

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

BRIAN L. SCHWALB
ATTORNEY GENERAL



April 18, 2024

OPINION OF THE ATTORNEY GENERAL

SUBJECT: The Legal Effect of the Chief Financial Officer’s Refusal to Certify the District’s Budget and the Chief Financial Officer’s Authority to Refuse to Release Funds

The Honorable Phil Mendelson
Chairman, Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Ave, N.W.
Washington, DC 20004

The Honorable Muriel Bowser
Mayor
John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Chairman Mendelson and Mayor Bowser:

This letter responds to your April 9, 2024 request for a formal opinion under D.C. Official Code § 1-301.81(a)(2) concerning the legal implications of the District’s Chief Financial Officer’s (“CFO’s”) potential decision to refuse to certify or to otherwise call into question a duly enacted District of Columbia Fiscal Year 2025 to Fiscal Year 2028 Budget and Financial Plan (“FY 25 Budget”) that does not allocate funds to replenish the District’s Fiscal Stabilization Reserve fund (“FSR”). You have also asked whether the CFO may refuse to release funds to satisfy District Fiscal Year 2025 obligations incurred pursuant to such a budget.

It is the opinion of the Office of Attorney General that, although the CFO is an integral part of budget process, the CFO’s failure to certify an otherwise valid budget would have no legal effect and, correspondingly, he has no authority to require that an otherwise valid budget replenish the FSR. The CFO would also exceed his authority if he refused to release funds that have been appropriated pursuant to a balanced budget.

I. Background

A. Factual Background

On Wednesday, April 3, 2024, the Mayor presented her proposed FY 25 Budget to the Council, in which \$217 million is allocated to replenish the FSR.¹ Included in the FY 25 Budget submission was a letter from the CFO “certify[ing]” it as “balanced.”² At the public briefing, Chairman Mendelson and the CFO engaged in a colloquy regarding the CFO’s insistence that the FY 25 Budget fully replenish the FSR.³ Chairman Mendelson queried whether the Council could eliminate any issues regarding the FSR by eliminating or repealing the authorizing statute. The CFO responded that it would not resolve the issue because the District needs the \$217 million for cash flow needs in fiscal years 2027 and 2028. According to the CFO, replenishing the FSR is a “certification issue,” and District and federal law authorize the CFO to ensure the District’s financial stability, including cash flow needs. The CFO further noted his belief that the Council would not have authority to spend funds without a budget certified by the CFO.

B. Legal Background

1. *The District’s Budgeting Process Prior to 1995*

Congress set out the roles of the Mayor and the Council in enacting the District’s budget in several provisions of the District of Columbia Home Rule Act of 1975 (“Home Rule Act”).⁴ Although Congress later made certain changes to the budgeting process, many Home Rule Act provisions have remained the same. The Home Rule Act requires the Mayor to “prepare and submit to the Council each year, and make available to the public, an annual budget for the District of Columbia government.”⁵ This budget must include the Mayor’s multi-year plan⁶ and multi-year capital improvement plan.⁷ After the Council receives the Mayor’s budget proposal, it must enact a final version of the budget within 70 days⁸ subject to the Mayor’s review and her signature or veto.⁹ Prior to 2012, the Mayor was responsible for submitting the entire budget to the President for transmission to Congress for its inclusion in the annual federal appropriations act.

The Home Rule Act also includes several provisions that require the District’s budget to be balanced. For example, the Mayor’s proposed budget “shall be prepared on the assumption that proposed expenditures resulting from financial transactions undertaken on either an obligation or cash outlay basis, for such fiscal year shall not exceed estimated resources from existing sources and proposed resources.”¹⁰ Further, the

¹ FY 2025 Proposed Budget and Financial Plan, at 82 (FY 25 Budget Book), <https://app.box.com/s/ix96hmpm6bcjnp1fdd629x24s2d16q5f>.

² *Id.* at 31.

³ *Public Briefing on the Mayor’s Fiscal Year 2025 Proposed Budget and Financial Plan Before the Comm. of the Whole, Council Period 25 (2024)*, 3:51-4:01, https://dc.granicus.com/MediaPlayer.php?view_id=2&clip_id=8794.

⁴ Approved December 24, 1973, Pub. L. No. 93-198, 87 Stat. 777 (codified as amended at D.C. Official Code § 1-204.01 *et seq.*).

⁵ D.C. Official Code § 1-204.42.

⁶ D.C. Official Code § 1-204.43.

⁷ D.C. Official Code § 1-204.44.

⁸ D.C. Official Code § 1-204.46.

⁹ D.C. Official Code § 1-204.04(e) and (f).

¹⁰ D.C. Official Code § 1-204.42.

Council is prohibited from “approv[ing] any budget which would result in expenditures being made by the District government, during any fiscal year, in excess of all resources which the Mayor estimates will be available from all funds available to the District for such fiscal year.”¹¹ And, once a budget is enacted, the Mayor cannot “forward to the President for submission to Congress a budget which is not balanced.”¹² Accordingly, the Home Rule Act requires the District to submit to Congress a balanced budget each fiscal year, defined as expenditures that do not exceed all available resources estimated to be available for that fiscal year.

2. *The District of Columbia Financial Responsibility and Management Assistance Act of 1995 and 2005 District of Columbia Omnibus Authorization Act*

Congress enacted the District of Columbia Financial Responsibility and Management Assistance Act of 1995 (“Financial Assistance Act”)¹³ when the District was in a severe financial crisis and had experienced several years of budget deficits and cash shortages. Congress’s goal in enacting the Financial Assistance Act was to both deal with this fiscal emergency and to put certain controls in place to ensure the “long-term financial, fiscal, and economic” health of the District.¹⁴

To address the then-existing fiscal crisis, the Financial Assistance Act established the District of Columbia Financial Responsibility and Management Assistance Authority (“Authority”) and placed the District under its control.¹⁵ The Authority’s purposes were to bring the District out of insolvency; address and cure the fiscal, financial, management, and economic problems of the District government; and enhance the District’s standing and access to credit in the credit and capital markets.¹⁶ While under the Authority’s control, the traditional budget functions performed by the Mayor and the Council were subject to significant oversight. For example, for each fiscal year that the District government was under the Authority’s control, the Mayor was required to “develop and submit to the Authority,” and the Council, “a financial plan and budget.”¹⁷ Before the Mayor could send the financial plan and budget to the Council, the Authority had to “approve the financial plan and budget” and provide the Mayor, the Council, the President of the United States, and Congress “with a notice certifying its approval.”¹⁸ The Council then had to adopt a financial plan and budget within 30 days and submit it to the Mayor and the Authority.¹⁹

Once the Authority reviewed and approved the Council-adopted financial plan and budget, the Authority again was required to provide the Mayor, the Council, the President, and Congress “with a notice certifying its approval,” only after which could the Mayor transmit it to the President and Congress.²⁰ The Authority could disapprove of the Mayor’s proposed budget or the Council-adopted budget if it did not meet statutory

¹¹ D.C. Official Code § 1-206.03(c). Congress subsequently transferred the authority to estimate revenues to the CFO. *See infra* section I.B.2.

¹² D.C. Official Code § 1-206.03(d).

¹³ District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, 109 Stat. 97 (“Financial Assistance Act”).

¹⁴ Financial Assistance Act, 109 Stat. 99.

¹⁵ *See* D.C. Official Code § 47-392.09(c).

¹⁶ *See* H.R. Rep. 104-96, at 33 (1995); Financial Assistance Act, § 2.

¹⁷ D.C. Official Code § 47-392.01(a).

¹⁸ D.C. Official Code § 47-392.02(c). If the Authority did not approve the Mayor’s proposed budget within 30 days, it was deemed approved and certified. *Id.*

¹⁹ *Id.*

²⁰ *Id.*

requirements in the Financial Assistance Act, including that the District “fully restore[d]” funds that had been withdrawn from “accounts of the District government which are dedicated for specific purposes,” and that the “financial plan and budget . . . assure[d] the continuing long-term financial stability of the District government, as indicated by factors including access to short-term and long-term capital markets, the efficient management of the District government’s workforce, and the effective provision of services by the District government.”²¹

Congress did not expect or intend the District to be subject to the Authority’s control indefinitely.²² The Financial Assistance Act also made structural changes to the District’s budget process to promote long-term financial stability, one of which was amending the Home Rule Act to establish the Office of the Chief Financial Officer (“OCFO”) within the executive branch. The Financial Assistance Act’s Home Rule amendments assigned specific functions to the CFO related to the District’s finances, including, among other things, property assessments, taxation, cash management, accounting, financial reporting, apportionment of funds, investment of public resources, payment of obligations, debt management, payroll and retirement administration, and the preparation of fiscal impact statements for legislation, regulations, and contracts.²³ In 2006, Congress further amended the Home Rule Act in Title II of the 2005 District of Columbia Omnibus Authorization Act (“2005 Omnibus Act”) to add additional CFO responsibilities and further establish the CFO’s independence by making him removable only for cause.²⁴ As currently constituted, the Home Rule Act specifies 28 duties of the CFO in section 424(d).

Several provisions in section 424(d) are relevant to the budgeting process. Many of these CFO duties specifically relate to the annual budgeting process in non-control years, like at present, when the Authority is not in operation. Prior to any proposed budget, the CFO must prepare “annual estimates of all revenues of the District of Columbia (without regard to the source of such revenues), including proposed revenues, which shall be binding on the Mayor and the Council for purposes of preparing and submitting the budget” as well as quarterly re-estimates throughout the fiscal year.²⁵ The CFO is also responsible for “[p]reparing the” annual budget “for the use of the Mayor . . . , and preparing the 5-year financial plan based upon the adopted budget for submission with the District of Columbia budget by the Mayor to Congress.”²⁶ In doing so, the CFO is directed to prepare, “under the direction of the Mayor, who has the specific responsibility for formulating budget policy using Chief Financial Officer technical and human resources, the budget for submission by the Mayor to the Council and to the public and upon final adoption to Congress and to the public.”²⁷

Unlike the power given to the Authority in control years, none of the CFO’s duties expressly require him to certify the budget. By contrast, the CFO must “certify” certain District obligations, including “all contracts and leases” and “all bills, invoices, payrolls, and other evidences of claims, demands, or charges against the District government.”²⁸ For the budget, however, the Mayor and the Council are responsible

²¹ D.C. Official Code § 47-392.01(c)(1)(D), (E).

²² H.R. Rep. 104-96, at 22 (1995); (“A [federal control board] is intended to be temporary.”).

²³ See Financial Assistance Act, § 302 (codified as amended D.C. Official Code § 1-204.24d.).

²⁴ Title II of the 2005 District of Columbia Omnibus Authorization Act, Pub. L. No. 109-356, 120 Stat. 2029 (“2005 Omnibus Act”).

²⁵ D.C. Official Code § 1-204.24d(5).

²⁶ D.C. Official Code § 1-204.24d(2).

²⁷ D.C. Official Code § 1-204.24d(26).

for sending a balanced budget to the federal government. Although the Mayor initially was required to transmit both the federal and local budget requests to the federal government, in 2012, the Council passed the Local Budget Autonomy Act of 2012.²⁹ Now, the law authorizes the Mayor to submit the Federal Portion Budget Request Act requesting federal appropriations to the President for transmission to Congress, and the Council Chair to send the District’s Local Budget Act to Congress for passive review.³⁰

One other CFO responsibility, which relates to all legislation including the budget, warrants mention. Section 424(d)(25) of the Home Rule Act, along with section 4(a) of the General Legislative Procedures Act of 1975,³¹ requires the CFO to prepare fiscal impact statements on all permanent legislation. A fiscal impact statement must include “the estimate of the costs which will be incurred by the District as a result of the enactment of the measure in the current and each of the first four fiscal years for which the act or resolution is in effect, together with a statement of the basis for such estimate.”³² Further, “acts which are accompanied by fiscal impact statements which reflect unbudgeted costs, shall be subject to appropriations prior to becoming effective.”³³

3. *District Reserve Funds*

The Home Rule Act mandates a general fund for District revenues and authorizes the Council to “establish such additional special funds as may be necessary for the efficient operation of the government of the District.”³⁴ Congress additionally created an emergency reserve fund for “unanticipated and extraordinary” emergency needs and a contingency reserve fund for “nonrecurring or unforeseen needs” during a fiscal year.³⁵

In 2010, the Council enacted the Sustainable Capital Investment and Fund Balance Restoration Act of 2010.³⁶ That law created two additional reserve funds: a Cash Flow Reserve fund and the FSR.³⁷ The CFO can use the Cash Flow Reserve fund to cover cash flow needs, which must be replenished in the same fiscal year, and operating expenses during a lapse in regular appropriations, which must be replenished at the end of the lapse.

The Council has amended the authorized uses for the FSR several times. As originally enacted, the FSR could only be used for the same purposes as the contingency reserve fund, except it could not be used for cash flow needs. In 2016, the Council amended the law to authorize the CFO to use the FSR “to cover cash flow needs,” provided that any funds used for this purpose “shall be replenished . . . in the same fiscal year.”³⁸ In 2023, the Council further amended the law to authorize the Mayor to use the FSR for Fiscal Year 2023 operating expenses, but the FSR did not need to be replenished unless there was a surplus.³⁹ Other changes authorize the Mayor to use the FSR for operating expenditures during a lapse in

²⁹ Effective July 25, 2013 (D.C. Law 19-321; 60 DCR 1724).

³⁰ D.C. Official Code § 1-204.46(a).

³¹ Pub. L. No. 109-356, 120 Stat. 2038 (codified at D.C. Official Code § 1-301.47a).

³² *Id.*

³³ *Id.*

³⁴ D.C. Official Code § 1-204.50.

³⁵ D.C. Official Code § 1-204.50a.

³⁶ Sec. 7162, effective Sept. 24, 2010 (D.C. Law 18-233, 57 DCR 6242).

³⁷ D.C. Official Code § 47-392.02(j-1), (j-2).

³⁸ Fiscal Stabilization Reserve Amendment Act of 2016, § 7142, effective Oct. 8, 2016 (D.C. Law 21-160, 63 DCR 10775).

³⁹ Fiscal Stabilization Reserve Amendment Act of 2023, § 7032(c), effective June 27, 2023 (D.C. Law 25-50; 70 DCR 10366).

appropriations or to advance funds to public and charter schools while waiting for an approved budget, which must be “replenished immediately” at the conclusion of the lapse or the approval of a budget, respectively. It is our understanding that the Mayor used the FSR for FY23 operating expenses, but not because of any lapse in appropriations. This is what caused the current shortfall. At full funding the FSR must equal 2.34% of the District’s General Fund operating expenditures.

II. Analysis

A. The CFO Does Not Have the Authority to Certify the Budget or to Require that the Budget Replenish the FSR.

The first question you have asked is:

What is the legal effect, if any, of the CFO declining to “certify” or otherwise calling into question the validity of a duly enacted District budget that both meets the balanced budget requirements of D.C. Official Code § 1-206.03 and otherwise complies with District law—solely because the enacted budget does not direct an additional \$217 million to the Fiscal Stabilization Reserve Account established by the Council at D.C. Official Code § 47-392.02(j-1) as demanded by the CFO?

We conclude that because there is no legal requirement or authority for the CFO to certify the budget, his refusal to do so will have no legal effect on a duly enacted budget that does not replenish the FSR. Further, the CFO does not have authority to dictate specific budget line items, including how much, if anything, should be budgeted to replenish the FSR.

1. *There is no legal requirement for the CFO to certify the District’s budget.*

Neither federal nor District law gives the CFO the power or duty to certify the District’s budget. The Home Rule Act expressly requires the CFO to certify many types of instruments and transactions, but the budget is not one of them.⁴⁰ This is in stark contrast to the Financial Assistance Act’s requirements that the Authority “certify” both the Mayor’s proposed budget and the Council’s enacted budget during a control year. When Congress “includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [it] acts intentionally and purposely in the disparate inclusion or exclusion.”⁴¹ This presumption applies “with particular force” when the contrasting provisions are “in close proximity” to each other, as they are here.⁴² The Financial Assistance Act assigned the responsibility of budget certification exclusively to the Authority and limited this certification process to control years. It did not transfer this authority to the CFO upon the Authority’s termination but confined the CFO’s budget

⁴⁰ Section 424(d)(14) requires the CFO to “[c]ertify[] contracts and leases (whether directly or through delegation) prior to execution as to the availability of funds to meet the obligations expected to be incurred by the District government under such contracts and leases during the year.” Section 424(d)(16) requires the CFO to “[c]ertify[] and approv[e] prior to payment of all bills, invoices, payrolls, and other evidences of claims, demands, or charges against the District government, and determining the regularity, legality, and correctness of such bills, invoices, payrolls, claims, demands, or charges.” Section 424(d)(27) requires the CFO to “[c]ertify[] all collective bargaining agreements and nonunion pay proposals prior to submission to the Council for approval as to the availability of funds to meet the obligations expected to be incurred by the District government under such collective bargaining agreements and nonunion pay proposals during the year.”

⁴¹ *Russello v. United States*, 464 U.S. 16, 24 (1983).

⁴² *Dep’t of Homeland Sec. v. MacLean*, 574 U.S. 383, 392 (2015).

responsibilities to the functions stated in section 424(d)(2), (5) and (26). Similarly, the Financial Assistance Act assigned the CFO various certification authorities, but not budget certification.

This is so despite the CFO's practice to include a letter certifying that the budget is balanced when he transmits the final Budget and Financial Plan to the Mayor for submission to the Council and to transmit the Council-adopted budget to Congress. However, Congress's omission of a legal requirement for certification of the budget—unlike the other certification requirements and the requirement for the Authority's certification in a control year—indicates that the CFO's certification practice is not legally required.

The Home Rule Act's fiscal impact statement requirement also does not provide a basis for the CFO either to certify a balanced budget or to refuse to certify one where he believes there could be future short-term cash flow mismatches.⁴³ Section 424(d)(25) of the Home Rule Act and D.C. Official Code § 1-301.47a require the CFO to issue a fiscal impact statement indicating whether a law has unbudgeted costs, and, if so, it provides that such a law cannot become effective until sufficient money is appropriated.⁴⁴ Budget legislation that is balanced—one where estimated resources meet or exceed expenditures during a fiscal year—does not include any “unbudgeted costs,” and any fiscal impact statement the CFO would issue for such legislation would necessarily reflect this conclusion. Further, once funds are appropriated, D.C. Official Code § 1-301.47a imposes no barrier to a law taking effect. The CFO's authority to prepare fiscal impact statements thus does not allow him to block a budget from taking effect. Finally, the Council's Fiscal Year 2025 Local Budget Act only covers the upcoming fiscal year; it does not include the future years covered by the financial plan. The CFO's concerns about cash flow shortfalls in future fiscal years would not be appropriately included in the fiscal impact statement for the FY 2025 budget.

Although the CFO is not required to certify the budget, he does have an important Home Rule Act role in the budget process. The CFO prepares the annual revenue estimates, which are “binding on the Mayor and the Council for purposes of preparing and submitting the budget.”⁴⁵ Therefore, although the Mayor, and ultimately the Council, determine the District's expenditures, those expenditures cannot exceed estimated resources, taking into account the CFO's estimated revenues. The CFO's transmission letter accompanying the FY 25 Budget highlights this aspect of the CFO's authority, noting that if revenue forecasts change during the year “such that an unbalanced budget would result, the budget must be adjusted, following approved procedures, to re-establish balance.”⁴⁶

2. *The Mayor and the Council decide whether to replenish the FSR.*

In enacting the Financial Assistance Act, Congress expressly continued to reserve budget policy decisions to the Mayor and Council. Although the CFO determines the annual revenue to be budgeted, the Mayor in her proposed budget, and ultimately the Council in its enacted budget, have the “discretion . . . to allocate District government revenues” “among competing programs and activities.”⁴⁷ Once the CFO provides his revenue estimates, his role in the budgeting process is limited to preparing the Mayor's budget under her direction using his technical and human resources. Allowing the CFO to dictate that a certain fund be

⁴³ D.C. Official Code § 1-301.47a.

⁴⁴ *Id.*

⁴⁵ D.C. Official Code § 1-204.24d(5).

⁴⁶ FY 25 Budget Book, at 244.

⁴⁷ *D.C. Bd. of Elections & Ethics v. District of Columbia*, 866 A.2d 788, 794 (D.C. 2005) (citation omitted).

replenished would remove the local budget process from “within the control of the Mayor and Council” and “interfere with the locally elected officials’ decisions about how District government revenues should be spent.”⁴⁸

The CFO has expressed concern that cash flow shortfalls in FY 2027 and FY 2028 could lead to deficits or have a negative effect on the District’s credit rating. And because he maintains that a balanced budget requires overall financial stability, he asserts that a balanced budget requires full replenishment of the FSR in the FY 25 Budget. The CFO’s interpretation of the balanced budget requirement is at odds with the plain language of the Home Rule Act. The Home Rule Act defines “balanced” as a budget that would not “result in expenditures being made by the District government, *during any fiscal year*, in excess of all resources which the Mayor estimates will be available from all funds available to the District for such fiscal year.”⁴⁹ The unit of reference for applicable revenues and expenditures is the entire fiscal year, not month-to-month cash flows. Thus, while having sufficient reserves is important to the District’s financial stability, the amount of reserves does not factor into whether, on the whole, budgeted obligations for a particular fiscal year exceed available resources. The Mayor could therefore propose a budget and the Council could adopt budget legislation that balances resources against expenditures without following the CFO’s advice about replenishing the FSR. This would be entirely consistent with section 7032(c) of the Fiscal Stabilization Reserve Amendment Act of 2023,⁵⁰ which does not require FSR replenishment for expenditures from the FSR for FY 2023 operating expenses.

The Council has created several reserve funds to smooth out mismatches in cash inflows and outflows. As the CFO acknowledged during the budget briefing, because the FSR was created by the Council, the Council has the authority to repeal it, and the District has several different options for addressing potential cash flow shortfalls that might occur in Fiscal Years 2027 and 2028. Provided that they stay within the bounds of the District’s resources for the fiscal year at issue, it is ultimately the Mayor’s and then the Council’s responsibility to determine how best to balance the District’s cash flow needs and attendant financial risk.

B. The CFO Does Not Possess the Authority to Withhold Payment Under a Budget the Council Determines Is Balanced.

Second, you have asked:

May the CFO refuse to release funds appropriated pursuant to a duly enacted District budget that meets the balanced-budget requirements of D.C. Official Code § 1-206.03 and otherwise complies with District law—solely because the enacted budget does not direct an additional \$217 million to the Fiscal Stabilization Reserve Account established by the Council at D.C. Official Code § 47-392.02(j-1) as demanded by the CFO?

The CFO has no authority to refuse to release funds appropriated under a validly enacted budget. As a statutorily created office, OCFO “possess only the authority that Congress has provided.”⁵¹ None of the 28 duties that Congress specified for the CFO gives him the authority to refuse to release lawfully appropriated funds. The CFO is responsible for “[s]upervising and assuming responsibility for financial transactions to

⁴⁸ *Id.*

⁴⁹ D.C. Official Code § 1-206.03(c), (d) (emphasis added).

⁵⁰ Sec. 7032(c), effective June 27, 2023 (D.C. Law 25-50; 70 DCR 10366).

⁵¹ *NFIB v. Dep’t of Lab.*, 595 U.S. 109, 117 (2022).

ensure adequate control of revenues and resources,” but supervising transactions is not the same as refusing to make budgeted funds available to pay valid obligations.

Indeed, the CFO’s refusal to release funds under a valid District budget would cause precisely the type of financial problems that the CFO’s decision not to approve the budget would be designed to avoid. Withholding all funds could cause the District to default on its obligations. If the CFO exercised discretion to release funds for only some of the District’s obligations, he would be carrying out a policy making function that would extend far beyond the duties assigned to him under the Home Rule Act. The CFO therefore cannot lawfully withhold funds.

I hope this opinion is useful to you in assessing how to proceed with the Fiscal Year 2025 – Fiscal Year 2028 Budget and Financial Plan. If you have questions about this opinion, please contact me.

Sincerely,



Brian L. Schwalb
Attorney General for the District of Columbia