Attachment 1

Frequently Asked Questions on Contracting, Grant Administration, and Payment Processing During a Lapse in Appropriations

As agencies update plans for an orderly shutdown in the event of an absence of appropriations, there are a number of cross-cutting issues that apply to all agencies. The below FAQ is meant to address these issues in a way that is understandable, accessible, and convenient to agencies. If you have further questions, please consult your agency counsel or your appropriate points of contact within OMB.

Normally, routine, ongoing operational and administrative activities relating to contract or grant administration (including payment processing) cannot continue when there is a lapse in funding. Therefore, agency employees who are paid with annual appropriations and who perform an activity associated with contract or grant administration (including oversight, inspection, payment, or accounting) should generally not continue work during a funding hiatus.

Below is an outline of the general principles that govern an agency's operations during a lapse in appropriations. Following this outline is a set of Q&As, based on these principles, for agencies to use in addressing contract and grant situations that arise during a lapse in appropriations.

The outline and Q&As are based on the legal opinions issued by the Justice Department (DOJ), and the guidance issued by the Office of Management and Budget (OMB), regarding agency operations during a lapse in appropriations (see, generally, OMB Circular A-11, Section 124). To the extent that agency staff need further guidance regarding the situations addressed below, or on other situations involving contracts and grants, the staff should consult with the agency counsel, which may in turn consult with OMB and DOJ.

I. Basic Principles of Agency Operations during a Lapse in Appropriations.

The Antideficiency Act prohibits agencies from incurring obligations that are in advance of, or that exceed, an appropriation. Thus, with certain limited exceptions, an agency may not incur obligations when the funding source for the obligation is an appropriation that has lapsed.

A. Excepted activities under the Antideficiency Act (express statutory authorizations, emergency circumstances, and the President's constitutional authorities).

As DOJ has explained in its opinions, an agency may incur an obligation in the absence of an appropriation in certain "excepted" situations:

1. A statute or other legal requirement expressly authorizes an agency to obligate funds in advance of appropriations.

In very rare situations, Congress has granted an agency the statutory authority to incur obligations in advance of appropriations. The best known example, in the contracting realm, is the Civil War-era Feed and Forage Act (41 U.S.C. § 6301), which provides authority to the Defense Department to contract for necessary clothing, subsistence, forage, fuel, quarters, transportation or medical and hospital supplies in advance of appropriations. Other examples are the authorities provided by 25 U.S.C. § 99 (Bureau of Indian Affairs contracts for goods and supplies) and 41 U.S.C. § 6302 (Army contracts for fuel).

2. The function addresses emergency circumstances, such that the suspension of the function would imminently threaten the safety of human life or the protection of property.

As DOJ has explained, the emergency exception applies when both of the following exist:

(a) a reasonable and articulable connection between the obligation (in this case, involving a contract or grant) and the safety of life or the protection of property,

and

(b) some reasonable likelihood that either the safety of life or the protection of property would be compromised in some significant degree by failure to carry out the function in question -- and that the threat to life or property can be reasonably said to be near at hand and demanding of immediate response.

As the Antideficiency Act states, the emergency exception does not authorize the continuation of ongoing, regular functions of government, the suspension of which would not imminently threaten the safety of human life or the protection of property.

3. The function is necessary to the discharge of the President's constitutional duties and powers (e.g., Commander-in-Chief or conducting foreign relations).

B. Activities that an agency must continue, in the absence of appropriations, because their continuation is "necessarily implied" from the authorized continuation of other activities.

In addition, as DOJ has explained, there are a limited number of government activities which an agency must otherwise continue despite a lapse in their appropriations because the lawful continuation of other funded or excepted activities "necessarily implies" that these additional activities will continue as well. A "necessary implication" can arise when an agency needs to incur obligations, even though there has been a lapse in the appropriation against which those obligations would be charged, in order to implement:

1. An "orderly shutdown" when there has been a lapse in appropriations (as DOJ has explained, "authority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies"),

2. One of the "excepted" activities in I.A. above, or

3. A congressionally authorized or appropriated function for which Congress has provided funding that remains available during the lapse (including funds already obligated from the current fiscal year), where the suspension of the related activity (during the funding lapse) would prevent or significantly damage the execution of the terms of the statutory authorization or appropriation. The touchstone of the analysis is determining whether execution of the terms of the statutory provision – not the terms of the funded contract or grant pursuant to that statute – would be significantly damaged in the absence of immediate performance of the unfunded, related activity.

As DOJ has explained, an example of a "necessarily implied" activity, for which obligations can continue to be incurred despite a funding lapse, are the administrative activities (funded out of annual appropriation) that are necessary to disburse benefit payments under entitlement programs, such as social security benefits, for which an indefinite appropriation provides the funding for the benefits (and for which there is a congressional authorization to make regular payments to beneficiaries).

However, as DOJ has also explained, a "necessary implication" may not ordinarily be inferred from the kind of broad, categorical authority that often appears in the organic statutes of government agencies.

Moreover, the fact that an agency has unobligated balances (appropriated in a prior fiscal year on a multi-year or no-year basis) that continue to remain available for funding a program does not, in itself, demonstrate that the incurring of obligations for related activities (for which there has been a lapse in appropriations) is necessarily implied. In this regard, it is often the case that agencies possess discretion with respect to when, during the period of availability, the agency engages in activities for which Congress has provided funding. Furthermore, in those cases when Congress has provided funding on a multi-year or no-year basis, the agency may often possess substantial discretion with respect to the timing of when the agency carries out these funded activities. In such situations, where an agency is not otherwise compelled by the terms of a statute to engage in a funded activity during a period in which there is a lapse in appropriations, there is not a "necessary implication" that the agency must incur obligations for related activities for which the appropriation has lapsed.

II. Questions and Answers on Contracts and Grants.

The following Q&As address principally the impact on contract and grant activity of a lapse of appropriations, with respect to an agency incurring obligations for the contract or grant itself as well as for the administrative activities in support thereof.

Of course, in the situation in which performance under an already-issued contract or grant is not impacted by such a lapse, the contractor or grantee may continue to proceed with its work during

the lapse period. An example is the situation where an agency has already obligated funds representing the entire price under a contract or task order before the funding lapse began, or where the agency may use multi-year or no-year funds to incur new obligations for the contract or grant. This assumes there is no problem with funding for any necessary related activities, for example, by federal employees overseeing the contract or grant. The question of what to do if necessary activities related to the contract or grant are funded out of lapsed appropriations is addressed in Question 5 below.

A. Incurring New Obligations for Contracts or Grants.

Q1. When an appropriation has lapsed, may an agency incur a new obligation – by signing a new contract or grant, or by extending a contract or a grant, or by exercising a renewal option – when the funding source for that obligation would be the lapsed appropriation?

A1: No – except in very limited circumstances.

The Antideficiency Act prohibits agencies from incurring obligations that are in advance of, or that exceed, an appropriation. Thus, except in certain limited circumstances, an agency may not incur obligations when the funding source for the obligation would be an appropriation that has lapsed. As outlined above in I.A.-B., these limited circumstances are when:

1. A statute expressly authorizes an agency to obligate funds in advance of appropriations.

2. The function addresses emergency circumstances, such that the suspension of the function would imminently threaten the safety of human life or the protection of property.

3. The function is necessary to the discharge of the President's constitutional duties and powers.

4. The agency must continue the function, in the absence of appropriations, because its continuation is "necessarily implied" from the continuation of other authorized activities.

In these limited circumstances, an agency may incur the obligation (e.g., by awarding a contract to support an emergency activity, such as the minimal necessary guard services to protect a facility), but the agency cannot pay the contractor until appropriations are enacted. Agency staff should work with agency counsel to establish if such an exception may be appropriately invoked.

Q2. May an agency incur a new contractual or grant obligation in order to address emergency circumstances, even though the annual appropriation, against which the obligation would be charged, has lapsed?

A2: Yes, if the new obligation is necessary to address emergency circumstances that imminently threaten the safety of human life or the protection of property. See I.A.2., above, and the DOJ

opinions that address the emergency exception.

Q3. May an agency incur a new contractual or grant obligation – even though the appropriation for this obligation has lapsed – as part of the agency carrying out a program that is separately funded through an appropriation that remains available?

A3: That depends on whether the authority to incur the obligation during the lapse is a "necessary implication" of the program (see I.B. above).

Q4: May an agency incur a new contractual or grant obligation that would be charged against an appropriation that remains available for obligation if the agency would not incur any related obligations (such as for administrative activities by agency employees) for which the appropriation has lapsed?

A4: Yes. In this situation, the agency may incur the new contractual or grant obligation, since both the contract or grant obligation itself, as well as the obligations for necessary related activities (e.g., the administrative actions that are needed in order for the agency to incur the contract or grant obligation), may be charged against an available appropriation.

B. Continued Performance of Administrative, Supervisory, or Support Activities, During a Funding Lapse, In Connection With a Previously-Awarded Contract or Grant.

Q5: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. If there has been a lapse in the appropriation that funds the Federal employees who supervise or support the performance of the contract or grant, can the Federal employees continue these activities during the funding lapse?

A5: In most cases, the absence of appropriations would prevent the continuation of such supervision or support. Routine ongoing activities, related to the agency's contract and grant administration, would not usually be authorized to continue when there has been a lapse in the appropriation that funds the contract and grant administration activities. In other words, during a funding lapse, the performance – by contracting officers, contracting officer technical representatives, contract administration personnel, and grants management specialists – of routine oversight, inspection, accounting, administration, payment processing, and other contracting or grant management activity would generally not continue.

There are very limited circumstances under which such work may continue, notwithstanding the lapse in appropriations. As is further explained in I.B. above, these limited circumstances are when the continued performance of the contract or grants administration is "necessarily implied" for carrying out:

1. An "orderly shutdown" when there has been a lapse in appropriations,

2. One of the "excepted" activities in I.A. above (i.e., express statutory authorizations, emergency circumstances, and the President's constitutional authorities), or

3. A congressionally authorized or appropriated function for which Congress has provided funding that remains available during the lapse, where the suspension of the related activity (during the funding lapse) would prevent or significantly damage the execution of the terms of the statutory authorization or appropriation.

For example, in the situation where an agency has awarded a contract to provide services that are necessary to address emergency circumstances that pose an imminent threat to life or property, some contract administration might well be necessary in order to enable this "excepted" activity to accomplish its objective (e.g., where a contractor cannot perform an emergency service unless the contractor receives direction from the contracting officer regarding how and where to proceed). In that situation, that direction by the contracting officer would be a "necessarily implied" activity, and thus could occur even though there has been a lapse in the appropriation that funds contract administration.

Another example might be a grant program that cannot proceed to the next milestone, under the previously-awarded grant, unless the grant administrator provides approval to the grantee for its continued performance. If the grant program is one that is mandated by Congress, and if failing to proceed to that next milestone – during the period of the funding lapse – would violate a statutory timetable, then in that case the review and approval by the grant administrator would be a "necessarily implied" activity, and thus could occur even though there has been a lapse in the appropriation that funds grant administration. Again, the touchstone of the analysis is determining whether execution of the terms of the statutory authorization or appropriation for which funding remains available – not the terms of the funded contract or grant pursuant to that statute – would be significantly damaged in the absence of performance of the unfunded activity.

These situations are expected to be very limited ones, and the employee may be excepted from furlough only for the bare minimum of time necessary to carry out the review and approval.

Q6: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. In addition, the agency has determined that, due to a lapse in the appropriation that funds the Federal employees who supervise or support the performance of the contract or grant, those Federal employees cannot continue these activities during the funding lapse. In the absence of such supervision or support, may the contractor or grantee nevertheless continue performance?

A6: If the continued supervision or support, during the lapse period, is not critical to the contractor's or grantee's continued performance during that period, then the contractor or grantee may continue to proceed with its work. This is the case, for example, if an agency had obligated funds representing the entire price for a good or service under a contract or task order before the funding lapse began. In that example, the agency would not have to issue an affirmative direction to the contractor or grantee to continue performance, such as a notice to proceed. Instead, the

contractor or grantee could continue to engage in performance. (It is always prudent to be in communication with the contractor or grantee to avoid a misunderstanding.)

However, depending on the duration of a funding lapse, the absence of available Federal employee oversight may lead an agency to reconsider whether the contract or grant activity should continue to be performed. In particular, if the continued supervision or support, during the lapse period, is critical to the contractor's or grantee's continued performance during that period, then – where consistent with law and the terms of the contract or grant – the agency should instruct the contractor or grantee to suspend performance.

The same would be true if continued performance depends on the participation of other Federal agencies or the availability of other Federal facilities that would be precluded by the lapse of appropriations.

Q7: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. In addition, the agency has determined that the continued performance of the contract or grant, during a lapse in appropriations, does not require the supervision or support of Federal employees who may not continue to perform these activities during the funding lapse. In that case, should performance of the contract or grant always continue during the funding lapse?

A7: The first consideration is whether continued performance of the contract or grant is required in order for the agency to comply with its authorization or appropriations statute.

If it is the case that continued performance is statutorily required, then performance should proceed.

If continued performance is not statutorily required, then the agency should consider whether having the contract move forward is a sensible use of taxpayer funds in light of the lapse of appropriations. In this regard, there might be situations in which the continued performance of a contract would be wasteful due to the impact that the funding lapse is having on other agency activities. For example, if a Federal building is closed due to the funding lapse, it might be wasteful to have a contractor perform its normal duties of emptying trash cans every day in the building's offices. In that situation, the agency should consider whether to have the contractor suspend performance.

If an agency decides that continued performance would be wasteful and thus should be suspended during the funding lapse, the agency should take appropriate contractual action (which would be part of the agency's orderly-shutdown activities). Contracting staff will need to work closely with agency counsel in making and implementing these decisions to minimize costs to the government.

Q8: Is the duration of a funding lapse a factor in the analysis in Q&As 5-7?

A8: Yes. In evaluating whether, and to what extent, Federal employee activities – and contractor or grant performance – should continue during a lapse in appropriations, agencies should consider whether these activities or the performance can be postponed until after appropriations are enacted.

In some cases, activities and performance would not qualify for continuation during a very brief funding lapse (under the analysis in Q&As 5-7), but they would qualify if the duration of the funding lapse became longer.

In other cases, the opposite conclusion should be reached, namely, that activities or performance which would qualify for continuation at the outset of a funding lapse, or at some point during a funding lapse, become unnecessary – having been discharged – and thus should be discontinued (e.g. in the case of an agency's initial shutdown activities, or in the case of the one-time, grant-administrator approval that is discussed in the answer to Question 5).

Another situation in which the duration of a funding lapse can have a significant impact on the analysis is where the agency had previously awarded a contract or grant, and – under the analysis in Q&As 5-7 – the contractor or grantee could continue to perform during the initial period of the funding lapse. However, if the funding lapse extended for a sufficiently long period, a situation might arise in which continued performance could occur only if the agency obligated additional funds to the contract or grant. Whether the agency could obligate such additional funds would depend on whether the lapse of appropriations includes the funding for the contract or grant payments, and/or for the contract or grants administration, and whether the continued performance would be wasteful because of the impact of the funding lapse on other agency activities. The agency would therefore need to undertake the analysis under Q&As 2-8 to determine how to proceed in that situation. If the agency determines that the contract or grant performance should discontinue due to the funding lapse, then the agency would not obligate additional funds to the contract or grant, and the contactor or grant would cease work when the previously-obligated funds run out. (Agencies would be well advised to communicate with contractors to avoid any misunderstanding.)

C. Making Payments to Contractors and Grantees during a Lapse in Appropriations

Q9: In the case of a contract or grant that has been previously awarded (and thus for which available funds were obligated), can Federal employees be excepted from furlough in order to make timely payments to the contractor or grantee in accordance with the contract or grant?

A9: No – except in very limited circumstances.

During a lapse in appropriations, the activity of making contract and grant payments on a timely basis does not, by itself, qualify as one of the limited circumstances for which obligations can be incurred under the Antideficiency Act (as outlined in I.A.-B., above). In this regard, the fact that the government would incur interest penalties under the Prompt Payment Act or other law, due to

the delay in payment caused by a funding lapse, does not provide a legal justification under the Antideficiency Act for an agency to continue to make payments during a funding lapse.

An exception would exist in the very limited situation in which making the payment to a contractor or grant – during the funding lapse – is "necessarily implied" under the analysis outlined in I.B., above. There may be very limited circumstances where making a payment, during the funding lapse, is necessary because the agency's failure to make the payment – during the funding lapse – itself would result in an imminent threat to life or property, or would critically impair the President's constitutional functions, or would prevent or significantly damage the execution of a congressionally authorized and funded function. In that latter situation (applying the analysis in I.B.3., above), the agency must determine that (1) the continuation of the program during the funding lapse has been contemplated by Congress in authorizing or appropriations legislation, (2) the agency's failure to make the payment during the funding lapse would delay contract or grant performance, and (3) this delay in payment would significantly damage the execution of the terms of the authorizing or appropriations legislative provision.

Q10: Can an agency pay a contractor or grantee, during a funding lapse, for performance under a contract or grant that the agency awarded during the funding lapse under one of the exceptions to the Antideficiency Act (see Q&As 1-2)?

A10: No. As is the case with federal employees who are excepted from furlough to perform authorized activities during a funding lapse, the agency will incur obligations for the excepted work that a contractor or grantee is authorized to perform during a funding lapse. However, as with the pay of the excepted federal employees, the agency cannot liquidate those contract and grant obligations until an appropriation is enacted.

D. Can Non-furloughed Employees Perform Other Work?

Q11: The agency has excepted, from furlough, employees who are performing necessary contract or grant support functions for an "excepted" activity or under the "necessarily implied" standard. Can these employees also continue to perform other work (that is not for an excepted activity and is not "necessarily implied") during the remaining hours of the workday?

A11: If the non-furlough ("excepted') support function can be performed in less than an entire day, the employee is required to resume furlough status after completing the function.

However, there may be cases in which an employee is required to perform this "excepted" support function intermittently throughout the course of the day, and the intervals in between are too short to enable the employee to be furloughed and then recalled in time to perform the function. In such cases, the employee may remain at work, and may perform non-"excepted" functions during these intervals. In such situations, agencies must minimize the number of employees who are performing "excepted" functions on an intermittent basis, by consolidating the "excepted" functions, to the extent possible, for performance by a smaller number of employees (e.g., agencies

should not except, from furlough, multiple employees in order to perform intermittent "excepted" work, when instead the agency could have fewer employees perform the "excepted" work on more of a full-time basis). In this way, the agency properly minimizes its reliance on the Antideficiency Act to incur obligations for which the appropriation has lapsed.

Attachment 2

Supplement to Frequently Asked Questions Concerning Contingency Planning for Lapse in Appropriations

The FAQs below are designed to respond to additional questions posed by agencies in preparation for prior potential lapses in appropriations concerning IT, travel, orderly shutdown, and entitlement to payment for excepted work, and build upon the Basic Principles of Agency Operations During a Lapse in Appropriations that were set forth in the FAQs on Contracting, Grant Administration, and Payment Processing During a Lapse in Appropriations.

A: Information Technology

Q1: What is the controlling consideration for the continuity or suspension of IT operations for an agency during a lapse in appropriations?

A1: The consideration governing all determinations concerning continuity or suspension of Federal activities funded through lapsed appropriations is that such activities, including IT operations, may continue only if they are excepted activities under the Antideficiency Act, or where their continuation is necessarily implied from a congressional authorization or appropriation of other continued functions.

Q2: How should agencies determine what systems, including linked interoperable systems, are to be maintained and operated during an appropriations lapse?

A2: If a single system must operate to avoid significant damage to the execution of authorized or excepted activities, only this system should maintain operations, and support for continued operation of the single system (whether by agency IT staff or by a contractor) should be the minimum necessary to maintain functionality and ensure the security and integrity of the system during the period of the lapse. If the integration of that system with other systems makes it infeasible to maintain operation of the single system without maintaining others with which it is integrated, an agency must provide guidance on operations consistent with avoiding any imminent threat to Federal property (including avoiding any permanent disruption to agency IT systems and ensuring preservation of agency electronic records). Given that websites represent the front-end of numerous back-end processing systems, agencies must determine whether the entire website can be shut down or components of the website will be shut down.

Q3: What is the guidance on keeping Government websites up during a lapse in appropriations if the costs of maintaining the website are funded by a lapsed appropriations source?

A3: The same standards described above would apply. The mere benefit of continued access by the

public to information about the agency's activities would not warrant the retention of personnel or the obligation of funds to maintain (or update) the agency's website during such a lapse. However, if maintenance of the website is necessary to avoid significant damage to the execution of authorized or excepted activities (e.g., maintenance of the IRS website may be necessary to allow for tax filings and tax collection, which are activities that continue during an appropriations lapse), then the website should remain operational even if its costs are funded through appropriations that have lapsed. If it becomes necessary to incur obligations to ensure that a website remains available in support of excepted activities, it should be maintained at the lowest possible level. For example, in the IRS case above, the IRS website would remain active, but the entire Treasury Department website would not, absent a separate justification or a determination that the two sites cannot not feasibly be operated separately.

Q4: What notice should agencies provide to the public regarding the status of their websites during a lapse of appropriations?

A4: If an agency's website is shut down, users should be directed to a standard notice that the website is unavailable during the period of government shutdown. If any part of an agency's website is available, agencies should include a standard notice on their landing pages that notifies the public of the following: (a) information on the website may not be up to date, (b) transactions submitted via the website might not be processed until appropriations are enacted, and (c) the agency may not be able to respond to inquiries until appropriations are enacted.

Q5: What if the cost of shutting down a website exceeds the cost of maintaining services?

A5: The determination of which services continue during an appropriations lapse is not affected by whether the costs of shutdown exceed the costs of maintaining services.

Q6: If websites are down, will agencies be able to extend deadlines for applications that would otherwise have been due during the lapse in appropriations?

A6: To the extent permitted by law, agencies may extend deadlines for activities, as necessary to compensate for the period of the lapse in appropriations and the unavailability of the website.

Q7: What is the guidance regarding the use of mobile devices such as Blackberries, or home access to work email through Secure ID?

A7: Furloughed employees should be given clear guidance that the prohibitions of the Antideficiency Act extend to work performed from outside of the office, including via mobile devices or remote computer connections. Orderly shutdown procedures should not rely on mobile devices or home access to work email for providing notices of when to return to work. Agencies have discretion to enforce these access restrictions in light of their own particular needs. Some may choose, for example, to include in orderly shutdown activities a requirement that furloughed employees turn in their Blackberries until they return to the office; others may determine that circumstances warrant a different approach.

B. Orderly Shutdown

Q8: How long should "orderly shutdown" take?

A8: Ordinarily, furloughed employees should take no more than three or four hours to provide necessary notices and contact information, secure their files, complete time and attendance records, and otherwise make preparations to preserve their work. OMB Circular A-11 requires agencies to provide OMB with written justification for the conduct of orderly shutdown activities in excess of a half-day. While it may be appropriate in limited circumstances for some employees to take longer to assist in shutdown activities (e.g., seeking court continuances or stop-work orders on pending contracts), these may not be necessary in the event that a very short period of a lapse in appropriations is anticipated. Agencies should make every effort to prepare for these needs in advance of a lapse so that orderly shutdown activities are minimized.

Q9: In the event of a lapse on a Friday, when would employees whose schedule is a normal Monday-Friday work week and who are funded by annual appropriations be expected to conduct orderly shutdown activities?

A9: They should be directed to return to work on the following Monday morning to conduct such activities.

Q10: Does this mean that they can continue to work remotely over the preceding weekend?

A10: No. Following a lapse in appropriations, the Antideficiency Act bars nonexcepted work by such employees other than to perform orderly shutdown activities.

C. Travel

Q11: If employees funded through appropriations that have lapsed are on temporary duty assignments away from their normal duty stations at the time of an appropriations lapse, can they make arrangements to return home sooner than planned?

A11: They are encouraged to do so wherever reasonable and practicable. However, agencies should make a determination of reasonableness and practicality based on the length of the assignment and the time required for return travel, compared to the anticipated length of the lapse, so as to minimize the burdens of doing so.

D. Entitlement to Payment for Excepted Work

Q12: How will excepted employees be paid for excepted work required during the lapse in appropriations?

A12: Without further specific direction or enactment by Congress, all excepted employees are

entitled to receive payment for obligations incurred by their agencies for their performance of excepted work during the period of the appropriations lapse. After appropriations are enacted, payroll centers will pay all excepted employees for time worked.