

December 14, 2011

PLAN FOR OPERATIONS IN THE ABSENCE OF APPROPRIATIONS

1. Purpose. The attached plan outlines the National Capital Planning Commission (NCPC) procedures for conducting an orderly shutdown in the event of the absence of appropriations. This plan supersedes the formerly released April 2011 plan.
2. Background.
 - a) The language and legislative history of the Antideficiency Act unambiguously prohibit agency officials from incurring obligations in the absence of appropriations. This is supported by opinions from the United States Attorney General and the Office of Legal Counsel of the Department of Justice (DOJ).
 - b) In the absence of appropriations, Federal officers may not incur any obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. Federal officers may incur obligations as necessary for orderly termination of an agency's functions, but funds may not be disbursed.
 - c) To ensure compliance with these directives, Office of Management and Budget (OMB) Circular No. A-11, Section 124, "Agency Operations in the Absence of Appropriations", requires all Agency heads to develop and maintain plans for an orderly shutdown in the event of the absence of appropriations.
 - d) Chief Operating Officer (COO) is responsible for maintaining and updating this plan, coordinating activities to ensure proper implementation of this plan, and reporting activities to the Chairman of the Commission and to OMB. The COO will work with OMB to resolve funding questions and concerns in the absence of appropriations.
3. Implementing action. All NCPC staff will follow procedures in the plan. It goes into effect only when directed by the Chief Operating Officer.



BARRY S. SOCKS
Chief Operating Officer

Attachment

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1. Funds control in the absence of appropriations. If appropriations lapse, the following authorities and directives will govern operations. They reflect laws and regulations enacted by Congress, OMB, the Office of Personnel Management, and other authorities.
 - a) Under the Antideficiency Act, it is a felony to obligate the U.S. Government in advance of appropriations unless this is otherwise authorized by law (31 U.S.C. 1341), except for emergencies involving the safety of human life or the protection of property (31 U.S.C. 1342 and 1515(b)(1)(B)).
 - b) The Attorney General's opinion "Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriations" (1980) held that, under a lapse in appropriations, agencies could not incur any obligation that was not legally funded from prior appropriations or otherwise authorized by law. The opinion also held that authority may be inferred from the Antideficiency Act for Federal officers to incur those minimal obligations necessary for terminating operations.
 - c) The subsequent Attorney General opinion, "Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations" (1981), provided more detail on possible exceptions, including those authorized as emergencies involving the safety of human life or the protection of property. Generally, there must be a reasonable connection between the function and the safety of human life or the protection of property; second, there must be a reasonable likelihood that the safety of human life or protection of property would be compromised by delay in performance of the function.
 - d) Sec. 13213(b) of the Omnibus Budget and Reconciliation Act of 1990, Pub. L. 101-508 (title 13 is also known as the Budget Enforcement Act of 1990), amended 31 U.S.C. 1342.
 - i. It added a sentence to clarify that "...the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."
 - ii. As explained in the conference report on the bill, this action was taken to "guard against what the conferees believe might be an overly broad interpretation of an opinion of the Attorney General...regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress."
 - e) In an August 16, 1995, memorandum to the Director of OMB, the DOJ Office of Legal Counsel reaffirmed the validity of previous legal opinions and interpretations and provided two clarifications.

- i. In determining excepted functions for the safety of life or the protection of property, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised "in some significant degree" by delay in the performance of the function.
 - ii. The use of the word "imminent" in the 1990 amendment serves "to emphasize and reinforce the requirement that there be a threat to human life or property of such a nature that immediate action is a necessary response to the situation."
- f) Based on the Attorney General's 1980 and 1981 opinions, and reaffirmed by the 1995 DOJ opinion, OMB has cited the following as primary examples of activities authorized to continue during a funding lapse: providing for the national security; providing benefit payments and performing contract obligations under no-year, multi-year, or other funds remaining available for these purposes; and conducting activities that protect life and property. The list includes:
 - i. Providing medical care of inpatients and emergency outpatient care;
 - ii. Ensuring continued public health and safety, including safe use of food, drugs, and hazardous materials;
 - iii. Continuing air traffic control and other transportation safety functions and protecting transportation property;
 - iv. Continuing border and coastal protection and surveillance;
 - v. Protecting Federal lands, buildings, waterways, equipment, and other U.S. property;
 - vi. Caring for prisoners and other persons in U.S. custody;
 - vii. Pursuing law enforcement and criminal investigations;
 - viii. Providing emergency and disaster assistance;
 - ix. Preserving the essential elements of the U.S. money and banking system, including Treasury borrowing and tax collection activities;
 - x. Ensuring production of power and maintaining the power distribution system; and
 - xi. Protecting research property.
- g) For non-excepted activities, obligations may be incurred only for suspending normal agency operations. Once appropriations are no longer available, it is illegal for non-

excepted employees to do regular work. It also violates the Antideficiency Act to accept voluntary services of employees for non-excepted activities (31 U.S.C. 1342).

- h) Although obligations are incurred for excepted activities and for shutting down operations, expenditures cannot be made against lapsed appropriations; new appropriations must be enacted to liquidate the obligations. Obligations incurred against accounts not affected by the lapse may be liquidated, however.
- i) "Excepted" is not the same as "essential". Employees may be essential for conducting regular operations, and may even be required to report to work during hazardous weather conditions, but they are not necessarily excepted when those regular operations cease under a funding lapse. To be designated as excepted, personnel must be performing the specific functions allowed by law and defined in this order.

2. Implementation Plan.

- Number of employees expected to be on-board before implementation of the plan = 42
- NCPC requires 1/2 day(s) to complete a shutdown. Number of employees to be retained for orderly shutdown of agency's operations = 2
- Number of excepted employees to be retained under the plan because (1) they are engaged in military, law enforcement, or direct provision of health care activities, or (2) they are engaged in activities to protect life and property = 1¹
- Number of employees whose compensation is financed by a resource other than annual appropriations = 0

The following is the general framework for responding to a temporary lapse in appropriations. Although "temporary" is defined as 30 consecutive days or less for adverse employee actions, in this part it means only the relatively short period, often only a few days or less, normally required for Congress to provide funds. If a lapse is extended or an activity is terminated, additional instructions will be issued. For example, an extended lapse in appropriations may require the agency to cancel a regularly scheduled monthly Commission meeting or a planned public meeting or activity associated with a major planning initiative.

- a) Unless notified otherwise, only excepted employees should report to work on the first day of a temporary lapse. If employees have been directed to report for purposes of securing operations, they are released after initial shutdown.

¹ While not excepted employees, the Chief Operating Officer, or in his absence, the Director of the Office of Administration, shall be permitted to consult with the Office of Management and Budget and respond to emergencies involving the safety of human life or protection of federal real property, i.e., the agency's leased premises and the contents thereof.

- b) Released non-excepted employees are placed in non-duty, non-pay status by use of furlough under the adverse action procedures in title 5 of the Code of Federal Regulations (CFR) part 752. The time of release is accurately noted.
 - i. Although advance written notice of furlough is preferable, all-employee bulletins can be used but a copy should be provided to each employee. If there is no time for written notice, oral notice is acceptable (5 CFR 752.404 (d) (2)), with later written notice to confirm the action. At some point, the Office of Administration (OA) must document all personnel actions.
 - ii. Furloughed career Senior Executive Service (SES) employees are entitled to the procedures in 5 CFR Part 359, subpart H.
- c) Employees who are closing down operations or who perform excepted activities must report for duty as directed. During an appropriations lapse, they are still in a paid status, but are working for delayed pay; they are not rendering gratuitous services and must report to work.
- d) Non-excepted employees should monitor the media to determine when the lapse is over, and when they should report. OA shall establish procedures to notify released employees when to return to work. The recall system is used when the lapse is over or when other circumstances require changed instructions.
- e) During a lapse in appropriations, annual or sick leave may not be used by employees in place of furlough.
 - i. In the case of an appropriations lapse, annual, sick, court, bone marrow, and organ donation leave is canceled. Military leave will continue to be charged even though furlough days are considered non-work days. Employees serving as witnesses or jurors would be able to retain all moneys received from the court.
 - ii. Canceled or interrupted annual or sick leave is not forfeited, but can be used later.
- f) Persons on official travel when funds lapse are handled case-by-case.
 - i. Travelers performing excepted functions, or supported by funds not affected by the lapse, remain on duty.
 - ii. Non-excepted employees are placed on furlough. Although some obligations for travel costs are incurred before a funding lapse, the employees may be recalled to duty station because there is no authority to incur new per diem obligations. Decisions will be made on a case-by-case basis as determined by the COO to incur obligations as necessary for orderly termination of functions.
- g) Goods and services may be purchased under lapsed appropriations only in amounts required to support excepted operations.

- i. Existing definite quantity contracts awarded for supplies or services are probably not affected, since they should have been fully funded at time of award.
- ii. Contract options for additional services or to extend the term of the contract may not be exercised unless it is determined that the additional goods or services are needed to continue or support excepted operations. Contracting personnel need to consult with the General Counsel before making a final decision not to exercise an option, when this could expose the Government to financial liability or other damages.
- iii. Under recurring service contracts funded by annual appropriations that cross fiscal years, work may be continued at current or reduced levels, as appropriate, if it is needed to support excepted operations; otherwise it may be suspended or terminated in part. Contracting personnel need to work closely with the General Counsel in terminating services for the convenience of Government or reducing the level of work in a contract.