Executive and Congressional Control Mechanisms over IRA and IIJA Funding
January 2025

January 28 Update:
*On **January 27**, OMB released Memo M-25-13 directing federal agencies to freeze all federal grants and loans that are affected by several executive orders. By **February 10**, agencies must submit a detailed analysis of projects suspended by the memo. While the memo indicates the pause of funding only applies "to the extent permissible" by law, it is unclear how agencies will interpret the memo's broad language, and we expect parties will challenge the freeze as violating the Impoundment Control Act and the terms of grant agreements.*

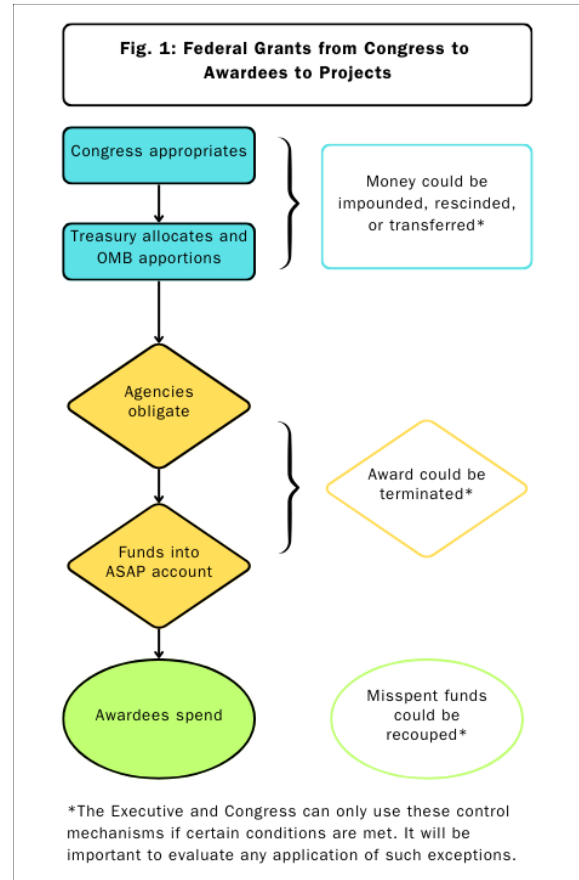
*This memo follows the **January 20** Executive Order (order) 14154 Unleashing American Energy, which directs federal agencies to "immediately pause the disbursement" of Inflation Reduction Act (IRA) and Infrastructure Investment and Jobs Act (IIJA) funds pending a comprehensive review of the funding processes, policies, and programs. The Office of Management and Budget (OMB) and the National Economic Council (NEC) clarified on **January 21** that the pause only applies to funds that are "implicated by" section 2 of the order, which lists several policy objectives including:*

- *Encouraging the domestic production and processing of fossil fuels and non-fuel minerals*
- *Protecting the domestic supply of abundant, reliable energy*
- *Reducing barriers to motor vehicle access, including a directive to "consider[] the elimination of unfair subsidies and other ill-conceived government-imposed market distortions that favor EVs"*
- *Ensuring "the American people's freedom to choose" gas-powered appliances and other goods.*

In the 2022 Inflation Reduction Act (IRA) and the 2021 Infrastructure Investment and Jobs Act (IIJA), Congress appropriated hundreds of billions of dollars for climate, clean energy, and environmental justice programs.[1] Under President Biden, federal agencies awarded $210.9 billion of IRA and IIJA grant funding,[2] and awardees are now implementing projects. In addition, the Biden administration finalized implementation of IRA clean energy tax credits designed to bolster clean energy development. The incoming administration campaigned on reducing government spending and President Trump announced plans to "terminate" "unspent" Inflation Reduction Act (IRA) funds; Project 2025 outlines plans to repeal, scale back, or redirect federal climate funding.[3]

[1] Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58 135 Stat. 429 (2021); Inflation Reduction Act of 2022, Pub. L. 117-169, 136 Stat. 1818 (2022).
[2] Atlas, Climate Portal Program, https://climateprogramportal.org/ (last visited Jan. 17, 2025).
[3] Donald Trump, Campaign Remarks at the Economic Club of New York at 21:14 (Sep. 5, 2024), https://www.c-span.org/program/campaign-2024/former-president-trump-remarks-at-the-economic-club-of-new-york/648558. Some sections of Project 2025 call for the IRA's repeal, while other sections call for remaining funding to go to states rather than nonprofits. https://static.project2025.org/2025_MandateForLeadership_CHAPTER-13.pdf.

Though the Trump administration's specific plans for the IRA and IIJA are not yet clear, the incoming administration and new Congress create risk for some of the IRA- and IIJA-funded climate programs.



The degree of risk to any program will depend on the type of funding (grant, loan, tax credit) and how far along the project is (see **Figure 1**). In this piece, we focus on competitive grant and tax programs and explain that the federal government loses authority to take back grant funds for policy reasons as money moves from Congress to the agency and on to the award winners. However, the executive maintains discretion to take back misused funds.

First, we look at risks to grant programs: in **Step 1**, we describe how the executive could impound unobligated funds or, with Congressional approval, could transfer or rescind funds; in **Step 2**, we explain how award agreements may include conditions under which the federal government may terminate the award; and in **Step 3**, we explain that the federal government may recoup misspent funds. Second, we consider potential risks to the IRA's clean energy tax credits in the Trump administration.

I. Competitive Grant Programs

Step 1: Applying Federal Appropriations Law to Unobligated Funding

Funding that Congress has appropriated but agencies have not yet obligated (committed to grant recipients[4]) faces the greatest risk of being redirected by the incoming administration or Congress for policy reasons.

The Appropriations Clause and the Spending Clause of the US Constitution give Congress the power to direct appropriations from the US Treasury and to direct spending for the general welfare.[5] The Supreme Court has read this authority to allow Congress to specify

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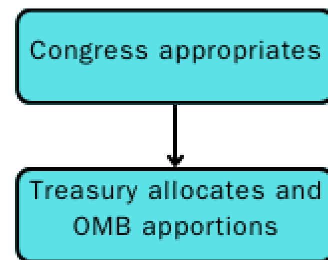
[4] GAO defines obligation as "A definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States. Payment may be made immediately or in the future." GAO, Federal Budget Glossary, page 70.

[5] Article I, Section 9, clause 7 reads "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The Supreme Court has interpreted this section to mean that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *See* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) and U.S. Const., art. I, § 9, cl. 7.

limitations on the use of appropriated funds.[6] The agency awarding the funding must follow the statutory limitations, though statutory language is often broad and gives the agency significant latitude to design the grant program and select winners.



Unobligated funding could be blocked by the executive branch or Congress under the following circumstances:

A. By the executive, without Congress

- *Impoundment.* When an agency fails to obligate funds by their statutory deadline, the funds expire. Presidents occasionally "delay[]...the obligation or expenditure of budget authority" which is called impoundment.[7]
    - Under the Congressional Budget and Impoundment Control Act of 1974 (ICA),[8] the president may temporarily withhold funds "only to provide for contingencies, to achieve savings made possible by changes in requirements or greater efficiency of operations, or as otherwise specifically provided by law."[9] Under this reading of the ICA, the president cannot defer funds past their expiration date or for pure policy reasons.[10]
    - The first Trump administration withheld Congressionally appropriated funds to Ukraine.[11] Although the administration ultimately ended up releasing those funds, the administration and conservative scholars argued that the ICA unconstitutionally constrains the president's authority under the Take Care Clause of Article II of the Constitution.
    - President Trump has said in campaign materials that he intends to use impoundment to cut wasteful spending.[12]

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[6] Subject to statutory interpretation and canons of construction upon judicial review. *See, e.g.,* Train v. City of New York, 420 U.S. 35, 40 (ruling 9-0 that President Nixon had to release all appropriated funds from the Federal Water Pollution Control Act).
[7] The Nixon Administration frequently impounded funds, and Congress responded by passing the Congressional Budget and Impoundment Control Act of 1974 (ICA). Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344 (codified at 2 U.S.C. §§ 681-688).
[8] Some policy experts have written that the ICA "does not create new restrictions on presidential authority, but rather specifies how a President can request that Congress change the law on an expedited basis to spend less than Congress initially provided." Richard Kogan, *FAQs on Impoundment,* Center on Budget and Policy Priorities (Nov. 21, 2024).
[9] GAO Red Book at 2-47, https://www.gao.gov/assets/2019-11/675709.pdf.
[10] In certain cases, GAO has has allowed the executive to withhold funds due to "programmatic delays," or circumstances in which "operational factors unavoidably impede the obligation of budget authority." *Id.*
[11] The GAO found that the Trump administration violated the ICA when it withheld from obligation funds appropriated to the Department of Defense (DOD) for security assistance to Ukraine. *Matter of: Off. of Mgmt. & Budget-Withholding of Ukraine Sec. Assistance*, B-331564 (Jan. 16, 2020).
[12] Donald Trump, *Agenda47: Using Impoundment to Cut Waste, Stop Inflation, and Crush the Deep State*, https://www.donaldjtrump.com/agenda47/agenda47-using-impoundment-to-cut-waste-stop-inflation-and-crush-the-deep-state (June 2023).

- *Reprogramming*. Without Congressional approval, agencies may reprogram funds, or move them from one object to another *within* a single appropriation account.[13] As DOE notes, where "unforeseen events or conditions" occur "reprogramming provides a mechanism to use funds within the same appropriations account for purposes other than the program, project, or activity specified in the explanatory statement accompanying the appropriations act."[14] The GAO has explained that unless restricted by statute, Congressional approval is not necessary for reprogramming because "the authority…is implicit in an agency's responsibility to manage its funds."[15]

B. With Congressional approval

- *Rescission or transfer*. With Congressional approval by a simple majority of both chambers, most unobligated funds can be transferred or rescinded.[16] Transfer occurs when funds are moved from one appropriation account to a different appropriation account.[17] Rescission occurs when Congress cancels a previously authorized budget authority.[18]

Under the Biden administration, EPA has obligated more than 75 percent of its grant funding from the IRA and the IIJA,[19] but remaining funds are at risk for impoundment, reprogramming, rescission, or transfer. Twenty-nine federal grant programs have open requests for proposals (RFPs) with due dates ranging from 2025-2027.[20] Open opportunities include DOE's $9 billion Home Energy Rebate Programs (due Jan. 31, 2025) and $775 million in state well-plugging funding. Notably, open RFPs suggest that *some* funding remains unobligated, but do not necessarily mean that *all* funding from the program is unobligated — for example, DOE's Home Energy Rebates program is making awards on a rolling basis and DOE has awarded more than half of the funds.[21]

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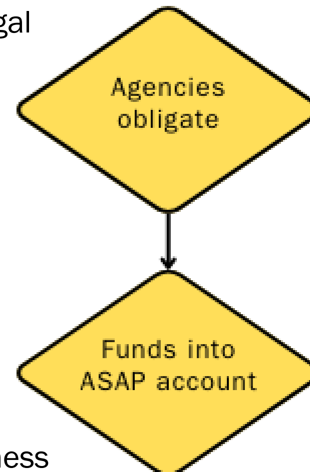
[13] GAO, Federal Budget Glossary, page 85.
[14] DOE Handbook on Financial Management, Chapter 3: Budget Execution and Accounting for Appropriations, 3-2 (May 2024), https://www.energy.gov/sites/default/files/2024-05/doe-financial-management-handbook-chapter-03-budget-execution-topics-and-accounting-for-appropriations_0.pdf.
[15] GAO Red Book at 2-24.
[16] GAO, Federal Budget Glossary, at 85, 95.
[17] GAO Red Book at 1-33.
[18] *Id.* At 2-24.
[19] EPA, *2024 Investing in America Report* at 12 (Dec. 2024), https://www.epa.gov/system/files/documents/2025-01/2024-iia-report_jan2025_508.pdf.
[20] In some cases, there may be statutory requirements that agencies award funding in multiple tranches across years. https://climateprogramportal.org/infrastructure-investment-jobs-act-dashboard/.
[21] DOE, Home Energy Rebates Progress Tracker, https://www.energy.gov/scep/home-energy-rebates-progress-tracker (last visited Jan. 15, 2025).

Step 2: Applying Award Agreement Terms and OMB Guidance to Obligated but Unspent Funds

When an agency signs a grant agreement, the agreement creates a legal obligation for the federal government to pay the grantee. Obligated funding is more insulated from executive policy decisions than unobligated funding, but still faces practical and legal risk from executive control in two ways:



A. Agencies approve the release of obligated funding.

- Once funding is obligated, agencies transfer the money into an Automated Standard Application for Payments (ASAP) account.[22]
- When an awardee is ready to spend grant money, they request funds in ASAP and generally receive the money within one business day.
- Money in ASAP remains in federal control until spent, and agencies can review ASAP requests before granting them.[23]
- Most agencies, including EPA and DOE, have policies that require awardees to promptly spend or return all funds. For example, EPA requires grantees to spend funds within five business days.[24]

B. Federal grant agreements often give the federal government significant latitude to terminate.

- *Termination.* The grant agreements contain the relevant conditions upon which the executive branch can terminate the award.[25] There are some federal guideposts for these conditions — OMB issues nonbinding guidance for agencies issuing federal financial assistance, which is published in Title II of the Code of Federal Register.[26]
    - OMB guidance states that the award agreement should include all termination provisions in its terms and conditions.[27]

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[22] Most agencies, including EPA and DOE, use this platform.

[23] Department of the Treasury Bureau of Fiscal Service, Requesting Payments on The Automated Standard Application for Payments (Dec. 18, 2024), https://fiscal.treasury.gov/files/asap/asap.gov-how-to-make-payment-requests.pdf.

[24] 2 C.F.R. § 305(b); EPA, *Grants Community Library of Frequently Asked Questions* (Nov. 25, 2024), https://www.epa.gov/grants/epa-grants-community-library-frequently-asked-questions-faq.

[25] Termination means "the ending of a Federal award, in whole or in part at any time prior to the planned end of period of performance." Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78,590 (Dec. 26, 2013).

[26] Guidance for Financial Assistance, 89 Fed. Reg. 30046 (Apr. 22, 2024).

[27] Termination for Convenience clauses (T4C) are common in government contracts and allow the federal government to unilaterally cancel for any reason. Note that Federal Acquisition Regulations (FAR), which provide detailed rules for T4C clauses, generally do not apply to federal grants. https://www.gao.gov/assets/gao-06-382sp.pdf, at 6-57 n. 6. The Government Accountability Office has cautioned against an expansive reading of T4C clauses, pointing out that "[t]he fact that the government may have the power to amend unilaterally a contract or agreement does not change the nature or scope of the obligation incurred at time of award. Were it otherwise, every government contract that permits the government to terminate the contract for the convenience of the government (48 C.F.R. § 49.502), or to

- OMB guidance also makes clear that the federal government may terminate the agreement:
  - "if the recipient ... fails to comply with the U.S. Constitution, Federal statutes, regulations or terms and conditions of the...award";
  - "with the consent of the recipient ...";
  - if the agency ... "determines that the...award will not accomplish the purposes for which the Federal award was made,"
  - if the award "no longer effectuates the program goals or agency priorities."[28]
- If an agency terminates the grant agreement, the awardee can be reimbursed for costs incurred before the termination but may not be reimbursed for costs incurred after the termination or anticipatory profits.[29]
- Funding determinations, including grant agreement terminations, are presumptively unreviewable by courts,[30] but awardees can and have overcome this presumption by showing that the statute or regulation provides "meaningful standards for a court to employ when reviewing agency decisions under the [Administrative Procedure Act] APA."[31]
  - Thus, if an awardee can show that an agency had meaningful standards and nonetheless acted in an arbitrary and capricious way, a court may set aside the termination.[32] If the federal government terminates a grant agreement for breach, the awardee can likely argue that the term in dispute creates a meaningful standard for the court to review.[33]

- *Deobligation.* The federal agency may deobligate unliquidated balances at the end of the award period.[34]
  - Deobligation could become relevant if the agency delays the approval and release of funds from ASAP.

Much of the funding from the IRA and IIJA falls into this category—obligated, but not yet spent by the awardee.

modify the terms of the contract at will (48 C.F.R. §§ 52.243-1, 243-2, 243-3), would not be an obligation of the government at time of award." https://www.gao.gov/assets/gao-06-382sp.pdf at 7-5.
[28] 89 Fed. Reg. 30168-69.
[29] *Id.*
[30] Pol'y & Rsch., LLC v. United States Dep't of Health & Hum. Servs., 313 F. Supp. 3d 62, 75 (D.D.C. 2018).
[31] *Id.* at 76.
[32] *Id.* at 84.
[33] *Id.* at 77.
[34] 89 Fed. Reg. 30169-70; GAO Red Book at 7-59, https://www.gao.gov/assets/gao-06-382sp.pdf.

Step 3: Applying the Law of Recoupment to Misspent Funds

Once awardees spend grant funds, the federal government may recoup funds if the federal agency determines they were misspent.

A. The federal agency may "claw back" or recoup improper payments.

- Grant agreements may include conditions by which the awardee can spend grant funds. If an awardee uses funds in a way other than what is specified by the statute, grant guidance, or grant agreement, this is called an improper payment.
  - To determine whether a payment is improper, a federal agency may review audit documents, conduct site visits, and review invoices or other financial documents.[35]
- Statutes generally give federal agencies considerable discretion to determine what constitutes an improper payment and how they will manage the recoupment process.[36]
  - Courts can review recoupment disputes.[37]
  - Some statutes may permit additional penalties to be enforced against winners who intentionally misspend funds.[38]

I. IRA Clean Energy Tax Credits

The IRA established clean energy, clean vehicle, home energy, alternative fuel, clean hydrogen, nuclear, and other climate-related tax credits that may be at risk in the Trump administration.[39] Some of these credits required Department of Treasury (Treasury) guidance to implement, and the Biden administration has finalized the guidance for these credits. Notably, the IRA included the Clean Energy Production Tax Credit (45Y)[40] and Clean Electricity Investment Credit (48E)[41], which replace existing credits that phased out at the end of 2024. These tax credits are designed to be "neutral and flexible between clean

[35] GAO, Testimony Before the Subcommittee on Government Operations and the Federal Workforce, Payment Integrity, Significant Improvements Are Needed to Address Improper Payments and Fraud (Sep. 2024).
[36] The Debt Collection Improvement Act and the Payment Integrity Act require federal agencies to recoup improper payments in most cases; meaning that agencies generally do not have authority to waive recoupment unless a more specific statute contains recoupment carveouts.
[37] In fact, the Fifth Circuit opined in 2024 that a *substantial threat* of recoupment may be sufficient to provide Article III standing. Texas v. Yellen, 105 F.4th 755 (June 25, 2024).
[38] *See* Eloise Pasachoff, Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off, 124 Yale L. J. 248 (Nov. 2014), https://www.yalelawjournal.org/article/agency-enforcement-of-spending-clause-statutes.
[39] IRS, Credits and deductions under the Inflation Reduction Act of 2022, https://www.irs.gov/credits-and-deductions-under-the-inflation-reduction-act-of-2022.
[40] 26 USC 45Y.
[41] 26 USC 48E.

electricity technologies."[42] In the IRA, Congress laid out the provisions of these clean energy tax credits, including credit rates, and directed the Secretary of the Treasury to develop rules to implement them.[43] In January 2025, Treasury released final rules implementing the tax credits after a notice-and-comment rulemaking process that included a request for comments, issuing a proposed rule, and a public comment period.

Even if the Trump administration does not alter guidance on IRS tax provisions, actions and statements by the administration may create uncertainty about the durability of the credits that discourages clean energy investment.

IRA tax credits face risks and uncertainties

The Trump administration may instruct Treasury to review and revise the implementing regulations or encourage Congress to repeal the credits. Regardless of how successful this effort is, it is likely to inject uncertainty for taxpayers seeking to use the credits, undercutting the credits' effectiveness as tools for investment in clean energy.

A. Treasury

The Trump administration may issue an executive order directing Treasury to review tax rules and identify opportunities to repeal or revise existing regulation, as it did in its first term.[44] This approach would apply to IRA tax credits for which Treasury has issued guidance. In these cases, Treasury will generally need to follow the same procedure for undoing or changing a regulation as it used for implementation. For the clean energy production and investment tax credits, for example, the agency would need to undertake a notice-and-comment rulemaking process, which can be lengthy. To review the steps required to roll back an existing final rule under the Administrative Procedure Act, see EELP's step-by-step guide to rulemaking. However, even if the IRS pauses or changes the implementing regulations, the obligation to provide these credits remains under the IRA unless Congress passes new legislation to repeal them.

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[42] The Clean Energy Production Tax Credit for facilities producing clean electricity establishes a base rate of 0.3 cents per kilowatt hour of electricity produced, with higher rates available for small facilities and bonuses for meeting domestic content requirements or being located in an energy community. The Clean Energy Investment Tax Credit is a credit for facilities that produce clean electricity and qualified energy storage technologies, with a rate starting at 6 percent, which can increase to 30% if facilities meet prevailing wage and apprenticeship requirements, with bonus credits for meeting domestic content requirements [will it be obvious to practitioners what domestic content requirements are?] or being located in an energy community. The credits apply to qualified facilities placed into service in 2025 or later and are available until 2032 or until certain greenhouse gas reduction targets are met, at which time they will be phased out over three years. IRS, Section 45Y Clean Electricity Production Credit and Section 48E Clean Electricity Investment Credit (90 FR 4006), https://www.federalregister.gov/documents/2025/01/15/2025-00196/section-45y-clean-electricity-production-credit-and-section-48e-clean-electricity-investment-credit; IRS, Clean Electricity Production Credit, https://www.irs.gov/credits-deductions/clean-electricity-production-credit; IRS, Clean Electricity Investment Credit, https://www.irs.gov/credits-deductions/clean-electricity-investment-credit

[43] Congress directed Treasury to write regulations to implement these tax credits. For the production tax credit, "Not later than January 1, 2025, the Secretary shall issue guidance regarding implementation of this section, including calculation of greenhouse gas emission rates for qualified facilities and determination of clean electricity production credits under this section." 26 USC 45Y(f). For the investment tax credit, "Not later than January 1, 2025, the Secretary shall issue guidance regarding implementation of this section." 26 USC 48E(i).

[44] *See, for example,* Executive Order 13789 (2017).

B. Congress

The Trump administration may encourage Republicans in Congress to repeal clean energy and climate-related provisions of the IRA, including tax credits. There are two main pathways for congressional rollback of the tax credits.

- **Congressional Review Act**: The Congressional Review Act (CRA) permits Congress to veto final rules prior to their enactment via a joint resolution signed by the president.[45] If Congress vetoes a rule with the CRA, the agency is prevented from promulgating a substantially similar rule.[46] The CRA only applies to rules promulgated within a specific 60-legislative day window.[47] This means that IRA tax credit rules finalized in August 2024 or later, including the clean energy production and investment credits, likely fall within the CRA lookback window. Congress has never used the CRA to disapprove a tax rule or other Treasury regulation, but it is possible that some try to apply the CRA to these rules. It will be important to track whether the Senate rules allow such an expansive application of this tool.
- **IRA Repeal**: Congress could repeal provisions of the IRA through a reconciliation bill, using this legislative vehicle to remove or change the credits. While there is much conjecture about what this type of bill could include, it is unclear what the scope of this approach will be and what is politically palatable given widespread benefits of IRA programs.

[45] 5 U.S.C. § 801(a)(3)(B).
[46] 5 U.S.C. § 801(b)(2).
[47] 5 U.S.C. §801(a)(3)(A).