

NLWJC- Kagan

Counsel - Box 007 - Folder 005

Shutdown [5]

MEMORANDUM FOR PROCUREMENT EXECUTIVES

DRAFT

FROM: STEVEN KELMAN

SUBJECT: CONTRACTS IN THE CONTEXT OF LAPSED APPROPRIATIONS

Background:

As the Attorney General Opinion of 16 January 1981, and the more recent Department of Justice memorandum of August 16, 1995, indicate section 1331 (formerly section 665(a)) of Title 31, United States Code provides:

- (a) (1) An officer or employee of the United States Government or of the District of Columbia government may not-
- (A) make or authorized an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
  - (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law, etc.

This provision has been interpreted to mean that an agency may not enter contracts or create other obligations unless the agency has the authority to incur obligations. Such authority may happen in several ways.

One, an agency may have funds that are subject to multi-year or no year appropriation. If these funds have not lapsed then activities- ie contract award and administration- paid from these funds can continue.

Secondly, if there is specific statutory authority to engage in activities without regard to available appropriations, or to incur obligations in advance of appropriations, then these activities may continue. One such example is the Department of Defense's authority to contract for necessary clothing, subsistence, forage, fuel, quarters, transportation or medical and hospital supplies in advance of appropriations.

A third situation is when there is implied authority related to specific duties imposed on, or invested in, an agency. For example, "entitlement" benefits are funded from trust funds that are not subject to annual appropriations and thus can be paid. However the personnel administering these benefits are paid from annual appropriations. The Department of Justice finds an implied authority for the obligation of funds related to administering the primary program.

Fourth, there is a category of activities the President, or his subordinates, may engage in under functions authorized not by Congress but by the Constitution. Granting reprieves and pardons is such an example.

In addition to the above categories, there is a further exception contained within the Anti-Deficiency Act at 31 U.S.C. 1342. This exception allows the Government to accept voluntary services for "emergencies involving the safety of human life or the protection of property....the term emergencies 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." Justice has opined that in regard to this language, that there must be some:

"reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, 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 in question".

Under the concept of implied authority mentioned above, the Department of Justice also finds an implied authority to contract for materials essential to the emergency services related to the safety of human life and the protection of property exception to the Anti-Deficiency Act.

A sixth category discussed in the Justice memoranda of 1980, 1981, and 1995 is the authority to incur obligations for the orderly termination of operations upon a lapse in appropriations. The 1981 Justice opinion expects the agencies to act ~~prudent~~ and only incur obligations that would be justified by the expected lapse in appropriations.

DRAFT

What contracts can be awarded

QUESTION: May the Government enter into a contract during a lapse in appropriations?

DRAFT ANSWER: Generally no, unless the contract falls within one of the six categories described below.

(1) If the contract would obligate multi-year or no year money and funds are available then the contract may be awarded.

(2) If there is separate authority to contract in advance of appropriations then the contract may be awarded.

(3) If the contract functions are necessary for the safety of human life or to protect property from imminent threat, the contract may be entered into.

(4) If the contract supports a primary activity, which is funded by means other than an annual appropriation and for which funds are available, the contract may be entered into.

(5) The contract may also be entered into if it supports a Presidential function authorized by the Constitution.

(6) The contract is necessary for the orderly termination of agency functions.

DRAFT

How to treat options

QUESTION: May contract options be exercised during a lapse of appropriations?

DRAFT ANSWER: A contract option is treated no differently than entering into a new contract. The option may be exercised if it falls into one of the six categories mentioned above.

Options to extend the term of a contract typically contain two notice requirements. The first notice is a preliminary notice that informs the contractor that the Government intends to exercise the option. This notice, which does not commit the Government to an extension is issued at least 60 days before the contract expires. Contracting officers may continue to issue the preliminary notice if the Government intends to exercise the option. The contracting officer should include a statement to the effect warning that Congressional appropriation of funds may be delayed for FY 1996 with concomitant impact upon contract activities. The second notice, which exercises the option, may only be entered into if the contract falls within one of the six categories mentioned above, and should be addressed on a case by case basis. An availability of funds clause should be included in all exercised options.

In anticipation of a funding hiatus, contracting officers may wish to review existing contracts to determine when the contract will expire, and when the option period will expire. Extending the option period, prior to the lapse of appropriations, is an alternative to consider.

DRAFT

Contract Administration

QUESTION: Can contractors under existing contracts be paid during a lapse of appropriations?

DRAFT ANSWER: It is not clear. If the contract is funded under a previous annual appropriation, and the funds obligated pursuant to that appropriation, the contractor is legally entitled to be paid. However receipt of actual payment may be dependent upon an appropriation to pay the salaries of the personnel responsible for doing the work to pay the contractor. This payment function appears to fit within the ongoing, regular operations of the Government [which] cannot be sustained in the absence of appropriations, except in limited circumstances...# H.R. Rep. No. 964, 101st Cong., 2d Sess. 1170 (1990).

On the other hand, if an argument can be made that the initial contract was authorized by law, then by implication, administration of that contract, including paying the contractor, is also authorized and can proceed.

WAITING FOR A RESPONSE FROM JUSTICE. DOJ INITIAL RESPONSE WAS THAT THERE WAS AN IMPLIED AUTHORITY TO AUTHORIZE OBLIGATIONS FOR CONTRACT ADMINISTRATION.

If however, the contract fits one of the six exceptions mentioned above, an implied authority to obligate funds for contract administration personnel does arise, thus allowing actual payment to the contractor if funds are available.

DRAFT

QUESTION: What contract administration functions may proceed during a lapse in appropriation?

DRAFT ANSWER: It depends on the category of contract. If the contract fits one of the six exceptions mentioned above, then the reasoning --that of implied authority-- used by the Department of Justice to administer the benefits program, applies here also. In that case, necessary contract administration functions could proceed.

Additionally, to the extent that a contract administration function for any contract--not just one of the 6 exceptions-- is necessary to "protect property" from imminent threat, it may also proceed.

QUESTION: WHEN ARE STOP WORK ORDERS OR PARTIAL TERMINATION FOR CONVENIENCE NECESSARY?

DRAFT ANSWER: Based on each agency's shutdown plans, it may be necessary to suspend or reduce work under a contract. This may be accomplished as a partial termination for convenience or a suspension of work. Contracting staff need to work closely with counsel in implementing these changes, and in minimizing costs to the government.

Specific contract types

Service contracts

QUESTION: Can purchases for goods and services continue.

DRAFT ANSWER: No, not if the appropriation is annual unless it fits one of the six categories mentioned above.

Construction contracts

QUESTION: How will a lapse in appropriations affect construction contracts?

DRAFT ANSWER: No new construction contracts may be awarded unless they fit into one of the six categories. Administration of existing multi year construction contracts may be constrained by the lack of appropriated funds to pay government personnel for inspections, voucher approval etc. To the extent that an existing construction contract calls for government involvement that can not occur because of a lapse of appropriation, the existing contract may be subject to a suspension of work requirement.

Contracts that cross fiscal years

Contracts that cross fiscal years should contain an availability of funds clause (FAR 52.232-19). The clause provides that no legal liability accrues to the Government for payment unless funds are made available, and the contractor is so notified by the contracting officer. Absent notification the contractor should cease operation.

FTE Impact Associated with a 1-Day Hiatus in Appropriations Funding

last

9-11-95  
1 PM

<u>Agency</u>	<u>Status</u>	<u>Notes</u>	<u>FY 1995 FTEs</u>	<u>FTEs To Be On Furlough</u>	<u>Percent To Be At Work</u>
Agriculture .....	This Week		108,894		
Commerce.....	In	Plan, FTE impact being assessed	36,000	26,000	28
DOD--Military.....	This Week	Extensive work req'd to assess 500-pg plan	834,105		
Corps of Engineers.....	In		27,739	22,739	18
Education .....	In	Plan distinguishes appn hiatus, CR, debt ceiling	5,131	4,583	11
Energy.....	In	FTE Numbers not expected until 9/25	20,549		
HHS.....	In		62,735	34,570	45
HUD.....	In	HUD claims 2k FTE essential v. 100 in FY 1990	12,883	10,883	16
Interior.....	In	Rec has carry-over auth; BIA rec's adv appn	76,340	56,000	27
Justice .....	In		101,963	37,248	63
Labor .....	This Week		17,632		
State .....	In	Plan submitted only for Domestic	25,006	6,360	
Transportation.....	In	Extensive work req'd to assess FTE impacts	65,154		
Treasury.....	This Week		161,402		
Veterans Affairs .....	In	No distinction between short/long shut downs	229,902	34,516	85
Environmental Protection Agency .....	In	Id of essential/non-essential staff not final	18,879		
General Services Administration .....	In		16,936		
NASA.....	In	Some essential staff used for 9/28 space flight	23,285	21,422	8
Office of Personnel Management .....	In	Agency claims 64% of staff would be at work	5,472	2,564	53
Small Business Administration.....	In		6,090		
Social Security Administration.....	In	Plan would reopen agency after 2 wks	64,930	61,415	5
Armed Forces Retirement Home.....	In		1,020	235	77
American Battle Monuments Comm.....	In		371	0	100
Arms Control and Disarmament Agency.....	In		251	207	18
Cemeterial Expenses, Army .....	In	Indefinite appropriations to carry over	133	20	85
Commission on Civil Rights .....	In		105	90	14
Commodity Futures Trading Comm.....	In		545	521	4
Consumer Product Safety Comm.....	In		487	438	10
Corporation for Natl/Comm Service.....	In	Less than 30 FTE essential after 1 wk	603		
Defense Nuclear Facilities Safety Board.....	This Week		150		

(7 down)

FTE Impact Associated with a 1-Day Hiatus in Appropriations Funding

9-11-95  
1 pm

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Equal Employment Opportunity Comm.....	In	FTE Numbers not clear	2,860		
Export-Import Bank .....	In	All but 19 staff would be furloughed on day 1	448		
Federal Communications Commission.....	In	FTEs used to protect wireless communications	2,271	2,171	4
Federal Election Commission.....	This Week		327		
FEMA.....	In		3,944		
Federal Labor Relations Authority.....	In		232	228	2
Federal Maritime Commission.....	In		205	182	11
Federal Mediation and Conciliation .....	In		302	296	2
Federal Trade Commission .....	This Week		979		
International Trade Commission .....	This Week		454		
Interstate Commerce Commission .....	In		428	428	0
Intell comm management account.....	This Week		241		
Merit Systems Protection Board .....	In		286	277	3
National Archives and Records Admin.....	In	Plan, FTE impact being assessed	2,486		
National Credit Union Administration .....	In		944	0	100
NEA.....	In		273	234	14
NEH.....	In		262	261	0
National Labor Relations Board .....	In		2,054	2,038	1
National Science Foundation.....	In		1,267	1,247	2
NTSB.....	This Week		350		
Nuclear Regulatory Commission.....	This Week		3,218		
Panama Canal Commission.....	In	Past practice indicates all staff are essential	8,772	0	100
Railroad Retirement Board.....	In		1,638	1,308	20
Securities and Exchange Commission .....	In	1-2 day plan => 66 at work; 3-day plan => 172	2,944	2,878	2
Selective Service System .....	In		228	227	0
Smithsonian Institution.....	In		5,544	4,990	10
Tennessee Valley Authority.....	In	Furlough for 800 FTEs would start Oct 30	16,609	0	100
US Holocaust Memorial Council.....	This Week		218		
US Information Agency.....	This Week		8,028		

**FTE Impact Associated with a 1-Day Hiatus in Appropriations Funding**

9-11-95  
1 PM

<u>Agency</u>	<u>Status</u>	<u>Notes</u>	<u>FY 1995 FTEs</u>	<u>FTEs To Be On Furlough</u>	<u>Percent To Be At Work</u>
<b>Executive Office of the President</b>					
The White House Office.....	This Week		400		
Office of Administration.....	This Week		192		
Office of Management and Budget .....	This Week		557		
U.S. Trade Representative.....	This Week		168		
<b>Funds Appropriated to the President</b>					
AID.....	In	Plan does not yet cover overseas staff	3,838		
Peace Corps .....	This Week		1,233		
OPIC.....	This Week		182		
<b>Total.....</b>			<b>1,999,074</b>	<b>336,576</b>	



Administrator  
General Services Administration  
Washington, DC 20405

September 8, 1995

The Honorable John A. Koskinen  
Deputy Director for Management  
Office of Management and Budget  
Washington, DC 20503

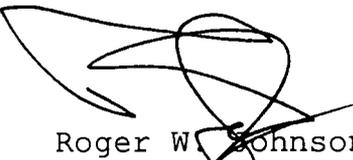
Dear Mr. Koskinen,

For your information, I have enclosed a number of questions and answers that have been used within the General Services Administration (GSA) to address employee concerns over the potential appropriations lapse in October.

This started as an abbreviated list to let employees know in general what was going on, and has grown as they have raised additional issues. New questions and answers are sequentially added and dated to make the document easier to use; it is also posted on an electronic bulletin board accessible to GSA employees nationwide. Next week, employees should be able to ask questions directly by electronic mail.

We are doing our best to keep lines of communications open, but this is not doing much to dispel employee anxiety.

Sincerely,

  
Roger W. Johnson  
Administrator

Enclosure



# **AGENCY SHUTDOWN**

## **General Questions and Answers**

Q1. It seems like we go through these shutdown exercises every other year, and nothing happens. Why is this year any different?

Answer. The possibility of shutdown occurs whenever Congress fails to provide new funding authority before a fiscal year begins on October 1. Usually, this happens because Congress is just slow to act, but nobody really seriously intends to shut down the Government, and things are "fixed" in a day or two. This year is different. The Congress is including in appropriations bills many actions or program cuts that the President says he will veto. Whereas in the past the threat of a Government shutdown might have caused Congress to leave such measures out of a bill, this Congress may react differently.

Q2. I've also heard something about the national debt causing a shutdown, even if Congress passes appropriations. What has the national debt got to do with it?

Answer. An appropriation is really just authority that lets agencies create obligations that result in later disbursements of Treasury cash. Treasury gets its cash largely by borrowing, but has no authority to borrow in excess of the legal national debt ceiling. That ceiling will have to be raised this fall in recognition of our deficit spending. If the ceiling is not raised, Treasury cannot borrow the money to finance Government operations. It's kind of like being over your limit on your credit card.

So, shutdown could happen because of a lapse in appropriations (lack of authority) or because the Treasury is out of money to make the authority good. Depending on when the current debt ceiling is reached, the two events could occur at the same time, or we could have the pleasure of facing shutdown twice in a short period.

✓ Q3. I'm a PBS employee, and my salary is paid out of the Federal Buildings Fund. Since revolving funds don't need Congressional action for their financing, shouldn't I be unaffected by a lapse in funding authority?

Answer. This is really two questions. First, although the Federal Buildings Fund is technically a revolving fund, it relies on an annual appropriations act to provide the authority to use its resources. So it is treated just like an appropriation if shutdown occurs.

It is true that other revolving funds, like the General Supply Fund and Information Technology Fund may not be immediately affected, but there are limits. Since availability doesn't expire on September 30, employees continue working on funded customer orders in effect until the job is complete or the money runs out. At that point, new customer orders need to be received to permit work to continue.

## Questions and Answers, Agency Shutdown

✓ Q4. Isn't the same thing true for work funded by reimbursable orders?

Answer. Not necessarily. Reimbursable orders under appropriated accounts usually expire for new obligation on September 30. If you have a new customer order in hand on October 1, work continues. If agency shutdowns are Government-wide, however, it's probable that many customers will not be able to use their appropriations to send GSA a reimbursable order. It can be a little different for PBS Reimbursable Work Authorizations, but the point is that components need to check with their customers to assure that funds are available on October 1. No funds, no work.

Q5. I understand that, even for accounts affected by a lapse in authority, essential functions and personnel can continue. How are these essential functions and personnel defined?

Answer. First, a minor clarification of terms. It is "excepted" functions that can legally continue under a lapse. These relate directly or indirectly to protecting life or property in some fashion. Each agency determines these functions and the personnel needed to do them, and specifies them in its contingency plan for lapse of appropriations. GSA's official plan is GSA Order ADM 4220.1B, Operations in the Absence of Appropriations. It is currently being reviewed for possible update to ensure compliance with the latest interpretation of laws covering this subject..

All employee work is essential to conducting regular operations. They are not necessarily excepted, however, when regular operations cease under a funding lapse. To be excepted, they must be performing the specific functions allowed by law and identified in the GSA Order. Employees will be notified if they are excepted.

✓ Q6. There are a number of excepted functions in the GSA Order that hardly seem like protection of life and property.

Answer. If you broadly view the definition of "property" as protecting the Government's assets, then you can appreciate something like debt collection as an excepted activity.

We also said "directly or indirectly." There are a number of jobs that by themselves might not qualify as excepted, but which gain excepted status because they are critical to allowing the performance of other excepted activities.

Q7. If a shutdown like this happens, my office will be a zoo, with the phones ringing off the hooks with questions from the press and public. My position isn't listed as excepted, but I think I should be there to help out.

Answer. This is a noble sentiment but, unfortunately, once funds are no longer available, it is illegal for non-excepted employees to do regular work. It violates the Antideficiency Act to accept voluntary services of employees for non-excepted activities.

## Questions and Answers, Agency Shutdown

- ✓ Q8. I am listed as an excepted employee, but most of the rest of my office is not, nor are any of my car pool members. Can't I just stay home with everybody else?

Answer. No. 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 pay status, but are working for delayed pay; they are not rendering free services, and are required to work.

- Q9. What actually happens if I'm a non-excepted employee?

Answer. Non-excepted employees are released and placed in non-duty, non-pay status by use of furlough.

- ✓ Q10. In the past, everybody was told to report to work to "begin shutdown," and then either released later in the day or resumed working if the bill got signed. Will the same thing happen this year.

Answer. We don't have an answer for that yet, and a lot will depend on OMB's guidance. Non-excepted employees might just be told not to report to work until contacted. That's why we need to have call-back procedures. We'll know more as October 1 approaches.

- ✓ Q11. What happens if I'm in leave status when the shutdown occurs?

Answer. This has not been resolved. GSA's current shutdown instruction indicates that employees may take - and be paid for - accrued leave approved before the shutdown occurred. This was based on a long-standing Office of Personnel Management (OPM) legal interpretation. OPM now advises us that this position may have changed. We are pursuing the matter, and will let employees know the final outcome.

- ✓ Q12. What happens to employees in travel status at time of shutdown?

Answer. That depends. Persons on official travel who are performing excepted functions, or who are supported by funds not affected by a lapse, continue on duty. Non-excepted employees are placed on furlough, but, since many obligations for travel costs are incurred before the funding lapse, they are usually not recalled to their duty station.

The best advice is NOT to schedule any discretionary travel, such as for training or conferences, for the first two weeks of October.

- Q13. What about other non-salary obligations, like supplies and the like?

Answer. This can get complicated. The GSA Order states that goods and services may be purchased under lapsed appropriations only in amounts required to support essential operations. GSA also has contracts under types of funding that are not

## Questions and Answers, Agency Shutdown

necessarily affected by a lapse. Detailed guidelines will be issued to assist managers and contracting personnel.

Q14. Specifically, how will salary payments be affected?

Answer. For employees paid from accounts not affected by a lapse, there may be no impact on salary payments. Under appropriations and the Federal Buildings Fund, nobody is paid during a lapse, since funds can't be disbursed against lapsed accounts. In this case, however, an obligation is being incurred for the work of excepted employees, and they will be paid when the lapse is over. In the past, final appropriations action provided that even non-excepted employees were to be paid, but there is no guarantee that this will happen this time.

✓ Q15. Will Treasury be affected or will they be able to process the payment for the pay period ending 9/30?

Answer. Treasury has advised us that the salary payments for the pay period ending 09-30-95 should be processed as normal.

✓ Q16. Can I collect unemployment while in furlough status?

Answer. The eligibility for unemployment is determined on a State by State basis, and the waiting period before eligibility begins varies by State. You can find out the waiting period requirements by contacting your state agency or your servicing Personnel office. Reminder: if your State pays you unemployment benefits and Congress acts to pay you for the same furlough period, you will be required to pay the money back to the State.

✓ Q17. Can employees take other jobs while on furlough?

Answer. GSA employees may engage in outside employment or activity while on furlough, provided that they adhere to the 12 guidelines and limitations in section 105-735.204 of the preserved portion of the GSA Standards of Conduct Order. These generally prohibit any outside employment that would give rise to a real or apparent conflict of interest situation. Although prior concurrence of supervisors is required, this might not be possible; in that event, you must provide written notification to your supervisor upon return to duty. Employees who begin seeking outside employment prior to and in anticipation of a furlough should provide written notification and get supervisory concurrence prior to being furloughed.

✓ Q18. What will be the effect on my health and life insurance?

Answer. Your health insurance coverage will not be affected by the furlough. You will owe the employee's share of the premiums for any pay periods you are in a non-pay status, and the National Payroll Center (NPC) will collect your share of the premium cost from the first available payroll after you return to paid duty status. Your life insurance coverage stays in force at no cost to you.

8/22/95

## Questions and Answers, Agency Shutdown

✓ Q19. What happens if I receive my check in the office, and to pay and leave statements, if no one will be there to receive them when they are delivered? What if the check is mailed to my home, and is lost in the mail?

Answer. Checks will be held in the NPC until they could be delivered to the designated agent. You should promptly arrange for EFT delivery of your pay by contacting your servicing Personnel office or the NPC to assure you can receive your pay as soon as the necessary actions are taken by the Congress and the President. Pay and Leave statements will be held until the furlough period is over. Establishing an Electronic Fund Transfer to your bank account is strongly encouraged.

If a check is lost or stolen, you would request a replacement check by writing to the NPC. In the event of a furlough, there will be a delay in processing a recertified payment to you, regardless of your funding source. If you are paid from an appropriated account, no recertifications will be made, even for pay periods prior to 10/1/95, until after Congress and the President complete the necessary actions to pass funding legislation. Employees should establish an EFT account now.

# AGENCY SHUTDOWN

## Additional Questions and Answers

### PAY AND ENTITLEMENTS

- ✓ Q20. What will be the effect on my deductions for charity, Savings bonds, and union dues?

Answer. While you are in a non-pay status there will not be any deductions taken. When you return to paid duty status, these deductions will resume, but the NPC will not take deductions for the furlough period.

- ✓ Q21. What will be the effect on my TSP contribution deduction or my TSP loan deduction? Will a double payment be taken when I return to work?

Answer. During the period of non-pay status, neither the contribution or loan payment deduction can be made, and these "missed" amounts will not be collected when you return to paid duty status. Your TSP loan repayment period will be extended by the number of non-pay pay periods.

- ✓ Q22. If I'm on furlough, will I still earn leave?

Answer. It depends. Leave accruals are based on paid hours. If you are on furlough (non-pay status) long enough, you won't earn leave. For full time employees, for each increment of 80 hours of non-paid time, you will not earn sick or annual leave for that pay period. For the purposes of sick and annual leave accruals, furlough hours count the same as other leave without pay (LWOP) hours. If you had 56 hours of LWOP before 10/1, and were in furlough status for 24 hours on 10/2 -10/4, then you would not earn leave for the pay period ending 10/14.

- ✓ Q23. I'm retiring 10/1/95. When will I receive my final pay, VSIP payment and lump sum payment? Will the furlough delay my annuity from OPM?

Answer. Your salary payment for the pay period ending 09-30-95 should be processed as usual. For employees paid from appropriated accounts, your VSIP and lump sum payment for earned annual leave can not be paid until the 1996 appropriation acts have been approved by Congress and the President. Your annuity payments may be delayed.

- Q24. If I separate from the agency just prior to the furlough, when will my retirement record go to OPM, if payroll isn't there to process it?

Answer. Your retirement records will be processed as quickly as possible.

- ✓ Q25. Will I be paid for any holidays that fall within the furlough period?

Answer. If an employee is in a non-pay status both the day before and the day after a holiday, he/she will not be paid for the holiday.

# AGENCY SHUTDOWN

## Additional Questions and Answers

- ✓ Q26. Will garnishment deductions that are not taken cause future deductions to be larger, so that the deductions are "made up"?

Answer. No. Garnishment deductions are based on salary paid to the employee. If an employee does not receive compensation for a period of time, then the garnishment period may be extended.

- ✓ Q27. Will child support and alimony deductions be "made up"?

Answer. Child support and alimony deductions that are made under court order are usually based on a monthly deduction. Furlough periods are treated the same as other leave without pay periods. The deduction may or may not be made depending on the wording of the court order, the length of the furlough period, and the deduction schedule. Voluntary payments are usually based on a bi-weekly deduction schedule, and will not be made if there are no earnings, or insufficient earnings for the pay period.

- ✓ Q28. If I am not able to make my CSRS or FERS retirement fund contribution during the furlough period, is this amount lost, or will it be made up - and if made up, will the government still do its matching?

Answer. It is lost. Retirement contributions, either CSRS or FERS, are based on, and are deducted, only when an employee has base pay. If an employee is not in a pay status then no deduction would be made, nor would a "make up" deduction be made. When an employee resumes paid duty status, the normal deductions for that employee will be made and the normal government share will also be paid.

- ✓ Q29. Will my service computation date be affected by the furlough status?

Answer. No. There is no change to your service computation date for service, retirement, or leave category purposes for periods of non-pay status less than six months.

- ✓ Q30. Will the waiting period for my within-grade be affected?

Answer. It could be, depending on your current step and the length of furlough.

- ✓ Q31. I understand that if the furlough period is a full pay period, and I have no earnings, you can't make any deductions; but what happens if the period of non-pay is less than a full pay period? Do you take partial deductions? Can I be assured of some minimum amount of net take-home pay?

Answer. Depending on the kinds of deductions and allotments you have, you may or may not receive any net take-home pay, even if you have some earnings. There is a specific order of deductions taken, starting with retirement contributions, moving

# AGENCY SHUTDOWN

## Additional Questions and Answers

through Federal, State, and local taxes, debts, Court-ordered deductions, other withholdings like union dues and charity contributions, with savings allotments as the last item. The NPC can provide more information.

Q32. What will the effect be on my tax levy, student loans, and other normal deductions?

Answer. As noted, deductions are made in a specific order of precedence. If there are no earnings at all, there is no payment due to the employee, and there can not, of course, be any deductions taken.

✓Q33. What is the effect of a furlough if I'm receiving severance pay?

Answer. If you are receiving severance pay, and the severance pay period extends into a furlough period, your severance pay payments will be suspended until the appropriation act is passed to allow the payments to resume. Furlough periods of up to 6 months count as creditable service for purposes of meeting the 12 month continuous period requirement of and for the computation of severance pay.

✓Q34. I have "use or lose" leave approved that is currently scheduled to be taken during the furlough period. If I am unable to take this leave and will not be able to use the leave before the end of the calendar year, will the leave automatically be restored next year?

Answer. You should make every effort to reschedule your use or lose leave when the furlough is over. The leave will not be automatically restored to your account. You would be required to go through the appropriate procedures to request the restoration of leave.

Q35. What will happen to any pending employment verification actions for loan purposes in the event of a furlough?

Answer. Depending on the extent and length of the furlough, the NPC or your servicing Personnel office may be unable to provide this service.

Q36. Will GSA employees who are detailed to another agency continue to receive salary from GSA?

Answer. GSA would not be able to issue checks to any employee effected by the appropriation funding lapse until the Congress and the President have passed the necessary funding bill.

Q37. Can employees with overseas assignments use their home leave? Will they receive their quarters and post allowances?

# **AGENCY SHUTDOWN**

## **Additional Questions and Answers**

Answer. These questions are under study at this time.

- ✓ Q38. How and when should we send in the time and attendance scanner sheets for the pay period ending 9/30/95?

Answer. If a furlough appears inevitable, the NPC will issue additional instructions concerning the submission of T/A information. At the very least, every effort should be made to be doubly sure they are completely and correctly prepared, and that they are sent to the NPC promptly.

- Q39. Can I get an advance on my pay due to hardship?

Answer. No.

- Q40. Should I verify with my financial institution the deposit of my electronic transfer for the 9/30 payroll?

Answer. We always suggest you verify electronic deposits prior to drawing on your account to be sure your bank has posted your account correctly. The EFT deposits for pay period ending 9-30-95 will be sent through Treasury to the Federal Reserve Bank on Thursday 10/5 for deposit at your bank on Friday October 6. Pay and leave statements may not be received within the normal time frame.

- ✓ Q41. If my T&A Clerk incorrectly processes my timesheet for the last pay period worked and my pay is less than it should be because employees will not be available to make corrections - who is responsible if I have checks bounce due to this error?

Answer. You should verify the amount of deposit with your financial institution before writing checks to prevent this from happening. You, as the employee, would be the party responsible if your checks are rejected due to insufficient funds.

- ✓ Q42. If I am contemplating a change to my financial institution or my allotments, what is the latest date I will have the opportunity to notify payroll for it to be effective before the furlough period?

Answer. The NPC will guarantee processing of all changes pertaining to delivery of checks if the documents or electronic notification is received by the NPC no later than 9/15/95.

# **AGENCY SHUTDOWN**

## **Additional Questions and Answers**

### **PROCUREMENT AND CONTRACTING**

Many of the issues facing procurement in an agency shutdown due to a lack of funding are very similar to non-procurement activities. A contracting officer should not and must not create or authorize an obligation in excess of available funds. The key issues to consider are the need for the supplies or services and the source and availability of the funds to support the purchase. Contracts supported or funded by reimbursable orders or revolving funds may not be immediately impacted. The same holds true for contracts issued under no-year funds. However, it is important to remember that typically, reimbursable orders under appropriated accounts usually expire for new obligations on September 30. The Federal Buildings Fund, while technically a revolving fund, also relies on annual appropriations. As a result, it is treated just like an appropriation if shut down occurs. The following Q and A's are provided to respond to the more common or basic questions relating to new and on-going procurements. Contracting officials need to work and consult closely with program, budget and legal staff during an agency shut down. See also decision trees, which follow.

- ✓ Q43. Can contracting officers continue to make purchases for goods and services under lapsed appropriations.

Answer. No, under lapsed appropriations, contracting officers can not continue to make purchases for goods and services, except when required to support excepted activities. Excepted activities are protecting life and property and supporting other essential functions, such as liquidating valid prior obligations, performing certain contractual requirements, and providing services ordered by those engaged in essential functions. Contracting officials must also consult GSA's shutdown plan to determine what constitutes excepted activities or operations.

- ✓ Q44. Do I need to worry about existing definite quantity contracts awarded for supplies or commodities?

Answer. Probably not, unless the need for the supplies or commodities changes as a result of the agency shutdown. Definite quantity contracts for supplies and commodities should be fully funded at time of award. Accordingly, these types of contracts generally should not be a concern. Options for additional quantities will probably require additional funding and should not be exercised unless funds are available.

- Q45. What about Multiple Award Schedule (MAS) contracts ?

Answer. Existing MAS contracts should not be a concern. However, contracting staff working on awarding or administering MAS contracts may be furloughed until the lapse in appropriations is resolved.

# **AGENCY SHUTDOWN**

## **Additional Questions and Answers**

✓ Q46. Are existing contracts for construction services impacted during a shutdown?

Answer. Probably not, funds are already obligated. However, contracting staff need to work with program, budget and legal staff before processing new work under existing construction contracts.

✓ Q47. What impact will the lapse have on existing service contracts?

Answer. Service contracts funded by annual appropriations that cross fiscal years present a number of issue or concerns facing the contracting officer. Recurring service contracts, funded by annual appropriations, that cross fiscal years should contain an availability of funds clause (e.g. FAR 52.232-19 or GSAR 552.232-77). The clause provides that no legal liability on the part of the Government for payment beyond the current fiscal year is available unless funds are made available and the contractor is so notified by the contracting officer. Absent notification, the contractor should cease operation. Once funding is available, notification is provided to the contractor.

The second issue is the continued need for the services in accordance with GSA's shutdown plan. In some cases it may be necessary to suspend or reduce work under the contract. Depending on the particular contract, this may be accomplished as a partial termination for convenience or a suspension of work. In the case of PBS service contracts, there may be a "Suspension of Work" clause in the contract that provides the wherewithal to suspend or reduce work. Contracting staff need to work closely with assigned counsel in terminating services for the convenience of the Government or reducing the level of work in a particular contract.

✓ Q48. What about exercising options on existing contracts?

Answer. There are generally two types of options contracting officers need to be concerned with - Options for Increased Quantity and Options to Extend the Term of the Contract. Before exercising any option, one of the determinations that must be made by the contracting officer is funds are available. If funds are not available, the option should not be exercised. However, before making a final decision to not exercise an option that could expose the Government to delays or other damages, the contracting officer needs to work with assigned counsel. Options to extend the term of a contract typically contain two notice requirements. The first notice is a preliminary notice that informs the contractor that the Government intend to exercise the option. This notice which does not commit the Government to an extension is issued at least 60 days before the contract expires. Contracting officers should continue to issue the preliminary notice if the Government intends to exercise the option. The second notice, or the modification exercising the options requires funds availability. Again, the contracting officer needs to look to the availability and source of the funds. If the source of funding is appropriated funds, the contracting officer should not commit the Government. However, these circumstances should be addressed on a case by case basis with Legal Counsel.

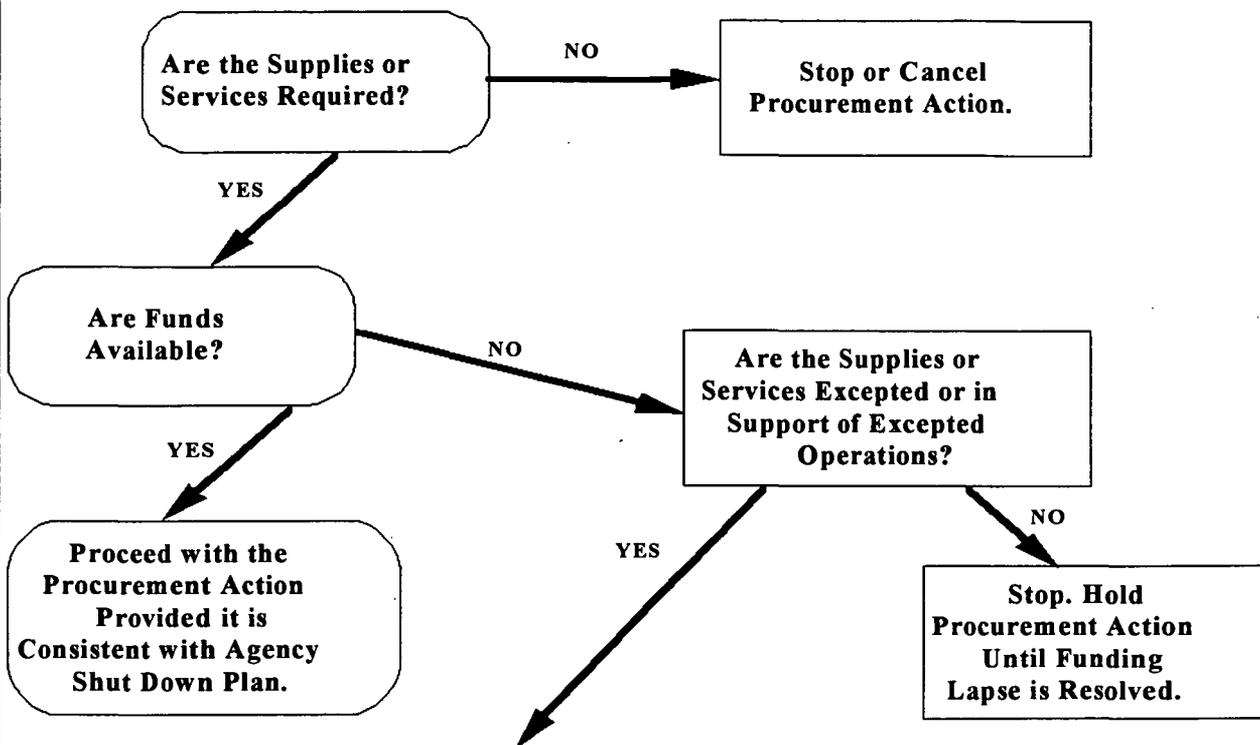
# AGENCY SHUTDOWN

## Additional Questions and Answers

### DECISION TREE

for

DECIDING WHETHER TO ENTER  
INTO A NEW OBLIGATION



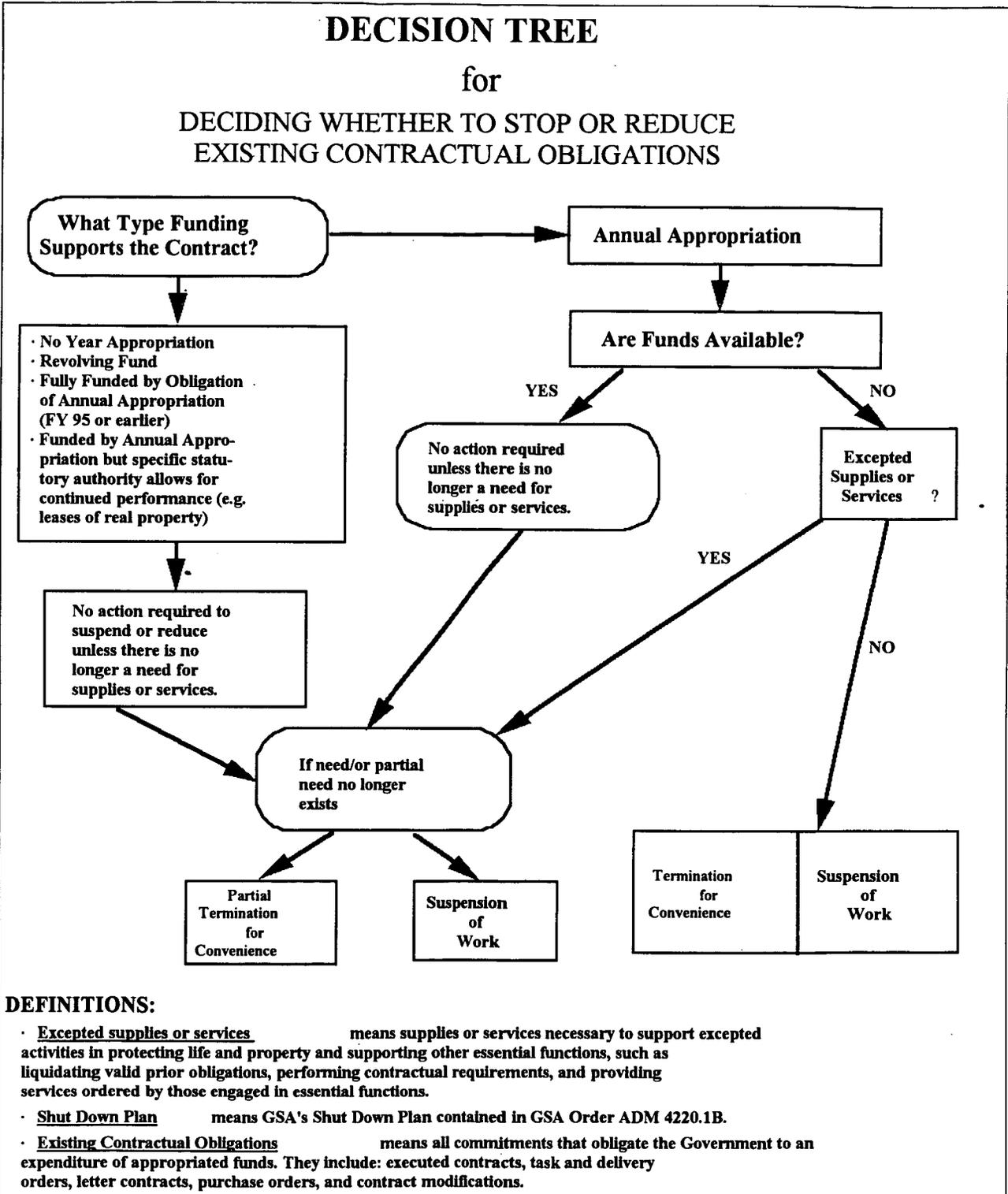
**Proceed with procurement action provided it is consistent with Shut Down Plan. \* NOTE: In this circumstance, the Government obligate but not pay until funds are enacted.**

**DEFINITIONS:**

- **Excepted supplies or services** means supplies or services necessary to support excepted activities in protecting life and property and supporting other essential functions, such as liquidating valid prior obligations, performing contractual requirements, and providing services ordered by those engaged in essential functions.
- **Shut Down Plan** means GSA's Shut Down Plan contained in GSA Order ADM 4220.1B.
- **New Obligations** means all types of commitments that obligate the Government to an expenditure of appropriated funds. They include: certified invoices, oral purchases to be paid by credit card, new contract awards, task and delivery orders, letter contracts, purchase orders, contract modifications including the exercise of options.

# AGENCY SHUTDOWN

## Additional Questions and Answers



# **AGENCY SHUTDOWN**

## **Additional Questions and Answers**

### **CURRENT OUTLOOK**

Q49. The Administrator's message says that all employees will be told if they are excepted, and must work during shutdown. I haven't been told, and can't seem to get any answers from my boss.

Answer. That's probably because he or she doesn't really know yet. We're in process of updating our current shutdown instruction for organizational and functional changes that have happened since it was last revised two years ago, and to make sure it complies with recent Department of Justice interpretations of law. The new instruction should be out in a couple of weeks. Employees should then be notified.

8/22/95

### **NON-CAREER EMPLOYEES**

- ✓ Q50. How are non-career employees, such as those in Schedule C or other excepted service employees such as attorneys, treated during a furlough?

Answer. Just like everyone else. So long as the individual is appointed and paid by GSA, he or she will be furloughed or excepted on the same basis as other GSA employees. Two agency employees, the Administrator and the Inspector General, are appointed by the President, and are paid on an annual basis irrespective of their day to day presence in the office. They are not furloughed, although they will have to wait for their pay until appropriations are enacted (like excepted employees).

### **MORE ON RETIREMENTS**

- ✓ Q51. If I plan to retire at the end of September, what should I do to improve my chances of getting a retirement check on time?

Answer. Employees who are planning to retire at the end of September or early October are urged to work with their servicing personnel offices now to ensure that all required paperwork is accurate and complete. Such employees should also ensure that required clearance forms and procedures are complete well before the end of September. As discussed in question 23, there are no guarantees, and paperwork may well be delayed in GSA or OPM, but by completing the required processes early, employees can help us minimize the chance that retirement, lump sum leave, and VSIP checks will be delayed.

### **FINANCIAL PLANNING**

- ✓ Q52. Question 14 says that, even for excepted employees, "nobody is paid during a lapse, since funds can't be disbursed against lapsed accounts." I don't want to panic, but if I miss a check in October I may be in financial difficulty. What should I do?

8/28/95

# **AGENCY SHUTDOWN**

## **Additional Questions and Answers**

Answer. Even though we do not know if we will be furloughed in October, or for how long, or if we will lose salary, a prudent person would plan now for what might happen then. If possible, employees might want to defer major expenses and try to put money aside from each paycheck; there are four paydays remaining: August 30, September 13, September 27, and October 11 (for the pay period ending September 30). Employees who are particularly concerned about their financial situation should visit an Employee Assistance Program Center counselor. These counselors are able to assist employees in obtaining help they may need to avoid financial difficulties.

In the 8/27/95 Washington Post, the Federal Diary Column also suggested the possibility of an equity line of credit, if you own a home. It's relatively inexpensive and usually doesn't cost anything unless money is drawn against it. You should make arrangements now, however, because it could take the bank a while to approve and set one up.

### **LEAVE**

- ✓ Q53. Question 11 indicated that the question of leave during furlough was unresolved. Is it resolved yet? May I be on paid leave while the agency is shut down?

Answer. It now appears that that law will not permit the use of paid leave by non-excepted employees during a lapse in appropriations. Since 1985, based on guidance from the Office of Personnel Management, GSA policy and labor agreements have stated that employees may be on paid leave during a furlough which was approved before the furlough began. Recently, OPM has written that, in its legal opinion, use of paid leave during a furlough would constitute a violation of the antideficiency act, and that in the case of a furlough due to the lapse of appropriations, "leave is automatically canceled because the necessity to furlough supersedes leave rights." Thus, in the case of a furlough, 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 monies received from the court.

We are exploring the impact that this OPM guidance will have on our negotiated agreements with our two national level unions, and we will let employees covered by negotiated agreements know what impact this will have on policies applicable to them as soon as we have completed our dealings with their union leadership.

In the meantime, the Administrator has written to the President's Management Council, requesting that employees be permitted to use accrued leave during a furlough, subject to a determination by appropriate authority such as the Department of Justice that granting leave for the period of lapse does not violate the Antideficiency Act. He recommended that the salaries of employees in annual leave status be treated similarly to those of excepted employees. When there are further developments, we'll let you know.

9/5/95

# AGENCY SHUTDOWN

## Additional Questions and Answers

✓ Q54. What will happen to credit unions, dry cleaners, day care centers, snack bars, and other commercial facilities located in Federal Buildings if the Government shuts down?

Answer. Unless we are directed otherwise, they will probably keep operating. Most Federal facilities, owned and leased, will remain open to accommodate some level of excepted services and, as long as there are people in a building, certain services must be provided, such as security, heating/cooling, electricity, and the like. The services may be at reduced levels.

This will allow commercial facilities to operate, but some may chose not to do so for economic reasons. Reduced personnel levels could mean too few customers to justify operations, or other factors may cause changes in operations. If you plan on making use of such an establishment during the possible lapse, check beforehand to make sure it will be operating, and on what conditions.

Q55. Question 16 says that I might be able to qualify for unemployment benefits while on furlough, but eligibility varies by state. Can GSA provide me with any more information?

Answer. The Office of Personnel has the responsibility to coordinate unemployment insurance benefits for GSA employees. Weeks ago, Regional Personnel Officers were asked to come up to speed on benefits and restrictions in states under their jurisdiction. Your servicing personnel office can answer many of your questions.

There are a number of issues still unresolved, however, like employment certification and how some states could physically process the claims, but they are being worked on. This is not just a GSA problem, and an inter-agency group of personnel directors, along with the Department of Labor and several unemployment insurance organizations, are trying to find solutions. Gail Lovelace is very much involved in this effort. We'll give you periodic updates.

Q56. Do we know yet when GSA's new shutdown instruction will be issued?

Answer. It was signed on August 31, 1995, and is being distributed by E-mail and other channels.

✓ Q57. I make small purchases for my office using the IMPAC card. Can it be used during a lapse in appropriations?

Answer. Yes, but during a lapse goods can be purchased only in amounts necessary to support excepted activities. If the purchase meets that criterion, and if the cardholder is excepted in order to make the purchase, use of the credit card is an excellent way to handle the transaction. Use of the card for an excepted purpose

9/5/95

# **AGENCY SHUTDOWN**

## **Additional Questions and Answers**

creates a legitimate obligation, the vendor is paid by VISA, and VISA later bills the Government when, hopefully, the lapse is over and disbursements can be made. If you think that your office would like to have this capability, check the GSA Order, Procedures for Use of the Governmentwide Commercial Credit Card Service, (OAD P 4200.1).

9/5/95

**FTE Impact Associated with a 1-Day Hiatus in Appropriations Funding**

9-11-95  
9 AM

<u>Agency</u>	<u>Status</u>	<u>Notes</u>	<u>FY 1995 FTEs</u>	<u>FTEs To Be On Furlough</u>	<u>Percent To Be At Work</u>
Agriculture .....	This Week		108,894		
Commerce.....	In	Plan, FTE impact being assessed	36,000	26,000	28
DOD—Military.....	This Week	Extensive work req'd to assess 500-pg plan	834,105		
Corps of Engineers.....	In		27,739	22,739	18
Education .....	In	Plan distinguishes appn hiatus, CR, debt ceiling	5,131	4,583	11
Energy.....	In	FTE Numbers not expected until 9/25	20,549		
HHS.....	In		62,735	34,570	45
HUD.....	In	HUD claims 2k FTE essential v. 100 in FY 1990	12,883	10,883	16
Interior.....	In	Rec has carry-over auth;BIA rec's adv appn	76,340	56,000	27
Justice .....	In		101,963	37,248	63
Labor .....	This Week		17,632		
State .....	In	Plan submitted only for Domestic	25,006	6,360	75
Transportation.....	In	Extensive work req'd to assess FTE impacts	65,154		
Treasury.....	This Week		161,402		
Veterans Affairs .....	In	No distinction between short/long shut downs	229,902	34,516	85
Environmental Protection Agency .....	In	Id of essential/non-essential staff not final	18,879		
General Services Administration .....	In		16,936		
NASA.....	In	Some essential staff used for 9/28 space flight	23,285	21,422	8
Office of Personnel Management .....	In	Agency claims 64% of staff would be at work	5,472	2,564	53
Small Business Administration.....	In		6,090		
Social Security Administration.....	In	Plan would reopen agency after 2 wks	64,930	61,415	5
Armed Forces Retirement Home.....	In		1,020	235	77
American Battle Monuments Comm.....	In		371	0	100
Arms Control and Disarmament Agency.....	In		251	207	18
Cemeterial Expenses, Army .....	In		133	0	100
Commission on Civil Rights .....	In		105	90	0
Commodity Futures Trading Comm.....	In		545	521	4
Consumer Product Safety Comm.....	In		487	438	10
Corporation for Natl/Comm Service.....	In	Less than 30 FTE essential after 1 wk	603		
Defense Nuclear Facilities Safety Board.....	This Week		150		

**FTE Impact Associated with a 1-Day Hiatus in Appropriations Funding**

9-11-95  
9 AM

<u>Agency</u>	<u>Status</u>	<u>Notes</u>	<u>FY 1995 FTEs</u>	<u>FTEs To Be On Furlough</u>	<u>Percent To Be At Work</u>
Equal Employment Opportunity Comm.....	In		2,860		100
Export-Import Bank .....	In	All but 19 staff would be furloughed on day 1	448		
Federal Communications Commission.....	In	FTEs used to protect wireless communications	2,271	2,171	4
Federal Election Commission.....	This Week		327		
FEMA.....	In		3,944		
Federal Labor Relations Authority.....	In		232	228	2
Federal Maritime Commission.....	In		205	182	11
Federal Mediation and Conciliation .....	In		302	296	2
Federal Trade Commission .....	This Week		979		
International Trade Commission .....	This Week		454		
Interstate Commerce Commission .....	In		428	428	0
Intell comm management account.....	This Week		241		
Merit Systems Protection Board .....	In		286	277	3
National Archives and Records Admin.....	In	Plan, FTE impact being assessed	2,486		
National Credit Union Administration .....	In		944	0	100
NEA.....	In		273	234	14
NEH.....	In		262	261	0
National Labor Relations Board .....	In		2,054	2,038	1
National Science Foundation.....	In		1,267	1,247	2
NTSB.....	This Week		350		
Nuclear Regulatory Commission.....	This Week		3,218		
Panama Canal Commission.....	In	Past practice indicates all staff are essential	8,772	0	100
Railroad Retirement Board.....	In		1,638	1,308	20
Securities and Exchange Commission .....	In	1-2 day plan => 66 at work; 3-day plan => 172	2,944	2,878	2
Selective Service System .....	In		228	1	100
Smithsonian Institution.....	In		5,544	4,990	10
Tennessee Valley Authority.....	In	Furlough for 800 FTEs would start Oct 30	16,609	0	100
US Holocaust Memorial Council.....	This Week		218		
US Information Agency.....	This Week		8,028		

**FTE Impact Associated with a 1-Day Hiatus in Appropriations Funding**

9-11-95  
9 AM

<u>Agency</u>	<u>Status</u>	<u>Notes</u>	<u>FY 1995 FTEs</u>	<u>FTEs To Be On Furlough</u>	<u>Percent To Be At Work</u>
<b>Executive Office of the President</b>					
The White House Office.....	This Week		400		
Office of Administration.....	This Week		192		
Office of Management and Budget .....	This Week		557		
U.S. Trade Representative.....	This Week		168		
<b>Funds Appropriated to the President</b>					
AID.....	In	Plan does not yet cover overseas staff	3,838		
Peace Corps .....	This Week		1,233		
OPIC.....	This Week		182		
<b>Total.....</b>			<b>1,999,074</b>	<b>336,330</b>	

Rivlin:

1. Explain: 2 different scenarios.

- a. Lapse of appropriations authority on Oct. 1.
- b. Running out of cash due to the lack of authority to borrow beyond the current debt ceiling.

2. Examples of why either scenario is bad (unavailability of important services; effects on employees, etc.)

3. The President wants a "clean CR."

- CR should not lock priority changes into place; that debate should take place on the individual bills and in the context of Reconciliation.

- A clean CR should continue funding as follows:

no language  
(includes etc)

4. We also need a debt limit extension; Treasury's current estimate is that the debt ceiling will be reached some time during October.

- Briefly explain implications of hitting the debt ceiling, running out of cash, and default.
- Importance of de-coupling the debt ceiling and the reconciliation process; illogic of threatening a debt ceiling crisis in the name of achieving fiscal stability.

5. OMB is coordinating a process to make sure agencies are prepared with appropriate plans for any eventuality, but I want to be very clear that this Administration wants to avoid a shutdown of any kind. Shutting down the gov't will not bring us closer to resolution of policy differences; it will simply hurt the citizenry we are all here to serve. Therefore, the Administration strongly requests the cooperation of Congress in sending the President a clean CR and a debt ceiling extension so we can go about the business of passing FY 1996 appropriations and enacting a sensible balanced budget plan.

POSSIBLE QUESTIONS:

1. Social security checks

2. Status of shutdown plans

3. During a debt ceiling crisis, is the Administration prepared to prioritize its cash outlays? If so, what would the priorities be?

4. During a shutdown, which programs have authority to continue obligating

Dellinger:

1. Legal framework: constitution and antideficiency act
2. Civiletti memo
3. Explain exceptions to the antideficiency act
4. Explain the authority to enter into obligations for emergency services vs. the lack of authority to pay employees in emergency situations
5. Scope of emergencies permitted by the exception; 1990 amendment

POSSIBLE QUESTIONS:

1. Does the antideficiency act apply to Congress, and if so, how?
2. During a debt ceiling crisis, does the Administration have authority to prioritize its cash outlays? If so, what would the priorities be?
3. What activities have, in the past, been considered emergencies?
4. Authority to call Congress back into session during a funding hiatus.