

# **U.S. Office of Personnel Management's (OPM) Contingency Plan for the Suspension of Operations in the Absence of Appropriations**

*December 13, 2011*

## **Purpose**

Federal law prohibits an agency from obligating funds for appropriated activities unless the agency has received an appropriation. Accordingly, in the event of a lapse in appropriations, some OPM operations will be suspended, as discussed below.

## **Summary**

The majority of OPM's functions are funded by sources other than annual appropriations, and thus would continue during a Government shutdown caused by a lapse in appropriations. Indeed, four out of OPM's six core components perform functions that are funded through alternative sources: Retirement Services, Healthcare and Insurance, Federal Investigative Services, and Human Resources Solutions. The vast majority of the employees working in the other two core components- Employee Services (ES) and Merit System Audit and Compliance (MSAC)-perform functions that are funded from annually appropriated funds and would thus be furloughed.<sup>1</sup> Furloughing these employees would mean that agencies and employees would not have access to OPM's expert guidance on HR matters that arise during a shutdown.

The vast majority of the employees in the core agency infrastructure offices would also be furloughed.<sup>1</sup> These include the Office of General Counsel, Congressional and Legislative Affairs, Communications and Public Liaison, Planning and Policy Analysis, Internal Oversight and Compliance, Executive Secretariat and Ombudsman, the Equal

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<sup>1</sup> *Employee Services is the component of OPM with primary responsibility for developing and implementing Governmentwide human resources (HR) policies. Merit System Audit and Compliance's (MSAC) primary responsibility is to ensure that agencies are adhering to Federal HR laws and policies.*

Employment Opportunity Office, and the Office of Diversity and Inclusion. On the other hand, a larger contingent of employees from the offices of the Chief Information Officer and Chief Financial Officer, as well as Facilities, Security, and Contracting, would need to continue to work during a shutdown, for the reasons described below.

Note the information about OPM's Office of the Inspector General is also included below as a courtesy. OPM has not independently reviewed the OIG's determinations and we offer no comment on them.

## **Responsibilities**

- A. The Director is responsible for establishing policy with respect to OPM operations during funding lapses. This includes determining which OPM employees are excepted from furlough and when employees are to be furloughed from and recalled to duty. The General Counsel is to advise the Director in exercising these responsibilities.
- B. Associate Directors and Heads of Offices are responsible for the overall administration of the contingency plan within their organizations. In doing so, they are to be guided by this plan and by instructions issued by Human Resources.
- C. The Deputy Associate Director, Human Resources is responsible for:
  - providing appropriate instructions to Associate Directors, Heads of Offices, and employees; and
  - ensuring that personnel rules and regulations are observed in the event a furlough is required.
- D. Employees are responsible for following OPM's instructions and for monitoring the local media for official announcements in the event operations are suspended.

## Identifying Employees Expected to Report to Work During Furlough

In the absence of an appropriation or continuing resolution, no new financial obligations may be incurred by the Agency, except with respect to certain personnel who are otherwise authorized to continue to work. In order to plan for a possible lapse in appropriations, OPM asked each Associate Director/Office Head to review a list of the positions in his or her organization and identify those that are performing a function that meets one or more of the exemption/exception categories. These are employees who would be required to work during a lapse of appropriations.

OPM's legal counsel has reviewed the submissions by the Associate Directors and Office Heads and evaluated them for compliance with the Anti-Deficiency Act and other applicable laws. Accordingly, OPM has determined that the following categories of personnel are authorized and expected to continue to work during a lapse in appropriations:

- **Category I - Orderly Suspension.** Obligations may be incurred for personnel related to the orderly suspension of operations. Activities related to the orderly suspension of operations include: distributing furlough notices; accounting for and following up to ensure that employees are given the proper notification; meeting statutory record-keeping requirements; and meeting OPM's Government-wide role in carrying out agency suspension of operation activities. In addition, obligations may be incurred for the orderly suspension of work by OPM staff who do not fall within one or more of the exemption/exception categories, but in no case for more than four hours.
- **Category II - Excepted Activity.** Obligations may be incurred for personnel performing excepted activities as defined in the OMB Circular No. A-11. Specific to OPM, these are personnel whose retention is necessary to provide for national security or the safety of life and property; provide for health care; or conduct essential activities to the extent they protect life and property. Personnel to be

identified under this category are those having direct responsibility for ensuring that OPM facilities are secure.

- **Category III - Exempted.** Personnel operating under multi-year appropriations and personnel who administer activities financed from OPM's earned benefit trust funds or other indefinite appropriation provisions that do not require passage of annual appropriations legislation, such as revolving fund activities, shall continue to work under their normal schedule. NOTE: Employees who provide for benefit payments may also qualify under Category II, but we consider them to be Category III employees by virtue of their being funded through OPM's earned benefit trust fund.
- **Category IV - Other Functions Required by Necessary Implication.** Obligations may be incurred for certain personnel performing activities that are necessary for excepted and exempted employees to perform their functions (facility functions necessary for health and safety, human resource functions, automated system support, legal counsel, etc.). This category shall include the minimum number of employees necessary to ensure health, safety, regulatory and security needs of excepted and exempted employees and effective performance of their functions.

Subject to changing circumstances, it is anticipated that employees performing excepted activities in Categories II, III, and IV will be required to continue performing their duties throughout the duration of a temporary Agency shutdown caused by a lapse in appropriations. These employees would not be given a notice of furlough; rather, they would receive a notice that they are to report to work during the furlough.

Employees engaged in activities related to suspension of operations (Category I) might be required to work for varying lengths of time depending on the activity in which they are involved, but would ultimately need to be furloughed, unless the shutdown is of a very short duration (one day, for example). Thus, these employees would initially receive notification that they are to report to work during the furlough. When their

services are no longer needed they would be given a subsequent notification placing them on furlough.

## **Legal Analysis**

The Anti-Deficiency Act generally prohibits agencies from incurring obligations in advance of appropriations. See 31 U.S.C. § 1341-1342. There are a few exceptions, however, which are relevant when there is a need to conduct a furlough in connection with a Government shutdown caused by a lapse in appropriations. These exceptions have been explained in a series of issuances by the Department of Justice. See, e.g., Memorandum for Alice Rivlin, OMB Director (Aug. 16, 1995); 5 Op. O.L.C. 1 (1981); 4A Op. O.L.C. 16 (1980). Each of the categories identified above falls within one of the applicable exceptions and/or concerns functions that have alternative funding sources and therefore would not be affected (at least in the short-term) by a Government shutdown.

**Category I.** These are the functions that OPM has determined are necessary to provide for the orderly suspension of operations. They fall within the "necessary implications" exception to the bar on incurring obligations in advance of appropriations. In his 1980 opinion, Attorney General Civiletti recognized that agencies, by necessary implication, are authorized "to incur those minimal obligations necessary to closing [the] agency." Both the 1981 opinion and the 1995 memorandum, cited above, reiterated this conclusion, and it has been the Government's consistent practice to allow for obligations to be incurred that are necessary for the orderly termination of those functions that may not continue during a lapse in appropriations. Of course, no funds may be disbursed during the lapse in appropriations to cover the obligations incurred. See OMB Circular A-11, § 124.

Furloughed employees would report for work following a lapse in appropriations only to the extent needed to provide for the orderly suspension of functions, and for no more than four hours.

**Category II.** These are functions that OPM has determined are necessary for the protection of life and property. The majority of OPM's employees would be exempted from any furlough caused by a lapse in appropriations, because they are funded through other mechanisms. As a result, many will report to OPM's office buildings around the country, notwithstanding any lapse in appropriations. We have determined, therefore, that incurring obligations on behalf of a small number of facilities and security personnel throughout the duration of a shutdown is reasonable and consistent with the Anti-Deficiency Act. Employees in this category fall within both the exception for preserving life and property and the "necessary implications" exception (because their presence is required as a consequence of the lawful continuation of other functions), both of which are recognized in the Department of Justice issuances cited above.

**Category III.** The majority of OPM's employees perform functions that are funded by sources other than annual appropriations. These alternatively funded functions would continue during a lapse in appropriations under the "multi-year appropriations and indefinite appropriations" exemption cited in the Justice Department's 1995 Memorandum.

Specifically, OPM operates four activities pursuant to our revolving fund statute, which are funded by agency fees and other payments. These include the Federal Investigative Services (FIS) fund, under which OPM operates its background investigations program, and the Human Resources Solutions (HRS) fund, under which OPM provides vendor services to agencies on various human resources issues. While the vast majority of these employees work in FIS and HRS, several employees in other parts of OPM are also directly funded through the FIS and HRS revolving funds, because they provide essential services to the FIS and HRS operations. OPM also operates revolving fund activities for USAJOBS, the on-line service through which individuals may locate and apply for jobs at Federal agencies, and for the Presidential Management Fellows Program, a leadership development program operated by OPM that provides pre-screened finalists for agencies to hire. These two functions fall within Employee Services.

Each of these revolving fund activities currently carries an operating balance that will allow its functions to continue even in the absence of further agency payments during a lapse in appropriations. In the event of an extended shutdown, however, the ability to continue some or all of these functions would have to be reevaluated. It is theoretically possible that funds from some of these revolving fund activities may not last throughout a lengthy shutdown. In that event, we would re-evaluate whether the functions would fall within a separate exception to the Anti-Deficiency Act's prohibition on incurring obligations in advance of appropriations.

OPM also operates a retirement trust fund and a health insurance trust fund. There are sufficient amounts in these trust funds to operate them throughout the duration of any lapse in appropriations.

Finally, OPM holds multi-year money in connection with its obligations under the Patient Protection and Affordable Care Act. Those functions would also continue, and we expect that sufficient funds are available for them to continue throughout the duration of any lapse in appropriations. As with the revolving fund activities, the majority of trust fund functions are performed in two OPM offices: Retirement Services and Healthcare and Insurance. But, functions in other parts of OPM essential to these trust fund activities are also funded from the trust funds.

**Category IV.** Employees in this category are excepted from the Anti-Deficiency Act because they are performing functions that are essential to continuation of the excepted and exempted functions discussed above. Most of these employees work in our CIO, CFO, or HR offices. These employees are needed because, for the reasons discussed above, we expect that over 5,000 OPM employees would continue working on excepted or exempted functions throughout the duration of a Government shutdown. Those functions could not be performed without the support provided by these personnel. Accordingly, these individuals also fall within the "necessary implications" exception (because their presence is required as a consequence of the lawful continuation of other functions).

**Office of Inspector General.** As with OPM, the majority of the OIG employees who would continue to work are funded by an alternative source, namely the trust funds. The OIG also identifies employees who are necessary to perform excepted functions, and employees who provide support needed for the lawful continuation of other functions. OPM will report the OIG's numbers as a courtesy to the OIG and OMB. We do not independently review the OIG's determinations and we offer no comment on them.

## **Implementation**

- Human Resources will maintain information related to reporting to work, activities required to prepare for suspension of operations, early release, recall, use of leave, travel and training situations, salary payments, effect on benefits, personnel actions, and other related items.
- If a lapse of funds occurs, all employees must receive either a notice of furlough or of the requirement for them to report to work. Furloughs are involuntary placements in a temporary status without duties and pay because of a lack of work or funds. As such, they are covered by the adverse action protections of 5 CFR Part 752, which provide for a 30-day advance written notice, the right to answer the proposal orally and in writing, the right to a representative, a written decision on the proposal, and a right to appeal the action to MSPB or to grieve under negotiated grievance procedures. However, Part 752 also contains a special exception to the requirement to provide advance written notice and the opportunity to answer when a furlough is necessitated by unforeseeable circumstances such as "sudden emergencies requiring immediate shutdown of activities." The notices of shutdown that OPM uses for these occasional lapses in appropriations are "emergency furlough" notices. OPM's policy is to give all employees written notices of decisions to furlough resulting from lapsed appropriations, whether or not the employees are covered by 5 CFR Part 752.
- Employees will be notified via email to their official OPM email address, with delivery confirmation. Employees who for any reason cannot be emailed a



notice letter will be sent the appropriate letter by certified mail, with return receipt requested to document delivery of the notice.

- Employees will continue to report to work unless advised otherwise by Human Resources, the supervisor, or an official announcement made through OPM.gov.
- Increased use of technology has improved government operations, allowing us to notify employees of furloughs and resumption of operations more quickly and at lower cost. As in the case of announcements related to weather-related delays or Government closures, OPM.gov will be kept up to date with respect to the Government's operating status. Employees who receive a notice of furlough will thus be instructed to monitor OPM.gov and media outlets, and when they hear that a continuing resolution or appropriation has been signed by the President, they will be expected to return to work on their next scheduled duty day. Most of the furloughed employees do not carry Government-issued smart phones, so that is not a viable option for communicating the end of a Government shutdown. We also do not believe it is necessary to attempt to reach employees telephonically. There would be a significant cost associated with telephonic notification, and, based on our experience, we expect that notification through our website and the media would be sufficient.
- Employees who receive a notice that they are to report to duty during the furlough will remain on duty and continue to report for duty, unless they subsequently receive a written notice of furlough.

## **Action Plan**

- When a lapse in appropriations occurs, employees will be sent a notice of the potential for furlough, and will be instructed to check their OPM email and OPM's website and to monitor the news media prior to reporting for duty on their next scheduled work day. Employees who for any reason cannot be emailed a notice letter, will be sent the appropriate letter via certified mail, with return receipt requested.
- Human Resources will transmit to the Director the final list of exempt/excepted positions and request authorization to implement necessary furlough activities. This list will closely track the list developed in connection with this plan, including only those modifications that are necessary to account for changing employee circumstances.