration.

Chairman ENZI. Senator Scott.

Senator SCOTT. Hi. Thank you, Chairman, for doing this. You know, going back to how these hospitals get paid, I will give you a story. In Florida, we have 22.5, 23 million people. New York has 2 to 2.5 million less. We get about \$230 million, I think, for Disproportionate Share Hospital (DSH) payments for our hospitals that take care of patients that—low-income patients, and New York gets \$1.7 billion. You know, the entire time I was governor I complained about it and nothing ever happened. As a matter of fact, at one point while I was governor the Obama administration cut out \$1 billion out of my Low Income Pool (LIP) payments, because I would not go along with something.

So, I mean, the way that—I think all of us should be a little frustrated with the way that the Federal Government allocates dollars, but especially the way dollars get allocated through our health care system makes no sense.

So, Mr. Kan, thank you for your hard work. I think one thing I know you and I talked about the other day, and if you could just talk about your position on this, I think we have got to decide that—we have got to come to the conclusion that China has decided to become our adversary. It is not something we chose. It is something that the General Secretary of the Communist Party, Xi, decided to do, and whether it is, you know, stealing our jobs or technology, or lying to us about the pandemic, or putting people in prison for their religion or taking away basic rights of Hong Kong citizens, or now trying to be a thug with regard to how they deal with Australia. I think we have got to wake up and understand that we have got to figure out how to build jobs in this country and not how to build more jobs in Communist China.

Can you talk about your position and how you think there are things you could do to possibly help? One thing I had, which we have not gotten done yet, is the Promoting Responsibility in Markets and E-Retailers Act of 2019 (PRIME) Act, which would require online retailers to disclose where products are made, because I think Americans—I do not think we should have to—we should mandate that they buy American products, but I think they would buy more American products if they knew where things were—if Amazon would tell us where things are produced, and right now we do not even know that. And they are not willing to do that voluntarily. Unfortunately, it seems like we have to pass legislation to do things like that.

But if you could just give us your view on how we are going to hold China accountable for all their bad deeds.

Mr. KAN. Sir, thank you. Thank you, Senator Scott. You are also prolific on writing about this topic, and your daily newsletter covers this topic and a lot of real estate is dedicated to this topic.

I think there are two major areas in which OMB will be playing a role in countering great powers, and specifically countering China. One is on the budget side. If you look at our fiscal year 2020 budget proposal, we focused heavily on great powers competition. That includes increasing spending in areas where we believe China has been a competitor. A lot of that is in the development of research and development (R&D), advanced engineering around areas such as artificial intelligence (AI).

So as we think about the budget, as we are going through the appropriations process now, it is helpful to consider where should we invest to counter China's technology development, infrastructure development strategies as they use it to compete against us.

The second is on the management side. We share a number of your concerns, and we will be addressing some of the supply chain risks that you have identified, through your letters and through some of your legislation. As you may know, we stood up the Federal Acquisition Security Council, which provides a whole-of-government response to remove bad actors from our Federal systems and networks. And so with all of the assets we own as a Federal Government, as well as our budget, we are seeking to counter China.

Senator SCOTT. Thank you, and thank you for your focus on that. Another thing I have tried to talk about up here—I have been up here about 18 months—is the fact that, you know, we have a Federal debt that I do not know how our generation or the next generation or the generation after that is ever going to be able to pay back, when you see that our debt is growing much faster than our GDP is growing. So as a percentage of GDP it is not going down. It is actually skyrocketing.

So what are some ideas that you guys have that are going to be able to counteract the fact that now we have—I guess at the end of this year we will have \$25, \$26 trillion dollars' worth of debt?

Mr. KAN. Well, our budget proposes more spending cuts than any budget in history, but I think also creating a fiscal rule for us to consider is something that we should begin looking at. If you look at, historically, the debt-to-GDP ratio has been about 60 percent. For the last 80 years it has been about 63 percent. Today it is over 100 percent. And so one of the considerations could be to look at a fiscal rule, which I think some of that is captured in Chairman Enzi's bill on budget process reform.

Senator SCOTT. You know, one thing I did as governor of Florida, I tried to go through every line. Unfortunately, the President does not have a line item veto, which I had as governor. But one thing I was able to do was go through every line—there were about 4,000 lines in the Florida state budget—and say do I get a return for the taxpayers? And whether that means that this money was going to go to take care of autistic children, and then I said, did it? If it did not, I am not going to continue to fund it. If we were going to do for economic development did we get a return on the dollars we put in, or we are not going to do it.

And so I hope the Federal Government will start thinking more about if we are going to spend money, can we get a return on those dollars. Whether—if that means just like things like, if the law enforcement bill unfortunately did not go forward, can we make sure that something happens with the dollars that we put out there, because I want to get results. And I think every—all of us up here came up here to get something done, and I think one way to do it is if the administration would work with us, and we will do it because we have to be the appropriators, but if we will focus on—if we are going to spend the money, did we get something for it, and if we do not, why are we spending the money? So we can look at that.

So thank you very much, and thank you. Especially thank you for your focus on watching how money is spent and focusing on holding China accountable.

Chairman ENZI. Senator Van Hollen.

Senator VAN HOLLEN. Thank you, Mr. Chairman, and welcome, Mr. Kan. As we discussed the other day I really wanted to ask you some questions about OMB and your involvement, the extent of your involvement in the withholding of dually appropriated funds to Ukraine.

As you know, the Government Accountability Office (GAO) found that during the period of time that you were at OMB that OMB broke the law and was in violation of the Impoundment Control Act when it withheld those funds.

Now in the sort of paper trail that so far has come to light there is an email regarding this issue on August 12th, from OMB General Counsel Mark Paoletta, stating that the Department of Defense (DOD) was being, quote, “extraordinarily difficult,” unquote, about the withholding. DOD was very worried that if the withholding continued that they would not be able to get the money out the door for Ukraine military assistance in time.

Are you familiar with that email?

Mr. KAN. I am not, Senator. If you send it to me or send it to somebody here I would be happy to review it. You said August 12th?

Senator VAN HOLLEN. August 12th, you were copied on an email. You are not familiar with that email?

Mr. KAN. I am not.

Senator VAN HOLLEN. Okay. This email has been discussed in many forums, including in the House, so it is a surprise to me that you would come here without knowing about that.

Let me ask you this. Were you aware, during your period of time at OMB, that monies to Ukraine were being withheld?

Mr. KAN. I was aware that monies were being paused. I was not substantively involved in the entire Ukraine policy process.

Senator VAN HOLLEN. Well, when did you first become aware that those funds were being withheld?

Mr. KAN. Probably near the end of summer, but it is—I do not remember the blow-by-blow. I had been at OMB for just a couple of months and was frankly still getting acclimated to the institution.

Senator VAN HOLLEN. Okay. On your—in your responses to our preliminary questions you indicated that the withholding was the

result of a policy review process. Do you recall that being your response?

Mr. KAN. Yes, Senator.

Senator VAN HOLLEN. So based on what you just told me, is that response based entirely on what others at OMB have told you, or is that based on your personal involvement and knowledge of these events?

Mr. KAN. I do not want to get into sort of each conversation I have had, but it was based upon my understanding of events.

Senator VAN HOLLEN. Yeah, but I am trying to figure out, you just were telling me you did not have much personal involvement.

Mr. KAN. Correct.

Senator VAN HOLLEN. So my conclusion from there would be that your statement that this was really a policy review was based on what others told you. So to what extent was that statement based on your personal involvement? Tell me about that.

Mr. KAN. It was more based upon what folks had told me, not based upon personal involvement.

Senator VAN HOLLEN. Got it. And so I am trying to better understand what it means to be involved in a policy review. Is that the way you would describe simply a pause in the obligation of the funds?

Mr. KAN. Yeah. So policy reviews and pauses are things that I even participated in when I was a program examiner at OMB 15 years ago, as a civil servant. Policy officials will oftentimes want to review a specific program, have questions on it. I think there is one program I worked on regarding veterans' affairs IT procurement, where policy officials felt that we needed to review the contracts and review the entire IT project before proceeding. And so—

Senator VAN HOLLEN. Well, let me just—let me, if I may, Mr. Kan, ask you this question. If the President of the United States, any President, were to pause foreign assistance to another country—again, let's hypothetically say Nigeria—in order to pressure that country to announce an investigation into an American politician, would that be a policy review, as you understand the term?

Mr. KAN. Senator, I do not want to get into hypotheticals, and I think the Senate—

Senator VAN HOLLEN. No, this is—I am just asking you, would that set of facts—that set of facts, would that constitute a policy review?

Mr. KAN. Senator, I think—I do not answer hypotheticals, as a matter of principle. But the Executive branch has the authority and has precedents, many precedents across many administration to pause funding to review, if a particular program makes sense.

Senator VAN HOLLEN. Okay. I see my time is up, Mr. Chairman. Well, OMB also withheld documents from GAO, so we will send some follow-up questions on whether or not you would be willing to provide those documents that OMB refused to provide.

Thank you, Mr. Chairman.

Mr. KAN. Thank you, Senator.

Chairman ENZI. Thank you, Senator. Are there any others wishing to ask questions?

[No response.]

Chairman ENZI. Seeing none, I want to thank Mr. Kan for appearing before the Committee today. Mr. Kan, your full statement will be included in the record. As information for all Senators, questions for the record are due by 12 p.m. tomorrow, with signed hard copies delivered to the Committee clerk in Dirksen 624. Emailed copies will also be accepted, due to our current conditions. Under our rules, Mr. Kan will have seven days from receipt of our questions to respond with answers.

With no further business before the Committee, this hearing is adjourned.

[Whereupon, at 3:22 p.m., the hearing was adjourned.]

United States Senate

COMMITTEE ON THE BUDGET
ROOM SD-624
(202) 224-0642

WASHINGTON, D.C. 20510-6250

STATEMENT OF BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF
PRESIDENTIAL NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:** (Include any former names used.) Derek Tai-Ching Kan
2. **Position to which nominated:** Deputy Director, Office of Management and Budget
3. **Date of nomination:** June 2, 2020
4. **Address:** (List current place of residence and office addresses, information will not be made available for public inspection.) (REDACTED)
5. **Date and place of birth:** Los Angeles, CA
6. **Marital status:** (Include name of spouse.) (REDACTED)
7. **Names and ages of children:** (information will not be made available for public inspection) (REDACTED)
8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.
University of Southern California, B.S. Business Administration, 1999
London School of Economics, Graduate Diploma in Economics, 2001
London School of Economics, M.Sc. Economic History, 2004
Stanford Graduate School of Business, MBA, 2012
9. **Employment record:** List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)
Program Examiner, Office of Management and Budget, Washington, DC (2004-06)
Policy Advisor, U.S. Senate Republican Policy Committee, Washington, DC (2006-07)
Policy Advisor, U.S. Senate Office of the Republican Leader, Washington, DC (2008-10)
Consultant, Bain & Company, Los Angeles, CA (2012-14)
Director of Strategy, Genapsys Inc., Redwood City, CA (2014-15)
Advisor, Story and Heart (2015-16)
Consultant, GLG Research (2016-17)
Board Member, Amtrak, Washington, DC (2015-17, 2017-19)
General Manager, Lyft, Los Angeles (2015-17)
Under Secretary for Policy, U.S. Department of Transportation, Washington, DC (2017-19)
Executive Associate Director, Office of Management and Budget, Washington, DC (2019-Present)
10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above.

None in addition to items listed in #9.

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

Board Member, Environmental Defense Action Fund (2013-14)
Board Member, Amtrak, Washington, DC (2015-17, 2017-19)
Advisory Board Member, Los Angeles County Auto Show (2016-17)

12. **Memberships:** List all memberships and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable and other organizations.

Member, Young President's Organization (2017-Present)
Advisory Board Member, Los Angeles County Auto Show (2016-17)
Member, Pacific Council on International Policy (2010-16)
Board Member, Environmental Defense Action Fund (2013-14)
Board Member, Great Commission Community Church (2007-10)

13. **Political affiliations and activities:**

- (a) List all offices with a political party which you have held or any public office for which you have been a candidate.

N/A

- (b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

N/A

- (c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 5 years.

None

14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

Arjay Miller Scholar, Stanford Graduate School of Business, June 2012
Harvey Fellowship, September 2011

15. **Published writings:** List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.

TARP Without Strings, American Enterprise Institute

16. **Speeches:** Provide the Committee with four copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated.

Date	Event
November 30, 2017	National Assoc. of Manufacturers, Infrastructure discussion
December 7,	AV Data Roundtable

2017	
January 8, 2018	Transportation Research Board annual conference (innovation panel, safety data panel)
January 10, 2018	Consumer Electronics Show: Incorporating Drones and Self-Driving Vehicles into Communities
January 11, 2018	Consumer electronics Show: Taking Stock: A New Year for Drone Innovation
January 24, 2018	Washington Auto Show, National Leadership in Automotive Innovation Lunch, Topic is DOT's Outlook on Innovation
March 2, 2018	IAC Luncheon, US International Aviation Policy
March 7, 2018	FAA UAS Symposium (Baltimore, MD), Moving Forward Together
March 10, 2018	SXSW Small UAV Coalition Panel (Austin, TX), Future of US Commercial Drone Industry
March 11, 2018	European Union Opening Reception for 2018 SXSW Cities Summit (Austin, TX)
March 14, 2018	American Society of Civil Engineers (ASCE) Legislative Fly-In, Remarks on the Administration's Infrastructure Plan
March 15, 2018	American Council of Engineering Companies, Talk on Lessons Learned
March 16, 2018	Brookings Institute, Discussing the President's New Infrastructure Initiative
March 22, 2018	AEI Infrastructure
May 9, 2018	Millennium Challenge Corporation, National Asian American Pacific Islander Heritage Event
May 16, 2018	Bloomberg Next Infrastructure, Framework for Digital Infrastructure
June 4, 2018	VOLPE Speaker Series, Transportation in the Age of AI & Predictive Analytics
June 6, 2018	6th International Transportation and Economic Development Conference, Relationships between Multimodal Transportation & Economic Development
June 12, 2018	DHL Public Policy Forum, Infrastructure Investments and Future Trends, Darien Flowers attending
June 14, 2018	Safety Data Forum
June 21, 2018	Transportation, Artificial Intelligence, and Predictive Analytics; Transportation in the Age of Artificial Intelligence and Predictive Analytics
June 25, 2018	Solving for Safety: Visualization Challenge Speech; Competition on Advancing Innovative Ways to Analyze Crash Data
June 28, 2018	Road to Zero Coalition Strategic Data Initiative meeting
July 23, 2018	Millennium Challenge Corporation, AAPI "Unite Our Vision by Working Together"
August 29, 2018	Governor's Highway Safety Association Annual Meeting
September 6, 2018	2018 InterDrone Conference Las Vegas, Topic: DOT's groundbreaking work on the UAS Integration Pilot Program
September 12, 2018	2018 Annual IAC Pogue Award Dinner, honoring recently retired DOT career officials
September 25, 2018	Auto-ISAC Cybersecurity Summit Detroit
September 27, 2018	The Ripon Society, Topic: The Future of Private Funding in Infrastructure Investment
October 4, 2018	Autonomous Vehicle 3.0 Guidance rollout

October 12, 2018	Transportation in the Age of Artificial Intelligence and Predictive Analytics
October 23, 2018	Google's Innovation and Responsibility with Cloud AI panel
	GTC DC Annual Conference
November 15, 2018	U.S. Department of Transportation's Safety Data Initiative Request for Information
November 29, 2018	Asian American Commerce Group Economic Summit Columbus, Ohio
December 4, 2018	American Legislative Exchange Council
February 5, 2019	Bloomberg NEF, Executive Interview: How U.S. Policy Aids, and Hinders, EV Deployment
February 14, 2019	Association of American Railroads PMAC Event, Topic: The Administration's Approach to Infrastructure
March 12, 2019	CERAWeek 2019 Houston, The Future of Mobility
March 14, 2019	APWA Big Cities and Big Counties Forum
March 18, 2019	3rd Annual Capital Region Executive Leadership Mission, EEOB, Hosted by Con. Doris Matsui (Tentative)
March 18, 2019	APTA Legislative Conference, Topic: STR Themes and Future of Mobility
March 26, 2019	The Year Ahead in Transportation - Update from the U.S Department of Transportation
April 9, 2019	3rd Annual Cement & Concrete Fly-In, Topic: Administration's Infrastructure Plans
April 9, 2019	Safety Data Forum
June 3, 2019	Traffic Safety and the 5.9 GHz Band Speech
May 1, 2019	China Civil Aviation Development Forum

17. **Selection:**

- (a) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

My passion for public service prepares me for this particular appointment. I started my career out at the Office of Management and Budget as an entry-level Program Examiner. In that role, I worked closely with agencies to develop budgets and strategic plans. Moreover, I spent subsequent years working on budget, appropriations, and economic matters in the U.S. Senate. These experiences impressed upon me the importance of serving the country and using my skills and experiences to be a faithful steward of taxpayer resources. Further, my experience in the private sector, as a consultant and general manager, impressed upon me the value of innovation in solving novel challenges

- (b) Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

No

- (c) Have you made any commitments with respect to the policies and principles you will attempt to implement in the position for which you have been nominated? If so, please identify such commitment(s) and all persons to whom such commitment(s) have been made.

No

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?
Yes
2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, please explain.
No
3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization? If so, please explain.
No
4. Has anybody made a commitment to employ your services in any capacity after you leave government service? If so, please identify such person(s) and commitment(s) and explain.
No
5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable? If not, please explain.
Yes

C. POTENTIAL CONFLICTS OF INTEREST

1. If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain.
No
2. Identify and describe all investments, obligations, liabilities, business relationships, dealings, financial transactions, and other financial relationships which you currently have or have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute a possible conflict of interest in the position to which you have been nominated.

None. In connection with the nomination process, I have consulted with the Office of Government Ethics and the Office of Management and Budget Ethics Official to identify potential conflicts of interest. None have been identified.
3. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy other than while in a federal government capacity.

As a Congressional staffer, I influenced the legislative process by advising Senators, drafting amendments, and negotiating legislation.

4. Do you agree to have written opinions provided to the Committee the ethics officer of the Office of Management and Budget and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?

Yes

5. Explain how you will resolve potential conflicts of interest, including any disclosed by your responses to the above questions.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Office of Management and Budget Ethics Official to identify potential conflicts of interest. Any potential conflicts have been resolved and no potential conflicts of interest have been identified.

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

No

2. To your knowledge, have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, regulation, or ordinance, other than a minor traffic offense? If so, provide details.

No

3. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

No

4. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

None

E. TESTIFYING BEFORE CONGRESS

1. If confirmed, are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so?

Yes

2. If confirmed, are you willing to provide such information as may be requested by any committee of the Congress?

Yes

F. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection, with the exception of income tax returns.)

1. Please provide personal financial information not already listed on the SF 278 Financial Disclosure form that identifies and states the value of all:
 - (a) assets of \$10,000 or more held directly or indirectly, including but not limited to bank accounts, securities, commodities futures, real estate, trusts (including the terms of any beneficial or blind trust of which you, your spouse, or any of your dependents may be a beneficiary), investments, and other personal property held in a trade or business or for investment other than household furnishings, personal effects, clothing, and automobiles; and
 - (b) liabilities of \$10,000 or more including but not limited to debts, mortgages, loans, and other financial obligations for which you, your spouse, or your dependents have a direct or indirect liability or which may be guaranteed by you, your spouse, or dependents; and for each such liability indicate the nature of the liability, the amount, the name of the creditor, the terms of the payment, the security or collateral, and the current status of the debt payment. If the aggregate of your consumer debts exceeds \$10,000, please include the total as a liability. Please include additional information, as necessary, to assist the Committee in determining your financial solvency. The Committee reserves the right to request additional information if a solvency determination cannot be made definitively from the information provided.

(REDACTED)
2. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, executory contracts and other future benefits which you expect to derive from current or previous business relationships, professional services and firm memberships, employers, clients and customers. If dates or amounts are estimated, please so state. Please only include those items not listed on the SF 278 Financial Disclosure form.

(REDACTED)
3. Provide the identity of and a description of the nature of any interest in an option, registered copyright, or patent held during the past 12 months and indicate which, if any, from which you have divested and the date of divestment unless already indicated on the personal financial statement.

(REDACTED)
4. Provide a description of any power of attorney which you hold for or on behalf of any other person.

(REDACTED)
5. List sources and amounts of all gifts exceeding \$500 in value received by you, your spouse, and your dependents during each of the last three years. Gifts received from members of your immediate family need not be listed.

(REDACTED)
6. Have you filed a Federal income tax return for each of the past 10 years? If not, please explain.

(REDACTED)

7. Have your taxes always been paid on time including taxes paid on behalf of any employees? If not, please explain.
(REDACTED)
8. Were all your taxes, federal, State, and local, current (filed and paid) as of the date of your nomination? If not, please explain.
(REDACTED)
9. Has the Internal Revenue Service or any other state or local tax authority ever audited your Federal, state, local, or other tax return? If so, what resulted from the audit?
(REDACTED)
10. Have any tax liens, either federal, State, or local, been filed against you or against any real property or personal property which you own either individually, jointly, or in partnership? If so, please give the particulars, including the date(s) and the nature and amount of the lien. State the resolution of the matter.
(REDACTED)
11. Provide for the Committee copies of your Federal income tax returns for the past 3 years. These documents will be made available only to Senators and staff persons designated by the Chairman and Ranking Minority Member. They will not be available for public inspection.
12. Have you ever been late in paying court-ordered child support? If so, provide details.
(REDACTED)
13. Have you ever filed for bankruptcy or been a party to any bankruptcy proceeding? If so, provide details.
(REDACTED)

AFFIDAVIT

Derek KAN being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Subscribed and sworn before me this

5th

day of

June, 2024



Bessie Mae Weaver
Notary Public

Commission Expires: 12/14/2024

Pre-Hearing Questions from Senator Bernard Sanders for Derek Kan
Nomination of the Hon. Derek Kan, of California, to be
Deputy Director of the Office of Management and Budget June 11, 2020

Question #1

In July 2019, you left your position at the Department of Transportation (DOT) to take the role of Executive Associate Director at the Office of Management and Budget. Historically, the Executive Associate Director has been the top position at OMB that does not require Senate confirmation, and during your tenure at OMB, the Deputy Director position has been vacant and the Deputy Director for Management position has been filled by individuals who were also busy leading the Office of Personnel Management. This leads me to believe that you have been, in effect, one of the most senior officials at OMB.

Please describe your responsibilities in your current role at OMB.

Describe how, if at all, you were involved in the decision-making process that went into President Trump's Fiscal Year 2021 budget request.

The mission of OMB is to assist the President in meeting his policy, budget, management and regulatory objectives and to fulfill the agency's statutory responsibilities. My current role at OMB is to advance this mission by supporting the Director in carrying out this mission by coordinating activities across the agency and with other components of the Executive Office of the President. These activities include analysis and reviews of various budget documents, including the FY21 Budget Request.

Question #2

In the President's budget request for Fiscal Year 2021, President Trump called for a 10-year, \$500 billion cut to Medicare, a \$900 billion cut to Medicaid, and a cut of up to \$71 billion to Social Security.

If confirmed, will you advocate for massive cuts to these vital programs?

The President has clearly indicated that he will protect Social Security and Medicare beneficiaries, and there are no spending cuts proposed to these programs in the FY21 Budget Request. The FY21 Budget Request shows Medicare spending growing each and every year. The President's Budget includes reforms and program improvements to reduce inefficient or waste in an effort to improve patient care.

Question #3

On January 22, The New York Times reported the following:

President Trump suggested on Wednesday that he would be willing to consider cuts to social safety-net programs like Medicare to reduce the federal deficit if he wins a second term, an apparent shift from his 2016 campaign promise to protect funding for such entitlements.

The president made the comments on the sidelines of the World Economic Forum in Davos, Switzerland. Despite promises to reduce the federal budget deficit, it has ballooned under Mr. Trump's watch as a result of sweeping tax cuts and additional government spending.

Asked in an interview with CNBC if cuts to entitlements would ever be on his plate, Mr. Trump answered yes.

"At some point they will be," Mr. Trump said, before pointing to United States economic growth. "At the right time, we will take a look at that."

Mr. Trump suggested that curbing spending on Medicare, the government health care program for the elderly, was a possibility.

"We're going to look," he said.¹

Although cuts to Medicare, Medicaid, and Social Security Disability have been part of each of President Trump's budget requests, these comments seemed to indicate that they would be made a priority in a second term if the President is re-elected.

If confirmed, and if President Trump is re-elected, would you recommend that he prioritize cuts to Medicare, Medicaid, and Social Security in a second term?

The President has made clear that he will protect Social Security and Medicare.

Question #4

On May 13, Federal Reserve Chair Jerome Powell stated that "the scope and speed of this downturn are without modern precedent, significantly worse than any recession since World War II." As such, Chairman Powell stated that "Additional fiscal support could be costly, but worth it if it helps avoid long-term economic damage and leaves us with a stronger recovery."²

¹ Alan Rappeport and Maggie Haberman, "Trump Opens Door to Cuts to Medicare and Other Entitlement Programs," The New York Times, 22 January 2020. <https://www.nytimes.com/2020/01/22/us/politics/medicare-trump.html>

² Jeanna Smialek, Jim Tankersley and Emily Cochrane, "Fed Chair Warns the Economy May Need More as Congress Hesitates," The New York Times, 13 May 2020. <https://www.nytimes.com/2020/05/13/business/economy/fed-chair-powell-economy-virus-support.html>

With this in mind, speaking of an attempt to reduce the debt relative to the size of the economy, Chairman Powell stated, “Now, when we are facing the biggest shock that the economy has had in modern times, is, for me, not the time to prioritize considerations like that.”

- a) Do you agree with Chairman Powell that addressing the certain near-term economic catastrophe that the COVID-19 pandemic has wrought is a more important concern than dealing with the highly-uncertain future problems that the national debt could one day cause down the road?

The COVID-19 pandemic has had a tremendously painful effect on the nation, including a significant adverse economic impact. Our shared response must balance near term economic recovery with long-term burdens for future generations including the national debt.

- b) Is Chairman Powell correct in saying that if we fail to right our economy soon it will have long-term implications on economic growth, potentially worsening those highly-uncertain potential future problems caused by the debt?

Failing to right our economy soon will have long-term implications on economic growth. However, persistent and unaddressed Federal debt will also have an adverse impact on the economy. Large persistent deficits will weaken consumer confidence, reduce access to capital, and potentially result in inflation and rising interest rates, thereby crowding out future investments. Large, unsustainable deficits become a drag on the economy and slow growth resulting in fewer jobs.

Question #5

On May 19, the Congressional Budget Office (CBO) released interim economic projections for this year and next.³ CBO envisions the unemployment rate to remain nearly 10 percent at the end of 2021.

This is a “current law” projection, meaning that it incorporates no further federal stimulus spending. No further federal stimulus spending means that millions of the unemployed will have had their unemployment benefits expire. It would mean that states and localities will have massively cut services to meet depressed revenues. It would mean the Paycheck Protection Program and other business supports will have run dry, bankrupting small businesses from coast to coast. It would mean tens of millions of people would be receiving insufficient nutrition assistance from SNAP (i.e. food stamps).

In your opinion, would this be an acceptable outcome if it were to mean we would not further increase the federal deficit?

It is unacceptable for any policymaker to be content with a projected unemployment rate of 10

³ Congressional Budget Office, “Interim Economic Projections for 2020 and 2021,” 19 May 2020. <https://www.cbo.gov/publication/56351>

percent, or anything close to that. Just 11 weeks ago, Congress passed and the President signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act, which was supported by every member of the Senate Budget Committee, is the largest economic response bill in American history and is currently being implemented expeditiously. This bipartisan bill included significant funding for unemployment benefits, state and local governments, and small businesses. The Administration is closely monitoring the implementation of this bill and the underlying economic conditions.

Question #6

On May 13, CBO published the following:

State and local governments will collect less revenue because of the sudden drop in economic activity and resulting fall in taxable income in 2020. It is unclear how large those shortfalls will be.

At the same time, demand for social services provided by state and local governments will increase. In the 2007–2009 recession and subsequent recovery, state and local governments similarly experienced fiscal pressure. They responded mainly by reducing spending on education, health, and social services. Some of those reductions were achieved by cutting public-sector employment.⁴

The Trump Administration seems extraordinarily reluctant to send federal dollars to states and localities as part of a potential next stimulus package, even if it means states will be “reducing spending on education, health, and social services.”

Is this a position you hold?

Any possible discussions regarding a potential next stimulus package are part of a deliberative process. However, the Administration has secured over \$500 billion for State, local, tribal, and territorial governments since the public health emergency began. This corresponds to roughly 25% of all State operating budgets combined.

Question #7

You have been a part of the President’s Coronavirus Task Force since its inception in January. On February 5, you helped give a briefing to Members of Congress. The New York Times described the briefing:

During a briefing on Capitol Hill on Feb. 5, senators urged administration officials to take the threat more seriously. Several asked if the administration needed additional money to help local and state health departments prepare.

Derek Kan, a senior official from the Office of Management and Budget, replied that the administration had all the money it needed, at least at that point, to stop the virus, two senators who attended the briefing said.

⁴ Congressional Budget Office, “Answers to Questions Related to Federal Funding for State and Local Governments,” 13 May 2020. <https://www.cbo.gov/publication/56360>

“Just left the Administration briefing on Coronavirus,” Senator Christopher S. Murphy, Democrat of Connecticut, wrote in a tweet shortly after. “Bottom line: they aren’t taking this seriously enough.”⁵

- a) In retrospect, is it true that “the administration had all the money it needed, at least at that point, to stop the virus”?

On February 5, there were 11 confirmed cases of the Coronavirus in the entire country. At the time, the Administration had billions of dollars in unobligated funds for pandemic response; these funds were in accounts across multiple agencies including HHS and CDC. As cases grew in the United States, the Administration transmitted a supplemental funding request on February 24, 2020. That letter stated in part, “To this point, no agency has been inhibited in response efforts due to resources or authorities.”

- b) As it was clear to many inside the government, beyond just Sen. Murphy, that the Administration was not nearly aggressive enough during the early stages of the pandemic, why was it not clear to you? How can we trust your judgement?

The Administration took decisive action given the information available at the time. This includes instituting travel bans from different to slow the spread, bringing home and safely quarantining 1,000 Americans from Wuhan, scaling testing and hospital supplies including ventilators and personal protective equipment, and working closely with all Governors around the country.

Question #8

On March 16, The Washington Post reported:

A member of President Trump’s coronavirus task force emailed his Stanford business school Google group last week to see if members wanted to discuss “topics related to covid-19,” appearing to try to crowdsource thoughts on the crisis response while offering former classmates his insider perspective.

Derek Kan, the executive associate director of the Office of Management and Budget, told the group of 2012 graduates in a mass email that he was currently on the president’s task force and was “happy to share how we are approaching this” on a subsequent conference call. The episode appears to be the second time someone with a White House tie has turned to the cyber masses for input on the covid-19 outbreak, drawing criticism over the haphazard nature of the administration’s response.

“I think there are a range of topics to discuss from what are the government and companies doing and what should they be doing, how are markets responding, and a host of others,” Kan wrote from a nongovernment email account. “If folks are

⁵ Eric Lipton, David E. Sanger, Maggie Haberman, Michael D. Shear, Mark Mazzetti and Julian E. Barnes, “He Could Have Seen What Was Coming: Behind Trump’s Failure on the Virus,” The New York Times, 11 April 2020.
<https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html>

interested in a conference call, please let me know and also flag what topic or topics you would find interesting to discuss.”⁶

- a) Though at least one recipient of your note said she did not believe you were “trying to crowdsource policy ideas from business school alums” from your private email account, do you believe now that this instance had at least gave off the appearance that you were doing just that? Do you believe MBAs could have valuable advice in handling a pandemic, more so than experts in health care?

The purpose of my email was to connect with former classmates of mine to hear how COVID was impacting their lives, both personally and professionally, and to share my perspectives. I think for the past several months, COVID has been top of mind for pretty much every single human on the planet, and it is only natural to want to talk about such a complex problem within one’s own communities. My business school classmates to this day are some of my closest friends and colleagues, and we often reach out to one another to catch up on each other’s lives and discuss current events. The purpose of my outreach was to understand how COVID was impacting them personally.

Yes, MBAs can provide valuable advice in handling a pandemic. This pandemic is not simply a health care issue but rather affecting every facet of life. My former MBA classmates are among the most expert in their respective fields and include some of the most creative, innovative, and brilliant minds in the country. For a problem of this magnitude, it would be foolish to rely upon any single discipline to handle this pandemic. We clearly need health experts, but we also need experts in the economy, experts in business (e.g., MBAs), experts in education, experts in manufacturing, experts in supply chain and logistics, experts in social welfare programs, and many more.

- b) Do you think it was appropriate to use your personal e-mail for this effort given that it was clearly work-related? Have you completed ethics training that covered the use of personal e-mail for official use? If so, when?

Again, the purpose of this email was not to solicit policy ideas but rather to learn how COVID was impacting the lives of my friends.

I have completed ethics training and that training covered the use of personal e-mail for official use.

Question #9

Prior to your nomination to serve at the Department of Transportation, you were a General Manager at Lyft. Despite your short stint at Lyft, when you left, you received a severance payment of \$72,433.33 that was not tied to any benefit within your employment contract. Lyft also gave you approval to convert your then-restricted stock options to common shares of Lyft Inc. – worth at least

⁶ Matt Zapotosky, “Member of Trump’s coronavirus task force reaches out to his Stanford business school Google group to discuss crisis,” The Washington Post, 16 March 2020. https://www.washingtonpost.com/national-security/derek-kan-trump-coronavirus-task-force-standford-google-group/2020/03/16/b866bab2-677f-11ea-abef-020f086a3fab_story.html

\$600,000 – in order for you to be able to sell them. Such a severance package was outside the usual practice of the company.

Because you sold the vested restricted stock units you held in Lyft prior to assuming your position at DOT – and because you agreed to recuse yourself from any particular matter in which Lyft had a financial interest – you were deemed to be in compliance with ethics laws and regulations.

- a) While at DOT, did you ever need to recuse yourself from any activities due to this agreement?

I did not need to recuse myself from any matter related to Lyft pursuant to my ethics agreement. Per a letter from the Designated Agency Ethics Official to Chairman John Thune dated May 17, 2017, “Mr. Kan has agreed, if confirmed, that he will not participate personally and substantially in any particular matter that to his knowledge has a direct and predictable effect on the financial interest of Lyft until he has divested his restricted stock units...” I sold my restricted stock units on June 23, 2017.

However, out of an abundance of caution, I recused myself from participating in a roundtable discussion on new mobility (which included a Lyft executive) and insurance as well as a discussion among Federal Transit Administration officials on transit partnerships with ridesharing companies.

- b) While at DOT, was there ever an instance in which you should have recused yourself but did not?

No.

- c) Though legal, do you feel it was unethical to take such a large amount of money from a company that had interests before your new employer, the Department of Transportation?

No. My restricted stock units were based upon my employment service prior to my nomination. In fact, as part of accepting the opportunity to serve at the Department of Transportation, I forfeited tens of thousands of unvested restricted stock options that today would have been valued in the millions.

Question #10

While at DOT, did you participate in the writing of the SAFE Vehicles Rule?

I did not participate in the writing of the SAFE Vehicles Rule. My office did review the rule.

Question #11

While you were at DOT, there were allegations that federal BUILD and INFRA grants were purposefully steered to Kentucky – home of Transportation Secretary Elaine Chao’s husband, Sen. Mitch McConnell – for political reasons.⁷⁷

Did you witness or participate in the decision to award these grants? If so, what was your role? Did you have any contact with the recipient of these grants before after they were awarded? If so, what did that entail?

Yes, I participated in the decision to award BUILD and INFRA grants, two programs run out of my office. My role was a member of the Senior Review Team which assembled a list of recommended projects. The career staff that prepared for the Senior Review Team reported up to me.

Yes, I had contact with many recipients of grants before and after they were reported. As part of my role as Under Secretary, I met regularly with Secretaries of Transportation and CEOs of local transit authorities from around the country. Many of these entities were awarded BUILD and INFRA grants.

Question #12

As a high-ranking OMB official during the summer of 2019 when your agency was holding up Congressionally-appropriated funds to Ukraine, did you have any knowledge of the escalating concerns on the part of the Department of Defense that the hold could result in a violation of the Impoundment Control Act?

No.

Question #13

On January 16, 2020, GAO issued a decision holding that OMB’s hold on the DOD-administered aid to Ukraine was illegal because it violated the Impoundment Control Act.⁸

a) If confirmed, what will you do to make sure that this never happens again?

While I very much value the perspective of the Government Accountability Office (GAO), the GAO is not part of the Executive Branch, and as such, its rulings are not binding on Executive Branch agencies. OMB disagrees with GAO’s opinion. GAO’s opinion is flawed, especially in its view that OMB does not have the power to pause funding to make sure the best policy is being carried out within the scope of the law. OMB regularly pauses funding to ensure agencies are spending funds efficiently and appropriately, and has done so across administrations of both parties.

⁷⁷ Tucker Doherty and Tanya Snyder, “Chao created special path for McConnell’s favored projects,” Politico, 10 June 2019, <https://www.politico.com/story/2019/06/10/mcconnell-elaine-chao-1358068>

⁸ Government Accountability Office, “Office of Management and Budget—Withholding of Ukraine Security Assistance,” 16 January 2020, <https://www.gao.gov/products/D21272>

- b) More generally, do you accept that using the apportionment process to delay federal outlays beyond their period of availability and thus effectively impounding the funds is illegal under the Impoundment Control Act?

No.

Question #14

In 2016, you donated \$1,200 to Focus on the Family, which has been a proponent of, among other things, "conversion therapy." Do you agree with this and other stances that the organization has taken toward the LGBTQ community?

My wife and I donated to this organization because we enjoyed their radio program. I agree with Focus on the Family's vision of redeeming families, communities, and societies worldwide through Jesus Christ. I am unaware of Focus on the Family's stance and have no opinions on this particular matter.

Pre-Hearing Questions from Senator Chris Van Hollen
for Derek Kan
Nomination of the Hon. Derek Kan, of California,
to be Deputy Director of the Office of Management and Budget

Question 1

I asked GAO to conduct an investigation into whether the withholding of vitally needed security assistance for Ukraine violated the Impoundment Control Act. GAO found that the withholding of Department of Defense (DOD) funds for Ukraine violated the law, and is continuing to investigate whether the withholding of State Department Foreign Military Financing (FMF) funds for Ukraine also broke the law

Did you have any personal involvement in the OMB process of withholding security assistance from Ukraine?

I did not have substantial involvement in the OMB policy process on this matter.

Question 2

Regarding the hold on Ukraine security assistance, the Office of Management and Budget stated that, "It was OMB's understanding that a brief period was needed, prior to the funds expiring, to engage in a policy process regarding those funds."

Will you personally affirm that this "policy process" was the only reason for the hold on Ukraine security assistance, since this is the sole reason identified by OMB?

To the best of my knowledge, yes, the policy process was the only reason for the pause in obligations.

Question 3

Please provide the following information on the policy process that OMB claimed was the reason for the hold on Ukraine security assistance, none of which asks about the content of deliberative conversations within the Administration:

- A. The start date.
- B. The end date.
- C. Which OMB personnel were involved, including whether you had any personal involvement.
- D. Which other agencies were involved in the process.
- E. Who oversaw the process.

See attached OMB letter to GAO dated December 11, 2019.

Question 4

Are you aware of any communications or documents that indicate a “policy process” was not the sole reason for withholding security assistance for Ukraine? If so, please provide them.

No, I am not aware of any such communications or documents.

Question 5

On August 12, 2019, OMB General Counsel Mark Paoletta emailed you, Russell Vought, and Michael Duffey about the apportionment to hold security assistance to Ukraine. Mr. Paoletta’s email stated, “Can we call you in 5, DoD is being extraordinarily difficult.”

Mr. Paoletta later stated in a letter to GAO that, “In fact, at no point during the pause in obligations did DOD OGC indicate to OMB that, as a matter of law, the apportionments would prevent DOD from being able to obligate the funds before the end of the fiscal year.”

To the best of your knowledge, is this statement in the letter to GAO

true?

Yes

Question 6

Regarding the hold on Ukraine security assistance, at any point during the pause in obligations did DOD indicate to OMB that the apportionments would prevent DOD from being able to obligate the funds before the end of the fiscal year?

See Question 1.

Question 7

DOD did not provide a substantive reply to GAO, and explained that it could not do so, “In light of the interagency equities at issue.” Are you aware of any actions taken by OMB officials to prevent DOD from providing a substantive reply?

No

Question 8

Please list any emails, communications, notes, or other documents in OMB’s possession that substantiate OMB’s stated reason for holding Ukraine security assistance funding, including the date each document was created. Please note that this part of the question can be answered without disclosing the contents of these documents.

For each document listed above, please provide the reason that OMB refused to provide this document to GAO in response to the following request from GAO to OMB on November 25, 2019: “Please explain why the funds were made unavailable for obligation,

and include documentation supporting this rationale.”

For each document listed above, please provide this document to Congress. For any document not provided to Congress, please provide the reason that OMB is refusing to provide the document.

OMB did not refuse to provide information to GAO’s November 25 request. On December 11, 2019, OMB provided the information that GAO needed, including OMB’s legal analysis and all of its apportionments related to this matter, which included the amounts and dates of OMB’s apportionments. OMB’s December 11, 2019, letter also explained:

The pause in obligations of the Ukraine funds at issue here is an example of programmatic delay. By its terms, OMB’s apportionment footnote expressly provided that DOD could continue all necessary activities—short of the final action obligating the funds—until there was a policy decision on the use of the funds. The statutory language of the USAI and FMF appropriations provided the Executive branch broad discretion to determine how these particular funds should be spent. It was OMB’s understanding that a brief period was needed, prior to the funds expiring, to engage in a policy process regarding those funds. OMB took appropriate action, in light of the pending policy process, to ensure that funds were not obligated prematurely in a manner that could conflict with the President’s foreign policy.

Because OMB’s letter provide the rationale for our actions, we believe we met GAO’s request. Further, after receiving OMB’s December 11 response, GAO did not follow up with any additional requests to OMB prior to issuing its January 16, 2020 opinion.

Question 9

As OMB Deputy Director, will you commit to providing a full and complete response to the questions asked by GAO in carrying out its statutory role to enforce the Impoundment Control Act?

Yes, I commit to providing GAO information it needs to do its work.

Question 10

Will you commit to following GAO rulings on the Impoundment Control Act and the Anti-Deficiency Act?

While I value the perspective of the Government Accountability Office (GAO), the GAO is not part of the Executive Branch, and as such, its rulings are not binding on Executive Branch agencies. The Department of Justice Office of Legal Counsel held in a 2005 legal opinion—that disagreed with GAO’s interpretation of appropriations law and reminded Executive Branch agencies that GAO’s opinion is not controlling on the Executive Branch—that “[b]ecause GAO is part of the Legislative Branch, Executive Branch agencies are not bound by GAO’s legal advice.”

Question 11

Will you commit to promptly notifying Congress of future Administration actions to withhold funding, as required under the rescission and deferral provisions of the Impoundment Control Act?

Consistent with the law and past practice, OMB will notify Congress if it withholds funding under the ICA's rescission and deferral provisions.



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

December 11, 2019

Mr. Tom Armstrong
General Counsel
Government Accountability Office
Washington, D.C. 20548

RE: B-331564, *Office of Management and Budget – Withholding of Ukraine Security Assistance*

Dear Mr. Armstrong:

This responds to your letter of November 25, 2019, seeking the Office of Management and Budget's (OMB) views on its apportionment of funds for security assistance for Ukraine during the fourth quarter of fiscal year (FY) 2019.

Background

For FY 2019, Congress appropriated \$250 million to the Department of Defense (DOD) for the Ukraine Security Assistance Initiative (USAI).¹ On June 19, 2019, OMB learned that the President had asked about DOD's plans for USAI. At that time, OMB began discussions with DOD regarding DOD's plans for obligating the USAI funds. In response to the Administration's directive that USAI funds not be obligated for Ukraine pending a policy decision, on July 25, 2019, OMB, following discussions with DOD, including DOD's Office of General Counsel, placed a footnote on the apportionment for the account that includes the USAI funds (Operation & Maintenance, Defense-wide, Treasury Appropriation Fund Symbol (TAFS) 97-0100/2019) that stated:

Amounts apportioned, but not yet obligated as of the date of this reapportionment, for the Ukraine Security Assistance Initiative (Initiative) are not available for

¹ That appropriation provided, in relevant part:

For the "Ukraine Security Assistance Initiative", \$250,000,000 is hereby appropriated, to remain available until September 30, 2019: *Provided*, That such funds shall be available to the Secretary of Defense, in coordination with the Secretary of State, to provide assistance, including training; equipment; lethal assistance; logistics support, supplies and services; sustainment; and intelligence support to the military and national security forces of Ukraine, and for replacement of any weapons or articles provided to the Government of Ukraine from the inventory of the United States: *Provided further*, That of the amounts made available in this section, \$50,000,000 shall be available only for lethal assistance described in paragraphs (2) and (3) of section 1250(b) of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114– 92; 129 Stat. 1068)....

Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. A, § 9013, 123 Stat. 2981, 3044-45 (2018).

obligation until August 5, 2019, to allow for an interagency process to determine the best use of such funds. Based on OMB's communication with DOD on July 25, 2019, OMB understands from the Department that this brief pause in obligations will not preclude DOD's timely execution of the final policy direction. DOD may continue its planning and casework for the Initiative during this period. (emphasis added)²

The action of adding the footnote to the apportionment made approximately \$214 million in unobligated USAI funds legally unavailable for obligation, but still permitted DOD to engage in any needed activities up to the point of obligation. Each time this temporary pause in obligations was extended, OMB emphasized (in either the apportionment footnote itself or in subsequent conversations with DOD) that the apportionment would permit DOD to engage in all of the activities short of actual obligation that were necessary to ensure that, following a policy decision, DOD would not be precluded from obligating the USAI funds prior to their expiration on September 30, 2019. In fact, at no point during the pause in obligations did DOD OGC indicate to OMB that, as a matter of law, the apportionments would prevent DOD from being able to obligate the funds before the end of the fiscal year. Based on data OMB received from DOD in August, DOD did not plan to obligate most of the USAI funds until September, and much of that amount in mid-to-late September. OMB removed the footnote from the USAI funds following a policy decision on September 12, 2019.³

Additionally, in FY 2019, \$ 5.9 billion was provided to State in a lump sum appropriation for the Foreign Military Financing Program (FMF) account (TAFS 11-1082/2019).⁴ Within this total, \$115 million was earmarked for Ukraine in the conference report for the State and Foreign

² The pause in obligations was extended on August 6, 15, 20, 27, and 31; and on September 5, 6, and 10, 2019. The third sentence in the original footnote was deleted beginning with the August 20 footnote. See Attachment.

³ Approximately 84% of the USAI funds were obligated at the end of FY 2019. Based on data provided by DOD, the adjusted FY 2018 obligations for USAI are currently at 83%. In other words, of the \$200 million appropriated for USAI that year, \$34 million was never spent. With respect to the last year of the previous Administration, current data for FY 2016 shows that the adjusted obligations for that year are at 79%, meaning that, of the \$231 million appropriated for USAI, more than \$43 million were never spent. The FY 2020 continuing resolution (CR) rescinded and reappropriated approximately \$35 million in USAI funds at the end of FY 2019. Continuing Appropriations Act, 2020, and Health Extenders Act of 2019, Pub. L. No. 116-59, div. A, § 124, 133 Stat. 1093, 1098 (2019). OMB understands that, of the amounts reappropriated on September 27, 2019, approximately \$20 million remains unobligated as of November 29, 2019—a period of time from the reappropriation that is more than 10 days longer than the period of the hold.

⁴ That appropriation provided, in relevant part:

For necessary expenses for grants to enable the President to carry out the provisions of section 23 of the Arms Export Control Act, \$5,962,241,000: *Provided*, That to expedite the provision of assistance to foreign countries and international organizations, the Secretary of State, following consultation with the Committees on Appropriations and subject to the regular notification procedures of such Committees, may use the funds appropriated under this heading to procure defense articles and services to enhance the capacity of foreign security forces: ... *Provided further*, That funds made available under this heading shall be obligated upon apportionment in accordance with paragraph (5)(C) of section 1501(a) of title 31, United States Code.

Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. F, 133 Stat. 13, 288-89 (2019).

Operations appropriations bill. FMF funds are obligated upon apportionment, consistent with the proviso under the FMF heading in the annual appropriations acts providing that “funds made available under this heading shall be obligated upon apportionment in accordance with paragraph (5)(C) of section 1501(a) of title 31, United States Code.” However, the funding cannot be obligated and, therefore, cannot be apportioned until after the statutory Congressional Notification (CN) period of 15 days is complete. The CN for this \$115 million was submitted to Congress on September 11, 2019, and the funds were apportioned and obligated on September 30, 2019. The timing of the obligation of conference report language earmarked Ukraine FY 2019 funding was similar to the timing of the earmarked FY 2018 Ukraine funding, which was obligated on September 28, 2018.

In FY 2018, \$0.46 billion was appropriated to State in the FMF Overseas Contingency Operations account (TAFS 11-1082 2018/2019).⁵ Within this amount, during the fourth quarter of FY 2019, State decided to allocate \$26.5 million of this funding to Ukraine. Note that an August 3, 2019, letter apportionment made this \$26.5 million in funding temporarily unavailable until OMB received an accounting of the unobligated balances in the fifteen accounts affected by that letter apportionment. This funding was made available in an August 9, 2019, letter apportionment, but each account was made subject to an even daily rate for the remainder of the year. On August 29, 2019, a final letter apportionment made the remaining unobligated balances in the affected accounts subject to a weekly rate, instead of a daily rate, effective on September 1, 2019. The CN for the \$26.5 million in funding was submitted to Congress on September 11, 2019, and the funds were apportioned and obligated on September 27, 2019.

OMB’s Apportionment Authority

The President of the United States is required to “take Care that the Laws be faithfully executed.” U.S. Const. Art. II, Sec. 3. As part of carrying out this duty, the Executive branch must ensure that Federal agencies spend appropriated funds in an efficient and effective manner, consistent with the purpose for which the funds were appropriated.

OMB is charged by law to assist the President in carrying out this constitutional duty by apportioning funds to Executive branch agencies. When funds are appropriated by Congress, they are provided for particular purposes, for a specified time period, and in a specified amount. Consistent with 31 U.S.C. §§ 1512 and 1513,⁶ OMB is required to apportion funds appropriated for a definite period to ensure that they last for the entirety of the period for which they were appropriated by Congress, and to apportion funds appropriated for an indefinite period to achieve the most effective and economical use.⁷ Those same laws expressly provide OMB with the authority to apportion funds for any time period (*e.g.*, days, months, quarters) or purpose authorized by the appropriation.⁸

OMB apportions funds by time period in many different ways, in accordance with 31 U.S.C. § 1512(b). For apportionments of funds with a definite period of availability (*i.e.*, for

⁵ Consolidated Appropriations Act, 2018, Pub. L. No. 115-41, div. K, 132 Stat. 348, 970 (2018).

⁶ Under the Antideficiency Act, the President is required to apportion funds to agencies. 31 U.S.C. §§ 1512-13.

⁷ 31 U.S.C. § 1512(a).

⁸ *Id.*

funds that “expire”), OMB often spreads the funds across the period of availability, dividing the funds evenly by quarters, months, days, or other time periods. Accordingly, OMB, through its apportionment authority, routinely makes annual funds unavailable for obligation for parts of that particular fiscal year. In other cases, such funds are not apportioned equally across the period of availability, typically because the program in question does not require that funds be obligated in that manner. Many programs, for example, obligate funds seasonally (*e.g.*, based on weather patterns, school years, grant cycles, or other considerations). When funds are appropriated for multiple years (or indefinitely) it is not uncommon for OMB to apportion amounts as unavailable for more than a year, to comply with § 1512. In other words, it is inherent to OMB’s apportionment authority that not all appropriated funds must be immediately available for obligation. Pauses in obligational authority are necessary for proper stewardship of taxpayer funds.

OMB’s role in apportioning funds is in part to prevent agencies from exhausting appropriated funds prior to the expiration of the period of availability of such funds; however, that is not the extent of OMB’s apportionment authority. OMB has significant discretion in determining how and when funds are released to an agency.⁹ Often, in managing appropriations, OMB must briefly pause an agency’s legal ability to spend those funds for a number of reasons, including to ensure that the funds are being spent efficiently, that they are being spent in accordance with statutory directives, or to assess how or whether funds should be used for a particular activity. For decades, OMB has routinely used its apportionment authority to prevent funds from being used: (1) during certain time periods, (2) for certain programs and activities, or (3) without adequate assurances from Federal agencies that the funds will be used effectively, consistent with law, and in accordance with programmatic need.

During a continuing resolution (CR), for example, OMB restricts agency obligations to a “daily rate” provided as a lump sum based on the length and other terms of the CR.¹⁰ Depending on what OMB projects is the likely outcome of the next fiscal year’s appropriations for an account (based on reported House and Senate bills) OMB may further restrict an agency’s spending during a CR, so as not to impinge on Congress’s final funding prerogatives for that fiscal year.¹¹

⁹ 31 U.S.C. § 1512(b)(2) (“The official designated in section 1513 of this title to make apportionments shall apportion an appropriation under paragraph (1) of this subsection as the official considers appropriate.”).

¹⁰ See, *e.g.*, OMB Bulletin No. 19-04, *Apportionment of the Continuing Resolution(s) for Fiscal Year 2020* (September 30, 2019).

¹¹ *Id.* (“You or your RMO may determine that an amount for a TAFS should be less than the amount automatically apportioned to ensure that an agency does not impinge on the final funding prerogatives of the Congress. In these cases, an account-specific apportionment may also be required.”) OMB Bulletin No. 19-04 also excludes certain accounts from the automatic apportionment under the CR and requires agencies to seek an account-specific apportionment before they may obligate CR funds:

If either the House or Senate has reported or passed a bill that provides no funding for a TAFS at the time the CR is enacted or extended, this automatic apportionment does not apply to that account. Reported bills are those that have been filed by the full House or Senate Appropriations Committee for floor action. You may request that OMB provide an account-specific apportionment for such TAFS during the period of the CR (including any extensions thereof), if needed.

Additionally, OMB apportions carryover balances at the beginning of a fiscal year at zero dollars, and that apportionment remains in effect until the agency requests an account-specific apportionment for those funds and OMB makes a new apportionment. OMB Circular A-11 expressly provides that:

[w]hen budgetary resources remain available (unexpired) beyond the end of a fiscal year, [an agency] must submit a new apportionment request for the upcoming fiscal year.... Until [the agency] receive[s] an account-specific apportionment from OMB, the amount of carryover apportioned is zero dollars. In addition, apportioned anticipated or estimated resources are not available for obligation until the resources are realized.¹²

In other words, OMB may temporarily pause an agency's ability to incur obligations until the need for the obligation arises.

In fact, OMB regularly uses this apportionment authority to temporarily pause agency obligations to obtain additional information needed to determine the best possible use of the funds consistent with the law. Pausing before spending is a necessary part of program execution: before obligating appropriated funds, it is incumbent upon the Executive branch to understand how an agency intends to execute a program—and whether that option is the best use of those funds within the program authorization—before granting it the authority to spend taxpayer resources. Most commonly, OMB executes this action by placing a footnote on the apportionment that suspends obligations for a period pending receipt from an agency of a “spend plan” from an agency, or pending a policy determination, including an interagency process, on the most efficient and effective use of the funds consistent with the law.

Deferrals

OMB's exercise of its statutory authority, pursuant to 31 U.S.C. § 1512, to apportion funds to ensure that they are spent in accordance with statutory directives and last for the period of availability is different than a “deferral” under the Impoundment Control Act of 1974 (ICA), which requires that a President not “defer” funds without prior notice to Congress. “Deferral” of budget authority is defined as:

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law.¹³

Under the ICA, “[d]eferrals shall be permissible only:

Id.

¹² OMB Circular A-11, *Preparation, Submission, and Execution of the Budget*, § 120.57 (June 2019).

¹³ Congressional Budget and Impoundment Control Act of 1974 (ICA), Pub. L. No. 93-344, tit. X, § 1011(1) (2 U.S.C. § 682(1)).

- (1) to provide for contingencies;
 - (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or
 - (3) as specifically provided by law.
- No officer or employee of the United States may defer any budget authority for any other purpose.”¹⁴

In enacting the ICA’s deferral provisions it appears that Congress was primarily concerned with preventing so-called “policy” deferrals, in which the intent behind the deferral is to substitute Executive branch policies for those established in the statute.¹⁵ Under the ICA, the President may only defer funds to provide for contingencies or achieve savings, so long as such deferrals are consistent with statutory intent, and the President reports such deferrals to Congress. In other words, under the ICA the President may not defer funds simply because he disagrees with the policy underlying a statute (assuming that the statute could be executed consistent with the President’s constitutional authorities).

The definition of “deferral” under the ICA should be interpreted in a manner that is consistent with OMB’s independent statutory requirement under § 1512 to ensure that funds are, at a minimum, apportioned by:

- (A) months, calendar quarters, operating seasons, or other time periods;
- (B) activities, functions, projects, or objects; or
- (C) a combination of the ways referred to in clauses (A) and (B) of this paragraph.

This section also requires OMB to ensure that funds appropriated for a definite period are apportioned so as to avoid a deficiency appropriation and that funds appropriated for an indefinite period are apportioned to achieve the most efficient and economical use.¹⁶ In other words, OMB in many cases *must* apportion the appropriation in a manner that temporarily precludes some portion of the funds from being available for obligation—in some cases, for more than a year—as OMB “considers appropriate.”¹⁷

Both OMB and GAO have over the years read the two requirements—“deferrals” under the ICA and OMB’s statutory apportionment authority—in a manner that gives effect to both provisions of law. In so doing, both agencies have long concluded that, despite the apparent breadth of the definition of “deferral” under the ICA, there is necessarily a distinction between “deferrals”—which require the President to report to Congress pursuant to the ICA—and what have come to be known as “programmatic delays,” which do not.

¹⁴ ICA § 1013(b) (2 U.S.C. § 684(b)).

¹⁵ See H.R. REP. NO. 100-313at 67 (1987) (Conf. Rep.).

¹⁶ 31 U.S.C. § 1512(b).

¹⁷ *Id.* at § 1512(b)(2).

Programmatic Delays

Before continuing, it is important to clarify our terminology. “Policy deferrals” must be distinguished from “programmatic delays due to policy development.” Policy deferrals (which are not permitted by the ICA) occur when the intent behind withholding funds is *contrary* to the intent of the statute that provided the funds. By contrast, there is regularly a need for the Executive branch to conduct a process to determine the best policy for the efficient and effective use of funds *consistent with* the intent of the statute. This policy development process is a fundamental part of program implementation, and constitutes a type of programmatic delay. Similarly, a pause in spending to assess facts and ensure programmatic effectiveness is not a deferral of funds.

The ICA’s restrictions do not—and, logically, cannot—extend so far as to preclude OMB from performing its other statutorily required duty to ensure the effective management of funds through apportionments. GAO has long recognized this reality, stating:

There is also a distinction between deferrals, which must be reported, and ‘programmatic’ delays, which are not impoundments and are not reportable under the Impoundment Control Act. A programmatic delay is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency’s reasonable and good faith efforts to implement the program...Since intent is a relevant factor, the determination requires a case-by-case evaluation of the agency’s justification in light of all of the surrounding circumstances.¹⁸

As GAO notes, “programmatic delay” can take many forms, including conditions on the availability of funds not being met, contracting delays, time required to set up a program, delay due to pending issuance of necessary regulations, delay due to certain administrative determinations.¹⁹ Another form that programmatic delay may take is when the Executive branch needs time to develop or change policy. When the Executive branch is executing the laws, it is routinely necessary to reassess policy goals based on program effectiveness and other factors. Ensuring that there is time to conduct a meaningful process that results in successful policies (and that funds are not used in opposition to such policies in the meantime) often requires that obligations pause until that policy process is concluded.

GAO has recognized that policy considerations can equate to programmatic delay, concluding at one point that an agency’s failure to obligate funds due to its compliance with

¹⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-464SP, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2-50 (4th ed. 2016) (internal citations omitted). There are, of course, significant challenges presented by the ICA’s structure, which makes the “intent” of the President the relevant factor in determining whether an Executive action that delays obligations constitutes a deferral. Most obviously, as is clear from the experience of decades of litigants and legal scholars in other contexts who have attempted to discern Congressional intent from legislative text and history, determining a single “intent” of a large body composed of many individuals is an exceedingly complex and often impossible endeavor. When attempting to discern Executive intent, the task is made even more challenging by the fact that unearthing such “intent” often requires disclosing pre-decisional and deliberative information to the Legislative branch to persuade it that the Executive action was proper. Such a scenario is not appropriate under principles of constitutional separation of powers.

¹⁹ *Id.* at 2-50 to -51.

directives from Congressional committees not to spend funds constituted “programmatic delay” and not a “deferral.”²⁰ Appropriations Acts often require that agencies: (1) notify Congress in advance of obligating funds for particular purposes, and (2) wait a specified number of days prior to obligating such funds. This is sometimes referred to as the “statutory notice period.” Congress, however, has a history of insisting that the Executive branch withhold spending on certain programs or projects long beyond such statutory notice period, pending Congress’s often protracted review of an agency’s planned spending, or because a Congressional committee has placed a “hold” on such spending for its own purposes. The Executive branch, of course, is under no legal obligation to comply with such Congressional “holds” beyond the period specified in statute, following the Supreme Court’s decisions regarding the Constitutional doctrine of separation of powers in *Bowsher v. Synar*,²¹ and *INS v. Chadha*.²² Nevertheless, agencies are acutely aware of Congress’s power to control their funding, and therefore generally comply with Congressional directives.²³ When the agencies do, no one—certainly not their committees—accuses them of impounding funds.²⁴

In fiscal years 2017-2019 alone, OMB is aware of Congressional committees directing that billions of dollars of funds appropriated to State and the U.S. Agency for International Development (USAID) be withheld 10 days or more beyond the statutory notice period:

- In FY 2017, Congressional committee holds of 10 days or more beyond the statutory notice period affected more than \$6.7 billion in State and USAID funds. This included one hold of 321 days, one hold of 228 days, and three holds of more than 100 days past the statutory notice period. In total, there were at least 115 instances of Congressionally-directed holds in foreign aid funds in FY 2017 that extended 10 days or more past the statutory notice period.

²⁰ *Id.* See also B-221412 (Feb. 12, 1986). OMB’s position that programmatic delays, including programmatic delays that require the use of its apportionment authority, do not constitute deferrals is not new. That distinction was made in 2002. As a result, no President since that time has reported such actions as deferrals.

²¹ 478 U.S. 714 (1986).

²² 462 U.S. 919 (1983).

²³ As the Supreme Court has noted:

[A]n agency’s allocation of funds from a lump-sum appropriation requires “a complicated balancing of a number of factors which are peculiarly within its expertise”: whether its “resources are best spent” on one program or another; whether it “is likely to succeed” in fulfilling its statutory mandate; whether a particular program “best fits the agency’s overall policies”; and, “indeed, whether the agency has enough resources” to fund a program “at all.” ...Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes (though not, as we have seen, just in the legislative history). ...And, of course, we hardly need to note that an agency’s decision to ignore congressional expectations may expose it to grave political consequences.

Lincoln v. Vigil, 508 U.S. 182, 193 (1993) (internal citations omitted).

²⁴ OMB is aware of instances in which Members of Congress demanded that agencies withhold funds for months—and even years—beyond the period required by statute for reasons wholly unrelated to the purpose of the appropriation. OMB respectfully suggests that GAO take an interest in this practice, as well.

- In FY 2018, Congressional committee holds of 10 days or more beyond the statutory notice period affected more than \$3.5 billion in State and USAID funds. This included one hold of 201 days and four holds of more than 100 days past the statutory notice period. In total, there were at least 148 instances of Congressionally-directed holds in foreign aid funds in FY 2018 that extended 10 days or more past the statutory notice period.
- In FY 2019, Congressional committee holds of 10 days or more beyond the statutory notice period affected more than \$762 million in State and USAID funds. In total, there were at least 31 instances of Congressionally-directed holds in foreign aid funds in FY 2019 that extended 10 days or more past the statutory notice period.

If compliance with constitutionally non-binding directives from Congressional committees to “hold” funds is not a deferral, then certainly a delay in obligating funds arising from a Presidential direction that a policy process is necessary prior to making obligations cannot be. As stated above, it is the President’s constitutional role to faithfully execute the laws. The President has an obligation to ensure that funds are being spent prudently.

The pause in obligations of the Ukraine funds at issue here is an example of programmatic delay. By its terms, OMB’s apportionment footnote expressly provided that DOD could continue all necessary activities—short of the final action obligating the funds—until there was a policy decision on the use of the funds. The statutory language of the USAI and FMF appropriations provided the Executive branch broad discretion to determine how these particular funds should be spent. It was OMB’s understanding that a brief period was needed, prior to the funds expiring, to engage in a policy process regarding those funds. OMB took appropriate action, in light of a pending policy process, to ensure that funds were not obligated prematurely in a manner that could conflict with the President’s foreign policy.

In its letter, GAO also requested that OMB provide copies of certain apportionments for the security assistance funding for Ukraine. Those apportionments are attached.²⁵

The Executive branch has a duty to taxpayers to ensure that appropriations are spent wisely, in accordance with statutory requirements. As stewards of taxpayer funds, OMB always has and will continue to take seriously its legal duty to oversee agency spending, and apportion funds appropriately, in accordance with the ICA and all other applicable laws.

Sincerely,



Mark R. Paoletta
General Counsel

Attachment

²⁵ See Attachment.

Responses to
Questions for the Congressional Record
U.S. Senate Committee on the Budget
For the Nomination hearing of
the Honorable Derek T. Kan to be
Deputy Director, Office of Management and Budget

Questions for the Record

Sen. Cramer

Question

1. Mr. Kan, from 2013-2014 you served as a board member of the Environmental Defense Action Fund, an organization that is well known for its environmental activism. It goes without saying North Dakotans would not share most of the EDF's views. Here are a couple examples:

A. EDF was very supportive of President Obama's 2015 Clean Power Plan, which proved to be particularly harmful to North Dakota's energy sector. In 2015, following the publication of the Clean Power Plan, Fred Krupp, president of the Environmental Defense Fund stated opponents' of the Clean Power Plan "goal is to protect polluters instead of public health" This could not be further from the truth.

B. Similarly, EDF supported the Obama administration's disastrous WOTUS rule, which would have put roughly 85 percent of North Dakota's water under federal jurisdiction. They then submitted comments in opposition to the Trump Administration's repeal and rewrite of the rule.

C. Lastly, in 2013, while you were a board member for the EDF action fund, EDF's annual report stated "Growing corn comes at a significant cost" in reference to the impact of corn farming. Mr. Kan, in 2018, North Dakota's corn growers produced nearly 450 million bushels of corn for grain, in addition to another 2.5 million tons for silage. Our corn growers are a central part of our economy and culture. We are a farm state and proud of it.

Mr. Kan, positions like these rightfully raise an eyebrow in North Dakota. We want clean air and water, just like everyone else. The difference is, we currently enjoy both clean air and water in North Dakota without Washington DC dictating and micromanaging us. All three of the examples I mentioned are in clear contradiction of Trump administration policies. Should you be confirmed, you will play an integral part in writing and implementing administration policies. As a political appointee in the Trump Administration, how do you reconcile the stated positions of the Environmental Defense Action Fund and your time with them and their contradiction with the Trump administration policies?

Response

I fully support the Administration's policies, which promote economic growth, including agriculture production, and continue to provide clean air and water in North Dakota and across the United States. OMB has had point on the deregulatory agenda and, if confirmed, I will strongly support those efforts. Regarding EDF, I stepped down shortly after I joined the organization given certain differences.

Sen. Enzi

Question

1. The Bureau of Land Management submitted to OMB the "Non-Energy Solid Leasable Mineral Royalty Rate Reduction" as a proposed final rule on April 22. This rule is important to soda ash producers, who are suffering economically and facing layoffs, because it would provide the bureau with more authority to respond quickly to their needs, but it has faced delays since it was first proposed.

Can I have a commitment from you to see that this rule received fair and swift review at OMB?

Response

Yes, you have my commitment it will receive fair and swift review.

Sen. Grassley**Question**

1. The Department of Defense relies on more than 300 financial management systems, which is a major obstacle preventing a clean audit opinion.

According to some, the DOD has made progress in closing audit findings. But, DOD has spent time and money correcting problems in legacy systems that are planned for retirement, rather than on developing new, integrated systems.

In support of DOD consolidating financial systems, it would be useful to have OMB working with us in Congress to ensure that audit remediation efforts are not wasted on financial management systems that will soon be retired.

Mr. Kan, if confirmed, will you work with me to help ensure that we don't have wasteful efforts occurring at DOD to modify legacy systems that we know will obsolete in their attempts to consolidate their financial systems?

Response

Yes, OMB is committed to reducing wasteful spending and we continue to support DOD as it seeks to improve financial management systems and processes so that it can get a clean financial statement audit opinion for the Department as a whole. Reducing the number of legacy systems is critical to DOD's future success in achieving an unmodified opinion. An issue that has been identified is the need for DoD to develop a systems rationalization plan, which identifies systems and decommissioning dates.

Question

2. The recently enacted CARES Act is the largest relief package ever passed, with trillions of dollars of aid.

OMB issued an April memo to departments and agencies on implementation guidance for supplemental funding provided in response to COVID-19, including guidance on reporting uses of funds made available to departments and agencies in the CARES Act.

Included in the guidance are steps departments and agencies should take to prevent and detect waste, fraud, and abuse. Could you briefly outline what OMB's role will be in ensuring that the public is aware of how COVID-19 response funds are being used, while also ensuring that COVID-19 related work receives high priority?

Response

The Administration recognizes the importance of good stewardship over COVID-19 response funding, in particular the challenges Federal managers face when balancing their mission to provide COVID-19 assistance while also taking actions to safeguard taxpayer dollars.

OMB issued Memorandum M-20-21 on April 10 to provide agencies with guidance on reporting on COVID-19 spending consistent with sections 15010 and 15011 of the CARES Act. On June 30, OMB published a document of Frequently Asked Questions related to M-20-21 on the Chief Financial Officers Council website providing additional information. The FAQs are available at https://www.cfo.gov/wp-content/uploads/2020/06/M-20-21_FAQ_06232020.pdf.

In a memorandum issued on June 17, 2020 titled Risk-Based Financial Audits and Reporting Activities in Response to COVID-19, OMB expanded on M-20-21 and reiterated the importance of leveraging existing risk-based frameworks to stress the importance of working with the Inspectors General community to assess risks associated with meeting established reporting dates and improper payments. OMB has consistently reminded Federal agencies of their responsibility for ensuring compliance with applicable laws and regulations as noted in Circular No. A-123 Management's Responsibility for Enterprise Risk Management and Internal Control which implements the GAO's Federal Standards for Internal Control, also known as the Green Book, as well as the GAO Framework for Managing Fraud Risk. Additionally, A-123, Appendix A, Management of Reporting and Data Integrity Risk directs agencies to integrate efforts to achieve all reporting objectives, including COVID-19 spending. Additionally, OMB is in continuous coordination with CIGIE and the greater IG community whom have been provided significant resources in the CARES Act to root out fraud, waste and abuse.

Question

3. I've heard from some that they believe that the net operating loss, or NOL, provisions that were included in the CARES Act were somehow slipped in at the last minute for nefarious purposes.

But that just isn't the case. They were included in the original bill introduced by Majority Leader McConnell on March 19 and were part of bipartisan discussions on the legislation that followed. Those discussions, and the resulting legislation that included the NOL provisions, led up to the Senate's passage of the bill on March 25, by a vote of 96-0.

The NOL provisions were included first and only to provide a tool for businesses to access liquidity to keep the doors open and employees on payroll in the face of stay-at-home and shut-down orders.

Allowing businesses to carry back NOLs by five years is a well-tested, anti-recessionary policy that Congress used many times in the past. For example, in 2009, after the financial crisis, it was enacted when Democrats controlled both houses of Congress as well as the presidency.

Given what you know, did the administration view the NOL provisions as anything other than an important option for businesses to access liquidity to keep the doors open and employees on payroll in the face of stay-at-home and shut-down orders?

Response

The Administration supported the NOL provision as an important provision to provide liquidity to businesses and allow them to stay in business as they weather the coronavirus crisis. This provision is a conventional tool during economic downturns and is fashioned off of previous bipartisan legislation, including the Jobs Creation and Worker Assistance Act of 2002 and the American Recovery and Reinvestment Act of 2009.

Question

4. Monitoring the coronavirus pandemic requires reliable data on cases, death rates, and the like. The Centers for Disease Control and Prevention—or, CDC—produces a lot of useful data, but there have been some controversies over some of their measures—some of them political. That's not to blame the CDC necessarily. The CDC has to sometimes rely on data from states, and for some data there may not be consistency across the states.

Mr. Kan, I wonder if you could comment on whether OMB works with the CDC to help ensure that we get the most consistent, accurate, and understandable data possible for tracking the pandemic.

Response

OMB provides agency oversight for information quality under various statutes, including the Information Quality Act, the Paperwork Reduction Act, and the Evidence-Based Policy Making Act. I do not know the specifics regarding OMB's work with CDC regarding data about cases, deaths and the like. OMB has also deployed U.S. Digital Service team members to better understand how data is collected at the local level and some of the challenges that exist.

Sen. Kennedy**Question**

1.1. A GAO report from March estimated \$175 billion in improper payments for fiscal year 2019. Last year, the Social Security Administration Advisory Board recommended that death data management should shift to Treasury's Do Not Pay Program. Have you read this proposal and would you support shifting this data management to Treasury?

Response

The improper payment cited by GAO—\$175 billion in improper payments—includes all improper payments including administrative errors where the payments went to the right person at the right time in the right amount but was missing a signature. Of this amount, an estimated \$74 billion was attributed to monetary loss to the government and OMB is dedicated to working on this problem under the President's Management Agenda Cross Agency Priority Goal #9, Getting Payments Right.

OMB is supportive of proposed efforts that provide Do Not Pay (DNP) access to the Full File of Death Information (FFDI). OMB plans to continue discussions among OMB, SSA, and Treasury to explore the appropriate administration and use of the FFDI.

Question

1.2. Can you share with me OMB's recommended actions to improve "the quality, accuracy and timeliness of death data maintained by the Social Security Administration" that will be part of the death report to Congress under the Payment Integrity Information act?

Response

Yes, we can share our response. The report recommends Congress mandate states use the Electronic Death Reporting (EDR) system which will expedite the states reporting of death information to the Social Security Administration. Secondly, providing DNP access to the Full File of Death Information to match against all federal programs would help to prevent improper payments government-wide.

Question

1.3. Economic impact rebates went out quickly this spring. Unfortunately, there are numerous examples of the deceased - sometimes long deceased - receiving payments. What is OMB's plan to ensure these improper payments are returned to the Treasury in a timely fashion?

Response

While OMB has a limited role in recovering these payments, the Office of Federal Financial Management is working with Treasury in addressing this issue.

Question

2. In past fisheries disasters, OMB played a key role in approving State Spend plans that are submitted to NOAA. OMB was often a roadblock for states that wish to provide direct payments to affected parties. We received a response from Acting Director Vought to a similar question about direct payments indicating direct payments are authorized, but Louisiana is working on its spend plan for disaster funds. Would you support making direct payments to Louisiana fishers who were harmed during the Bonnet-Carre Fishery Disaster if Louisiana requests it as part of the state's spend plan?

Response

As you note, Louisiana is currently in the process of developing its spend plan for the Bonnet Carre fishery disaster assistance. Direct payments are an authorized use of NOAA's fishery disaster assistance funds. OMB looks forward to reviewing the spend plan.

Question

3. The fiscal response to coronavirus added approximately \$3.5 trillion to the national debt this year. The president's budget for fiscal year 2021 aims to save \$4.4 trillion- unfortunately, that savings would be realized over 15 years. What is OMB doing right now to ensure continued fiscal responsibility in the face of this excessive spending?

Response

The 2021 President's Budget would reduce spending by \$4.4 trillion over 10 years, and similar savings were achieved in each of President Trump's budgets. Under the 2021 Budget baseline, these savings were projected to eliminate the deficit in 15 years.

The fiscal crisis facing the country is only more dire now. I urge the Congress to act on the \$4.4 trillion in spending reductions included in the President's Budget, and OMB looks forward to working with the Congress to achieve these savings. At the same time, it is important for the Executive Branch to take steps to show fiscal restraint under current law. The Administration's Executive Order on Administrative Pay-As-You-Go (Administrative PAYGO), released last October, is an important new tool that OMB is using to ensure that executive branch agencies display fiscal restraint in operating their programs.

Sen. Sanders**Question**

1. Mr. Kan, President Trump's most recent budget includes a \$500 billion cut to Medicare. Before this hearing, you answered a written question from me about this, saying that it wasn't actually a cut because "The FY21 Budget Request shows Medicare spending growing each and every year."

Mr. Kan, you've worked for OMB previously. You were a senior staffer for Sen. McConnell. You were an Undersecretary of Transportation. In federal budgeting, we budget against a baseline. A proposal to spend less next year than what is required by law, or less than what it would take to provide the same type of service to those eligible for it, represents a cut. It is well established practice to factor in inflation, or population growth, or the growing expenses of health care beyond regular inflation when making spending projections based on current law.

Again, in federal budgeting, we measure against a baseline. And compared to the baseline, the Trump Budget for FY21 cuts Medicare by hundreds of billions of dollars, does it not?

Response

The President's Budget preserves and enhances Medicare benefits. It does not cut Medicare. Under the President's Budget, Medicare spending would grow an average of roughly 6 percent per year. The Budget's Medicare proposals address waste, fraud and abuse in the program; expand access to care; and strengthen Medicare's fiscal sustainability by paying for care more efficiently and enhancing choice and competition. This helps beneficiaries who rely on the program by preserving and enhancing benefits, and it helps taxpayers who help sustain the program. The President's proposed Budget extends Medicare's solvency and supports the President's promise to protect the program.

Regarding the baseline, as you know, the budget baseline is a projection of the budgetary resources, outlays, and receipts for mandatory programs and governmental receipts based generally on current law, and a projection of the current year (CY) levels of budgetary resources, outlays, and receipts into the outyears for discretionary programs. The baseline is complex and at times contentious. Relative to the baseline, reductions in Medicare are primarily related to eliminating waste, fraud, and abuse.

Question

2. New studies are showing that if the federal government acted as swiftly as countries like Germany, South Korea, and Australia, 70 percent or more of the Americans that have been killed by the COVID-19 pandemic could have been saved.¹

On February 5, you gave a briefing to Members of Congress and said that the Administration had all the money it needed to stop the virus.² It wasn't until February 24 that the Administration sent

up its supplemental request – for only \$1.8 billion – along with a letter that stated “To this point, no agency has been inhibited in response efforts due to resources or authorities.”³

Why do you believe countries like Germany, South Korea and Australia have so many fewer coronavirus deaths than the United States?

Response

Before Congress appropriated any COVID-19 funding, the Administration moved quickly in January to allocate existing resources for COVID-19 response efforts. In early February, it identified additional resources that could be transferred to address this growing threat. The Administration requested supplemental resources to meet immediate needs of this crisis and has continued to work with Congress to provide new funding necessary to address this continually changing threat. The Federal government has been doing everything possible to respond to coronavirus and the availability of resources in no way hindered the response.

We are working together with state, local, tribal and territorial governments, public health officials, health care providers, researchers, private sector organizations and the public to execute a whole-of-America response to the COVID-19 pandemic to protect the health and safety of the American people.

Question

3. Mr. Kan, for the first time since at least the 1970s, OMB will not update its economic projections in its statutorily-required Mid-Session Review. While economic conditions are changing rapidly and no ten-year projection will be perfect, that is not an excuse for OMB to not fulfill its obligation. The Congressional Budget Office has already updated its projections twice – once in April and once again in May – and will put out 10-year projections in the near future.

Earlier this month, CBO produced an analysis that said the pandemic has lowered projected GDP by nearly \$16 trillion over the next 10 years.⁴

a) Mr. Kan, how can you justify OMB’s decision, in a time of such economic uncertainty and crisis, to not produce new economic projections this summer?

Response

It is precisely that economic volatility, coupled with the lead time required for the Executive Branch to produce the Midsession Review (MSR) document that led to the determination that this year’s MSR would not include an updated economic forecast. The lag between producing an economic forecast and releasing the MSR is nearly 2 months in a typical year, due to the bottom-up, program-by-program review that MSR requires by hundreds of analysts across dozens of agencies. Given the statutory deadline for the MSR, this would mean that we would have had to produce an economic forecast in the middle of perhaps the most volatile economic quarter in history.

Question

3.b. It appears that not updating your economic projections may violate the law that governs the delivery to Congress and the American people of the Mid-Session Review,⁵ which states that it “shall include... substantial changes in or reappraisals of estimates of expenditures and receipts.” How can OMB can legally fulfill this obligation without an economic forecast?

Response

This year’s MSR met the statutory requirements. There is no legal requirement to produce an economic forecast for the MSR. Given the economic volatility and the lead time required to produce an economic assumption forecast and associated baseline estimates, any forecast would be immediately out-of-date. This is not the first time MSR did not include an updated economic forecast. In 2017, the MSR did not reflect updated economic assumptions given the short window between the Budget and MSR release that year.

Question

4. Mr. Kan, it has been reported that the U.S. government has spent well over \$2 billion to develop a coronavirus vaccine. I support that expenditure. But what I want to know is after the taxpayers have funded the research for that vaccine, can you assure the American people that once an effective coronavirus vaccine is approved by the FDA, it will be made available to everyone, not just the “vulnerable,” for free?

Response

The Administration is committed to making medical countermeasures affordable for the American people. That is why, as a condition of receiving support from the Administration’s Operation Warp Speed, companies will provide to the U.S. government an allocation of countermeasures developed.

Sen. Van Hollen**Question**

1. In my prehearing questions, I asked you about an August 12, 2019 email sent on by OMB General Counsel Mark Paoletta to you, Russell Vought, and Michael Duffey about the OMB apportionment to hold security assistance to Ukraine. Mr. Paoletta's email stated, "Can we call you in 5, DoD is being extraordinarily difficult."¹

We also discussed the withholding of security assistance to Ukraine on a call prior to the hearing, during which you indicated that you received two emails about this while it was happening, with the above email presumably being one of those.

The August 12, 2019 email that you received from Mr. Paoletta was also the subject of media attention and press inquiries to OMB when it fully came to light on February 11, 2020, since it cast doubt on OMB's claim that, "at no point during the pause in obligations did DOD OGC indicate to OMB that, as a matter of law, the apportionments would prevent DOD from being able to obligate the funds before the end of the fiscal year."²

Given all of that, it was surprising that you claimed to not be familiar with that email during the hearing. The email is available in redacted form from American Oversight, which received it under a court order on January 22, 2020.³

Please answer the following questions:

- A) Did you take any action when you saw Mr. Paoletta's email that DOD was being extraordinarily difficult?
- B) Do you recall any thoughts you had upon receiving that email?
- C) Aside from the August 12 email in which Mr. Paoletta told you that, "DoD is being extraordinarily difficult," did you receive any other emails or other written or communications about the withholding of Ukraine security assistance? If so, please provide those documents. For any document not provided in full, please explain why you are not providing it.

Response

To the best of my knowledge, I did not take any action in response to this email. I do not recall my thoughts upon receiving this email. I have passed along your request to our Office of General Counsel.

Question

2. Please provide any emails, communications, notes, or other documents in OMB's possession that would substantiate why the Trump Administration withheld security assistance for Ukraine. For any document not provided, or provided in redacted form, please provide for each such document a brief description of the document, the date it was created, and the reason that OMB is refusing to provide the document.

Response

I have passed along your request to our Office of General Counsel.

Question

3. President Trump's most recent budget proposal, which you worked on, originally called for cutting the CDC budget. OMB Acting Director Russ Vought personally called for Congress to cut the CDC budget as recently as a congressional hearing on March 10, even as COVID-19 was spreading in the United States.

At the time of Mr. Vought's testimony on March 10, and prior to the budget amendment later sent by OMB to walk back the proposed CDC cuts for the next fiscal year, did you still support cutting the CDC budget?

Response

The FY 2021 Budget outlines a vision for putting the United States on a more sustainable fiscal path, which is a vision that I support. In order to achieve that goal, it is necessary for agencies to set priorities and, in some cases, propose reduced funding for certain activities in order to support priority areas. Accordingly, the President's Budget request for CDC prioritizes and requests substantial funding increases for priority areas, such as infectious disease and emergency preparedness activities.

Question

4. Notwithstanding the OMB budget amendment to walk back President Trump's proposed CDC cuts for next fiscal year, all four of President Trump's budgets have called for cutting the CDC budget in future years. In the long-term, do you still believe that CDC should have less funding than it did before the pandemic?

Response

I am committed to ensuring that CDC has all necessary funding to support the agency's core mission and Administration priorities. The Administration's amended FY 2021 request for CDC is higher than the FY 2020 Enacted level and requests substantial increases for infectious disease and emergency preparedness activities across the CDC. The request prioritizes support for the highest priority activities across CDC, including those focused on preparing and responding to infectious diseases and emergency preparedness. These are precisely the types of investments that are needed to combat serious health threats like COVID-19 in the future.

Sen. Whitehouse**Question**

1. The CARES Act included two provisions, Sections 2303 and 2304, which provide tax breaks for corporations and wealthy Americans by allowing them to use losses in certain years to avoid paying taxes in others. The Joint Committee on Taxation estimates these provisions will cost \$160 billion.

a. How do you justify the net operating loss tax provisions included in the CARES Act?

Response

The Administration supported the NOL provision as an important provision to provide liquidity to businesses and allow them to stay in business as they weather the coronavirus crisis. This provision is a conventional tool during economic downturns and is fashioned off of previous bipartisan legislation, including the Jobs Creation and Worker Assistance Act of 2002 and the American Recovery and Reinvestment Act of 2009.

Question

1. b. Wouldn't that money be better spent helping families struggling to get through this difficult time?

Response

The CARES Act provides hundreds of billions of dollars in recovery rebates to help struggling families and boost the economy. In addition, individuals and families are supported through hundreds of billions of dollars in expanded unemployment insurance and other assistance. The NOL provision, while comparatively small, is one of several important CARES Act provisions that support businesses during this crisis.

Question

1. c. Did you or anyone else at the Office of Management and Budget have any input into the inclusion of Sections 2303 and 2304 in the CARES Act?

Response

Not to my knowledge. These provisions were included in the original bill included by Majority Leader McConnell on March 19, 2020 (S. 3548) and were part of the bipartisan discussion that led to the final bill.

Question

1.d. Were any executive branch officials involved in the inclusion of sections 2303 and 2304 in the CARES Act?

Response

These provisions were included in the original bill introduced by Majority Leader McConnell on March 19, 2020 (S. 3548) and were part of the bipartisan discussions that led to the final bill.

Question

1.e. Will any executive branch officials or their family members directly benefit from sections 2303 or 2304 of the CARES Act?

Response

I do not know because we have not performed that analysis.

Question

2. A report by insurers suggests that should we fail to limit our carbon emissions, losses from extreme weather events and sea level rise will more than double over the next 30 years. In 2017, the federal government spent over \$140 billion in disaster relief due to hurricanes and wildfires, types of disasters that scientists agree have been made worse by rising temperatures.

a. Do you believe it is economically sustainable to have to spend hundreds of billions of dollars per year on disaster relief?

Response

When Americans are faced with devastating natural disasters, we respond with the necessary resources to assist them. This often comes with a hefty price tag and can total in the billions – especially when we have multiple weather events in the same season. As the President has demonstrated time and again, however, this Administration will always help Americans when disaster strikes. At the same time, a comprehensive examination of all Federal disaster relief and recovery programs is urgently needed to consider how the Nation can best (1) speed up recovery and improve long-term outcomes for individuals and communities, (2) balance stakeholder incentives with responsibilities for creating and assuming risk, and (3) reduce costs to the taxpayers.

Question

3. Freddie Mac and many others are warning of a coastal property crash due to rising sea levels. The Bank of England and many economists are warning of a carbon bubble resulting from stranded fossil fuel assets as the global economy transitions to renewable energy. Both of these economic risks could result in total losses equal to or greater than the 2008 financial crisis, which of course had a devastating impact on the economy, on individual Americans who lost their jobs and homes, and on the federal budget.

a. Given these risks, please explain the administration's rationale for weakening rules and policies that had been in place to combat climate change.

Response

The Administration prefers innovation over regulation wherever possible. It is the policy of this government to eliminate regulatory barriers that are unlawful, unnecessarily burdensome, or that pick winners and losers among energy technologies. The policies that our agencies have put in place are consistent with that thinking and consistent with our obligations under the law.

Question

4. There have been reports that EPA political appointees have failed to provide OIRA with comments from agency career officials regarding rulemakings under the Clean Air Act. The CAA requires such agency comments to be provided to OIRA and made public as part of the rulemaking docket.

a. What steps will you take to ensure that OIRA is supplied with all agency comments as it reviews relevant rulemakings?

Response

EPA manages compliance with its docketing requirements under the Clean Air Act. I would refer you to EPA's Office of General Counsel for any further information.

Question

5. Medicare's hospital wage index is used to adjust Medicare reimbursement for differences in hospital labor costs across geographic areas. The BBA of 1997 established the Medicare wage index "rural floor." This policy requires that the wage index for hospitals in urban areas cannot be less than that state's rural wage index. Because Rhode Island does not have any rural hospitals, there is no rural floor to protect our hospitals against declines in the wage index. To address these concerns, in FY2005, CMS finalized the "imputed" rural floor, which established an alternate methodology for calculating a wage-index floor in all-urban states. The imputed rural floor policy was intended to be temporary; the Obama Administration renewed it annually but the policy was suddenly ended by CMS Administrator Seema Verma on October 1, 2018. At the time, CMS claimed it was working on broader reforms to the wage index. According to the Hospital Association of Rhode Island, this change reduced the Medicare reimbursement for nine Rhode Island hospitals by approximately \$28.6 million in FY19.

President Trump's FY21 Budget offered some policy suggestions, which would require a statutory change, to reform and bring equity to the wage index. This proposal is CMS' first attempt to correct a broken wage index since Administrator Verma removed the imputed rural floor in 2018. These policy suggestions were, however, budget neutral.

- a. By keeping this proposed policy budget neutral, are you concerned that these changes will result in the creation of additional winners and losers?
- b. Are there guardrails Congress could put in place to prevent this?
- c. What are the goals in proposing these changes to the wage index, and what would represent a successful demonstration outcome for HHS?

Response

The Administration's FY21 hospital wage index budget proposal comprehensively reforms this payment adjustment and mitigates disparities that persist in the current system. The proposed policy sets up a statutory demonstration in which HHS can construct a new hospital wage index based on more accurate wage data in a way that the policy can be tested and evaluated at a state-level. We believe that statutory demonstrations should be at least budget neutral, to preserve Medicare solvency and use taxpayer dollars efficiently and effectively. The demonstration would allow us to understand how best to reimburse hospitals for labor costs accurately and equitably.

Question

6. Rhode Island hospitals need relief now, especially as they face increased fiscal pressure as a result of the COVID-19 pandemic. The proposed changes in the FY21 budget don't include much detail and would require a statutory change.

- a. Will you commit to working through CMS' current regulatory authority to reinstate the imputed rural floor to provide immediate relief to Rhode Island hospitals while we work towards comprehensive hospital payment reform?

Response

The imputed rural floor policy expired in FY 2019 and was not renewed due to extensive feedback that the policy, along with many other wage index exceptions, was exacerbating payment disparities, particularly in rural States with high-need hospitals. The Administration's FY21 hospital wage index budget proposal would provide greater flexibility to implement necessary reforms to achieve equity in these payment adjustments. Current statutory requirements limits CMS' ability to sufficiently address concerns raised by all hospitals throughout the country. I am committed to working with you, other Members, and CMS to build evidence to reform the wage index in a fair way that helps not only support hospitals' immediate relief issues, but mitigate longer term funding issues.

Senator Wyden**Question**

You are a member of the COVID Task Force. President Trump has said¹ that if there is less testing for COVID there will be fewer cases.

Do you agree with President Trump that less COVID testing results in fewer cases, yes or no? (I am not looking for a response that cites statements made by other members of the President's COVID Task Force – this question is solely about whether you, as a task force member, agree with the President's widely publicized statement on this topic).

Response

On May 24th, the Department of Health and Human Services (HHS) delivered a COVID-19 strategic testing plan to Congress, fulfilling the requirement outlined in the Paycheck Protection Program and Health Care Enhancement Act, signed into law on April 24th. The plan outlines how HHS increased domestic testing capacity across the United States and provides additional guidance and information about diagnostic technologies, platforms and inventory that states, territories and tribes can utilize to develop flexible, adaptable, and robust COVID-19 testing plans.

Yes, I agree that less testing may result in fewer confirmed cases given a fixed positivity rate. However, as we have scaled testing, we have seen an increasing testing rate in some areas and a declining testing rate in others. That is, testing does not appear to be correlated to the positivity rate. The public experts indicate increased testing is helpful to better understand where the virus is spread.

Since the strategic plan was published, HHS has distributed \$11 billion in support to states, territories, and tribes to support implementation of jurisdictional testing goals as well as a broad array of activities associated with testing. Jurisdictional testing plans are required to address testing for vulnerable populations, for example. The Administration is now reviewing testing plans from each state, territory, and major city public health unit, as a requirement of \$10.25 billion in cooperative agreement funding distributed by the CDC and will continue to provide states, territories, and localities with technical assistance. In addition, HHS, working with FEMA, has greatly increased the number of testing supplies available nationally so that jurisdictions can help realize their testing goals. Through the efforts of the Administration, the United States has developed a multilayered, multifaceted approach to testing that can provide the right test to the right person at the right time.

Question

On February 5, 2020, you told Senators during a COVID briefing, that you felt the Trump Administration had all the resources it needed to fight the pandemic.²

Since January, over 122,000 Americans and counting have died from the coronavirus. The Trump Administration asked for not even \$2 billion in new money initially. Congress then stepped in with nearly \$8 billion, and then another \$2 trillion or more in economic aid through three and one-half COVID relief bills.

Would you like to revise your comments to Senators from February 5, 2020, in light of the enormous human toll in the U.S., and the significant but lagging budgetary resources that have been committed to fighting the spread of the virus?

Response

On February 5, there were 11 confirmed cases of the Coronavirus in the entire country. At the time, the Administration had billions of dollars in unobligated funds for pandemic response; these funds were in accounts across multiple agencies including HHS and CDC. As cases grew in the United States, the Administration transmitted a supplemental funding request on February 24, 2020. The Administration took decisive action given the information available at the time. This also includes instituting travel bans to slow the spread, bringing home and safely quarantining 1,000 Americans from Wuhan, scaling testing and hospital supplies including ventilators and personal protective equipment, and working closely with all Governors around the country.

¹ The Hill, "Trump: 'With smaller testing we would show fewer cases'", June 23, 2020. Accessible at: <https://thehill.com/homenews/administration/504026-trump-with-smaller-testing-we-would-show-fewer-cases>

² New York Times, "He Could Have Seen What Was Coming: Behind Trump's Failure on the Virus," April 11, 2020 (updated May 4, 2020). Accessible at: <https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html>

**EXECUTIVE BUSINESS MEETING TO CON-
SIDER THE NOMINATION OF THE HONOR-
ABLE DEREK T. KAN, OF CALIFORNIA, TO
BE DEPUTY DIRECTOR OF THE OFFICE OF
MANAGEMENT AND BUDGET**

TUESDAY, JULY 21, 2020

U.S. SENATE,
COMMITTEE ON THE BUDGET,
Washington, DC.

The Committee met, pursuant to notice, at 12:08 p.m., in Room SR-301, Russell Senate Office Building, Honorable Michael B. Enzi, Chairman of the Committee, presiding.

Present: Senators Enzi, Grassley, Crapo, Graham, Toomey, Johnson, Perdue, Braun, Scott, Kennedy, and Kaine.

Staff Present: Doug Dziak, Majority Staff Director; and Warren Gunnels, Minority Staff Director.

OPENING STATEMENT OF CHAIRMAN MICHAEL B. ENZI

Chairman ENZI. Good afternoon. This meeting of the Senate Budget Committee will come to order.

Today we are meeting to vote on the nomination of Derek Kan to serve as Deputy Director of the Office of Management and Budget.

It is Committee practice and precedent to allow for statements from the Chair and Ranking Member. I intend to support Mr. Kan's nomination. He has the necessary experience, both in and out of government, and I am glad he is willing to serve in this important role.

I hope my colleagues will also support this nomination.

Unless Senator Sanders has something to add, and recognizing that members have busy schedules and other votes, we will move directly to a vote.

Committee members may submit statements for the record.

I would note, for the record, that a quorum is present and unless there is objection. . . .

[No response.]

Chairman ENZI. Hearing none, the clerk will call the roll.

The CLERK. Senator Grassley.

Senator GRASSLEY. Aye.

The CLERK. Senator Crapo.

Senator CRAPO. Aye.

The CLERK. Senator Graham.

Senator GRAHAM. Aye.

The CLERK. Senator Toomey.
 Senator TOOMEY. Aye.
 The CLERK. Senator Johnson.
 Senator JOHNSON. Aye.
 The CLERK. Senator Perdue.
 Senator PERDUE. Aye.
 The CLERK. Senator Braun.
 Senator BRAUN. Aye.
 The CLERK. Senator Scott.
 Senator SCOTT. Aye.
 The CLERK. Senator Kennedy.
 Senator KENNEDY. Aye.
 The CLERK. Senator Cramer.
 Chairman ENZI. Aye, by proxy.
 The CLERK. Senator SANDERS.
 Senator Kaine. No, by proxy.
 The CLERK. Senator Murray.
 Senator Kaine. No, by proxy.
 The CLERK. Senator Wyden.
 Senator Kaine. No, by proxy.
 The CLERK. Senator Stabenow.
 Senator Kaine. No, by proxy.
 The CLERK. Senator Whitehouse.
 Senator Kaine. Yes, by proxy.
 The CLERK. Senator Warner.
 Senator Kaine. Yes, by proxy.
 The CLERK. Senator Merkley.
 Senator Kaine. No, by proxy.
 The CLERK. Senator Kaine.
 Senator Kaine. Yes.
 The CLERK. Senator Van Hollen.
 Senator Kaine. No, by proxy.
 The CLERK. Senator Harris.
 Senator Kaine. Yes, by proxy.
 The CLERK. Chairman Enzi.
 Chairman ENZI. Aye.
 The CLERK. Mr. Chairman, the yeas are 15, and the nays are 6.
 Chairman ENZI. The nomination is reported favorably.
 As a reminder to all Committee members, statements for the record are due to the Committee clerk by 12:00 p.m. tomorrow. E-mailed copies will be accepted, due to our current conditions.
 I ask for unanimous consent to enter into the record a letter of support for Mr. Kan's nomination from the American Trucking Association. Without objection, so ordered.
 [The letter follows:]
 Chairman ENZI. With no further business to come before the Committee, the hearing is adjourned.
 [Whereupon, at 12:10 p.m., the Committee was adjourned.]


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Chris Spear
President & Chief Executive Officer

July 20, 2020

The Honorable Mike Enzi
Chairman
Committee on the Budget
United States Senate
Washington, DC 20510

The Honorable Bernie Sanders
Ranking Member
Committee on the Budget
United States Senate
Washington, DC 20510

Dear Chairman Enzi and Ranking Member Sanders:

On behalf of the American Trucking Associations (ATA), I write to offer my full support for the nomination of Derek Kan to be Deputy Director of the Office of Management and Budget (OMB).

Mr. Kan's extensive experience in government, including his current and previous work for OMB, will be a significant asset to this new role and leadership responsibilities. Furthermore, his past service as a congressional staffer, and specifically as the Chief Economist for the Senate Republican Policy Committee, will provide invaluable experience and a wealth of knowledge to the Administration as it works on budget development, federal management, regulatory policy and collaboration with Congress on legislative clearance and coordination.

ATA had the good fortune over the last few years of working with Mr. Kan in his role as the Department of Transportation Undersecretary of Transportation for Policy. During that time, we were continuously impressed by his leadership, intellect, transparency and thoughtful collaboration with all stakeholders, to the benefit of transportation and highway safety. We are confident he will bring those same qualities to this new role at OMB.

ATA believes that Mr. Kan will make an excellent Deputy Director of OMB, and urges the Committee to swiftly report the nomination favorably to the full Senate for consideration.

Sincerely,

Chris Spear
President & CEO
The American Trucking Associations



Office: 703-838-1804 ★ Cell: 980-230-9115 ★ FAX: 703-838-1994 ★ cspear@trucking.org