

GENERAL FAQs
Background Information on Shutdown
September 2013

Privileged Deliberative Communication

What causes a shutdown?

A shutdown occurs when there is a lapse in appropriations. The lapse has an impact on those agencies, and those programs/activities, that were funded by the appropriation which lapsed.

Thus, if an agency has other separate, pre-existing appropriations, these other appropriations continue to remain available to support the activities which they fund. Examples are indefinite appropriation (e.g., the permanent law that provides for the payment of Social Security retirement benefits) and carryover balances from a multi-year appropriation in a prior fiscal year.

History of Shutdowns

Prior to FY1996, there were short shutdowns in 1981,1982,1983,1984,1986,1987 and 1990. These ranged from several hours to three days (and, in several cases, entirely on a weekend). In FY 1996, there were two shutdowns, neither of which was government-wide. The first affected many agencies and lasted for five days, beginning with the CR's lapse on November 14, 1995, and ending on November 19,1995, with the enactment of another CR. According to a Congressional Research Service (CRS) report, an estimated 800,000 federal employees had been furloughed. A few weeks later, there was a second shutdown, affecting fewer agencies. This shutdown ran for 21 days, beginning with the CR's lapse on December 16,1995, and ending on January 6,1996, with the enactment of another CR (funding for some activities had been provided on December 22 and January 4). According to CRS, an estimated 284,000 federal employees were furloughed as of January 2, with another 475,000 employees continuing to work on "excepted" activities.

Agency "shutdown plans," which are based on DOJ opinions and OMB guidance.

During a shutdown, a Federal agency operates under its "shutdown plan." OMB has required agencies to maintain such plans since 1980. An agency prepares its plan by applying, to its programs and activities, the general principles outlined in DOJ opinions and OMB guidance.

The key DOJ opinions are:

- OLC opinion of August 16,1995, *Government Operations in the Event of a Lapse of Appropriations*;
- AG opinion of January 16,1981, *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations* (Civiletti opinion);

- *Congressional Research Service Report for Congress, Shutdown of the Federal Government: Causes, Processes, and Effects, August 6, 2013;*
- *Congressional Research Service Report for Congress, Shutdown of the Federal Government: Causes, Processes, and Effects, September 27, 2010;*
- *Congressional Research Service Report for Congress, Shutdown of the Federal Government: Causes, Effects, and Process, September 20, 2004.*

The key OMB guidance documents are:

- Circular A-11, Section 124, *Agency Operations in the Absence of Appropriations* o Memorandum of November 17, 1981, *Agency Operations in the Absence of Appropriations*;
- OMB Bulletin 80-04 of August 28, 1980, *Shutdown of Agency Operations Upon Failure by the Congress to Enact Appropriations*;
- *OMB Memorandum M-13-22, Planning for Agency Operations During a Lapse in Appropriations, September 17, 2013*;
- *OMB Memorandum M-11-13, Planning for Agency Operations During a Laps in Government Funding, April 7, 2011*;
- *OMB Memorandum M-96-07, Planning for Agency Operations in the Absence of Appropriations, December 14, 1995*;
- *OMB Memorandum M-96-01, Planning for Agency Operations, November 9, 1995.*

The Antideficiency Act; “excepted” activities versus “non-excepted” activities

The key statute is the Antideficiency Act (ADA, 31 U.S.C. 1342), which provides that:

“An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or die protection of property. ... As used in this section, 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.”

Those Federal activities that authorized to continue, during a funding lapse, are “excepted” activities. Those activities which may not continue are “non-excepted.”

In the case of “excepted” activities, an agency may enter into an obligation for the activity to be carried out, but the agency may not expend funds during the shutdown in order to liquidate the obligation. The obligation can be paid only what an appropriation has been enacted.

Example: In the case of “excepted” activities, the agency may continue to have agency employees perform the “excepted” work. Thus, the agency may continue to incur the obligation to pay the employees for the “excepted” work. However, the agency cannot pay the employees for that “excepted” work until an appropriation is enacted. (Thus, whether employees would miss a paycheck would depend on the length of the shutdown.)

What are “excepted” activities under the ADA?

There are two main categories of “excepted activities”: activities that are “authorized by law” and those involving “the safety of human life or the protection of property.” Below are OLC’s descriptions of these activities from its opinion of August 16, 1995.

1. Activities “authorized by law.”

A. Express authorization: contract authority and borrowing authority.

“Congress provides express authority for agencies to enter into contracts or to borrow funds to accomplish some of their functions. An example is the ‘food and forage’ authority given to the Department of Defense, which authorizes contracting for necessary clothing, subsistence, forage, supplies, etc. without an appropriation. In such cases, obligating funds or contracting can continue, because the Antideficiency Act does not bar such activities when they are authorized by law. As the 1981 Opinion emphasized, the simple authorization or even direction to perform a certain action that standardly can be found in agencies’ enabling or organic legislation is insufficient to support a finding of express authorization or necessary implication..., standing alone. There must be some additional indication of an evident intention to have the activity continue despite an appropriations lapse.”

B. Necessary implications: authority to obligate that is necessarily implied by statute.

“The 1981 Opinion concluded that the Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well.

“Examples include the check writing and distributing functions necessary to disburse the social security benefits that operate under indefinite appropriations.”

“Further examples include contracting for the materials essential to the performance of the emergency services that continue under that separate exception.”

“In addition, in a 1980 opinion, Attorney General Civiletti opined that agencies are by necessary implication authorized ‘to incur those minimal obligations necessary to closing [the] agency.’ The 1981 opinion reiterated this conclusion and consistent practice since

that time has provided for the orderly termination of those functions that may not continue during a period of lapsed appropriations.”

C. Obligations necessary to discharge of the President's constitutional duties and powers.

“Efforts should be made to interpret a general statute such as the Antideficiency Act to avoid the significant constitutional questions that would arise were the Act read to critically impair the exercise of constitutional functions assigned to the executive. In this regard, the 1981 Opinion noted that when dealing with functions instrumental in the discharge of the President's constitutional powers, the ‘President's obligatory authority... will be further buttressed in connection with any initiative that is consistent with statutes -- and thus with the exercise of legislative power in an area of concurrent authority — that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates.’ 1981 Opinion, at 6-7.”

Note: In its opinion of September 15, 1995 (*Authority to Employ the Services of White House Employees During an Appropriations Lapse*), OLC concluded that the White House Office could employ individuals on a non-salaried (voluntary) basis to perform “non-excepted” activities during a lapse in the White House appropriation.

2. “Emergencies involving the safety of human life or the protection of property.”

As noted above, an agency may incur obligations (but may not expend funds) in order to address “emergencies involving the safety of human life or the protection of property.”

In 1990, Congress addressed the “emergency” category by adding the following sentence to the ADA:

“As used in this section, 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.”

In its 1995 opinion, OLC concluded that the 1990 amendment “prohibits overly expansive interpretations of the ‘emergency’ exception.” In 1995, OLC reviewed the test that had been set forth in the 1981 AG opinion - few identifying “life and property” emergencies - in light of the 1990 amendment. OLC concluded that the 1981 test should be revised by replacing “in some degree” with “in some significant degree,” so that it would read as follows:

“First, 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.”

As OLC explained, the 1990 amendment “emphasize[s] and reinforce[s] 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.” To illustrate the point, OLC provided an example:

“The brief delay of routine maintenance on government vehicles ought not to constitute an ‘emergency,’ for example, and yet it is quite possible to conclude that the failure to maintain vehicles property may ‘compromise, to some degree’ the safety of the human life of the occupants or the protection of the vehicles, which are government property. We believe that the revised articulation [requiring ‘some significant degree’] clarifies that the emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to the near at hand and demanding of immediate response.”

Should an agency assume that the private economy will continue operating?

In its 1995 opinion, OLC addressed the question of “whether the emergency status of government functions should be determined on the assumption that the private economy will continue operating during a lapse in appropriations, or whether the proper assumption is that the private economy will be interrupted. As an example of the difference this might make, consider that air traffic controllers perform emergency functions if aircraft continue to take off and land, but would not do so if aircraft were grounded.” OLC explained that “with respect to any short lapse in appropriations, the practice of past administrations has been to assume the continued operation of the private economy, and so air traffic controllers, meat inspectors, and other similarly situated personnel have been considered to be within the emergency exception of §1342.” OLC, though, further explained that “[t]he correct assumption in the context of an anticipated lone period of lapsed appropriations, where it might be possible to phase in some alternatives to the government activity in question, and thus over time to suspend the government function without thereby imminently threatening human life or property, is not entirely clear.”

Examples of “excepted” activities that may continue during a funding lapse.

Based on the above principles, OLC and OMB have outlined several examples of “excepted” activities that may continue during a funding lapse.

In its 1995 opinion, OLC stated that it “is an entirely inaccurate description” to refer to a funding lapse as “shutting down the government.” To illustrate this point, OLC outlined a number of Federal activities that are not required to cease but rather may continue during a funding lapse:

“Were the federal government actually to shut down, air traffic controllers would not staff FAA air control facilities, with the consequence that the nation's airports

would be closed and commercial air travel and transport would be brought to a standstill.

“Were the federal government to shut down, the FBI, DEA, ATF and Customs Service would stop interdicting and investigating criminal activities of great varieties, including drug smuggling, fraud, machine gun and explosives sales, and kidnapping.

“The country's borders would not be patrolled by the border patrol, with an extraordinary increase in illegal immigration as a predictable result

“In the absence of government supervision, the stock markets, commodities and futures exchanges would be unable to operate.

“Meat and poultry would go uninspected by federal meat inspectors, and therefore could not be marketed.

“Were the federal government to shut down, medicate payments for vital operations and medical services would cease. VA hospitals would abandon patients and close their doors.”

Again, as noted above, OLC offered these as examples of Federal activities that may continue.

In addition, in its November 1981 memorandum to agencies, OMB provided the following list of activities that may continue:

1. Provide for for national security, including the conduct of foreign relations essential to the national security or the safety of life and property.
2. Provide for benefit payments and the performance of contract obligations under no-year or multi-year or other funds remaining available for those purposes.
3. Conduct essential activities to the extent that they protect life and property, including:
 - a. Medical care of inpatients and emergency outpatient care;
 - b. Activities essential to ensure continued public health and safety, including safe use of food and drugs and safe use of hazardous material;
 - c. The continuance of air traffic control and other transportation safety functions and the protection of transport property;
 - d. Border and coastal protection and surveillance;
 - e. Protection of Federal lands, buildings, waterways, equipment and other property owned by the United States;
 - f. Care of prisoners and other persons in the custody of the United States;
 - g. Law enforcement and criminal investigations;

- h. Emergency and disaster assistance;
- i. Activities essential to the preservation of the essential elements of the money and banking system of the United States, including borrowing and tax collection activities of the Treasury;
- j. Activities that ensure production of power and maintenance of the power distribution system; and
- k. Activities necessary to maintain protection of research property.