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GENERAL MEMORANDUM 19-003

Status of FY 2019 Appropriations and Partial Government Shutdown

FY 2019 Appropriations Status. As of this writing we are in day 17 of a partial government shutdown affecting the Indian Health Service (IHS) and Indian Affairs (BIA/BIE) and many other federal agencies whose FY 2019 funding has lapsed as of December 21, 2018. On January 4, 2019, the House approved legislation (HR 21) on a largely party line vote (241-190) which would fund 6 of the 7 affected appropriations bills using the text of the Senate-passed FY 2019 appropriations bills from last year. The appropriations bills are: Interior, Environment, and Related Agencies; Financial Services and General Government; Transportation-Housing and Urban Development; Agriculture, Commerce-Justice-Science; and State and Foreign Operations.

The House Democrats, now the majority party, likely used the Senate-passed bills of last year because they had been approved by a wide bipartisan margin and, unlike the House-passed bills from last year, do not contain so many controversial policy riders. We point out that the FY 2019 Interior and Related Agencies bill approved by the House last year contains more funding for the IHS and Indian Affairs than does the Senate bill, so that is problematic. For a comparison of the FY 2019 House and Senate Committee recommendations for the IHS see our General Memorandum 18-025 of June 26, 2018 and for Indian Affairs see our General Memorandum 18-032 of August 16, 2018. HR 21 does not include Homeland Security funding which is the bill from which a border wall would be funded; rather the House Democrats' position is that there should be a short-term extension for Homeland Security while discussions continue. The President has said he will not sign HR 21 and Senate Majority Leader McConnell's position is that he will not call up that legislation unless the President will sign it. Now, Senate Democrats reportedly are coalescing around a plan to block any legislation on the Senate Floor that does not address the lapse in appropriations and House Democrats are planning to bring up individual FY 2019 spending bills in the House.

Directions for Impacted Federal Agencies and Federal Agency Contingency Plans. The White House's Office of Management and Budget has created a page (<https://www.whitehouse.gov/omb/information-for-agencies/agency-contingency-plans/>) to provide guidance to impacted federal agencies during the lapse in appropriations. This includes both an FAQ document and "special instructions" to agencies (both documents are attached). The page also provides links to each federal agency's contingency plan. Some federal agencies have made specific contingency plans by bureau and office. For example, under the Department of Interior, the BIA and the BIE each have their own contingency plans (attached). The Department of Health and Human Services has a contingency plan for few agencies for which appropriations have lapsed (including IHS) (attached) as well as a staffing plan (attached) and the IHS as a Dear Tribal Leader Letter (attached).

Generally, federal agencies for which appropriations have lapsed cannot incur obligations except in certain circumstances: when Congress has granted that agency authority to do so, when that agency is taking action to protect human life or property or if the work of certain federal employees is funded from sources other than the yearly appropriations process (such as fees or mandatory funding). Employees whose duties include protecting human life or property are generally "excepted" from the shutdown and required to report to work, albeit without pay. When Congress eventually provides funding to reopen the impacted agencies, those employees usually receive back pay. "Non-excepted" employees are generally furloughed and usually receive back pay as well; however, some Members of Congress object to this and do not want to pay the furloughed employees because they were not performing work during the shutdown. Each agency makes determinations about "excepted" and "non-excepted" employees. Regarding contracts and grants, the FAQ states that generally, routine, ongoing operational and administrative actions relating to contract or grant administration (including payment processing) cannot continue when there is a lapse in appropriations.

Specifically, the BIA's contingency plan provides categories of excepted required services and activities including: law enforcement, child protection, wildland fire management, irrigation (because it is fee funded) and safety of dams. Because most BIE accounts are forward funded (meaning that the FY 2018 appropriations law provided funding for the 2018-2019 school year) most BIE-funded employees and functions are excepted, including the BIE-funded K-12 school system and tribal colleges and universities. HHS's contingency plan states that the IHS is to continue to provide direct clinical health care services as well as referrals for contracted services that cannot be provided through IHS clinics. The HHS guidance however, states that IHS can only perform certain national policy development or oversight but is unable to provide the majority of funds to tribes and urban Indian health programs. The IHS's Dear Tribal Leader Letter states that Indian Self-Determination and Education Assistance Act (ISDEAA) agreements funded by appropriations will be impacted by the lapse in appropriations; however, HHS has determined that that tribally-managed programs operating under ISDEAA agreements are "excepted programs" which must continue to address emergency circumstances although no awards are being made and ISDEAA negotiations are suspended during the shutdown. The IHS suggests using prior year amounts or third party billing revenues to continue operations.

Impacts. Because the lapse in appropriations started just before the holidays, the impacts are just now starting to be felt. In years past when there have been short lapses in appropriations, the impacts have been relatively minor. Because Congress and the President have hardened their negotiating positions, this shutdown has the potential to last much longer and the impacts will grow the longer it lasts. The last extended government shutdown was in 2013.

Please let us know if we may provide additional information about the lapse in FY 2019 appropriations.

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Frequently Asked Questions 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 information below is meant to address the most frequently asked questions by agencies. If you have further questions, please consult your agency counsel or your appropriate points of contact within OMB.

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 Department of Justice (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 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, for example, 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 appropriations) that are necessary to disburse benefit payments under entitlement programs 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. 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.

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 lapse in appropriations.

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.

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 contractor 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: 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 circumstances in which 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.

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.

III. Information and Information Technology

Q12: What is the controlling consideration for the continuity or suspension of IT operations for an agency during a lapse in appropriations?

A12: 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.

In making the necessary determinations for the continuity or suspension of information technology operations, agencies must take into consideration the agency’s cybersecurity risk posture and avoid making determinations that would result in any imminent threat to Federal property, including:

- any permanent disruption to agency information systems or loss of agency information;
- any potential threats to the security, confidentiality and integrity of agency information and information systems.

Generally, agency cybersecurity functions are excepted as these functions are necessary to avoid imminent threat to Federal property. Agencies must also ensure the preservation of agency information, including electronic records, and maintain the security, integrity and confidentiality of such information.

Q13: Should agencies suspend information technology operations if doing so would introduce cybersecurity risk?

A13: No, agencies should avoid making any determinations that would result in imminent threat to Federal property. As noted above, cybersecurity functions are excepted as these functions are necessary to avoid imminent threat to Federal property. In making the determination to suspend information technology operations, including websites, agencies must take into consideration cybersecurity risk.

At a minimum, agencies must avoid any threat to the security, confidentiality, and integrity of the agency information and information systems maintained by or on behalf of the Government. Agencies should maintain appropriate cybersecurity functions across all agency information technology systems, including patch management and security operations center (SOC) and incident response capabilities.

Q14: How should agencies determine what systems, including linked interoperable systems, are to be maintained and operated during an appropriations lapse?

A14: If a single system must operate to avoid significant damage to the execution of authorized or excepted activities, including activity necessary to avoid imminent threat to Federal property, as discussed above, this system should maintain operations. Support for the 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 and any other necessary agency information technology resources during the period of the lapse.

If the integration of that single 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 manage its information technology resources consistent with avoiding any imminent threat to Federal property (including avoiding any permanent disruption to agency information systems, avoiding any threat to the security, confidentiality and integrity of agency information and information systems, and ensuring preservation of agency electronic records).

Q15: 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?

A15: 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 and updating 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 level of functionality necessary to support those excepted activities. 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.

As discussed specifically in Q13 above, in making the necessary determinations for the continuity or suspension of a website, agencies must also take into account whether suspending the website or functionality would introduce risk into its cybersecurity risk posture. Agency determinations must avoid any imminent threat to Federal property, including:

- any permanent disruption to agency information systems or loss of agency information;
- any potential threats to the security, confidentiality, and integrity of agency information and information systems.

If shutting down or suspending a website would increase cybersecurity risk, an agency may elect to keep the website operational but suspend non-cybersecurity related updates for websites that are not necessary to avoid significant damage to the execution of authorized or excepted activities.

Q16: What notice should agencies provide to the public regarding the status of their websites during a lapse of appropriations?

A16: If an agency's website is shut down or is operating at a reduced functionality, users should be directed to a standard notice that the website or service 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.

Q17: What if the cost of shutting down a website exceeds the cost of maintaining services?

A17: 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. Nevertheless, agencies should ensure the shutting down of a website or other functionality does not introduce or invite potential threats to the security, confidentiality, or integrity of the agency information resources as described in the preceding questions.

Q18: If websites are down, will agencies be able to extend deadlines for applications that would otherwise have been due during the lapse in appropriations?

A18: 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.

Q19: What is the guidance regarding the use of mobile devices such as government-issued cell phones or Blackberries, or home access to work email through Secure ID?

A19: 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 government-issued cell phones or Blackberries until they return to the office; others may determine that circumstances warrant a different approach.

IV. Orderly Shutdown

Q20: When does an agency begin “orderly shutdown?”

A20: While agencies should be prepared to implement their contingency plans, they must wait to execute an orderly shutdown until the Director of OMB directs agencies to operate in accordance with the contingency plans that agencies have prepared under OMB Circular A-11, section 124, and apportions the amounts necessary for obligations required to carry out agencies' contingency plans. Agencies should not begin orderly shutdown prior to such direction and apportionment by OMB. (Note: Individual employees may be allowed to engage in some orderly shutdown preparatory activities in anticipation of a possible lapse, as provided in Q21.)

Q21: How long should “orderly shutdown” take?

A21: 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. Agencies should use this time to provide written notices of the decision to furlough if notice has not already been provided to employees. 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.

Q22: 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?

A22: Unless the employee's agency specifically directs otherwise, employees should generally report to work to conduct necessary orderly shutdown activities (if any) on the next day on which the employee would have been scheduled to work. Agencies should take into consideration an employee's previously scheduled leave, alternative work schedule (AWS) day off, or holiday(s) that take place during the furlough period and generally allow the employee to complete orderly shutdown activities on the workday on which the employee had been scheduled to return to work. For example, if the employee was scheduled to be on paid leave and out of the office on the next workday after the commencement of a lapse in appropriations, the employee would not report to work to complete orderly shutdown activities until the workday on which the employee had been scheduled to return to duty. Even though an employee's scheduled paid leave is cancelled during a lapse in appropriations, agencies should generally allow the employee to continue planned periods of absence. Agencies should provide clear instructions to employees who have planned periods of absence regarding when they are expected to report to work to perform orderly shutdown activities.

If an agency directs an employee to perform orderly shutdown activities on a weekend off day, a holiday, or an AWS day off, any hours performing orderly shutdown activities would count as hours in applying applicable premium pay rules (e.g., for holiday premium pay or overtime pay). (Whether the agency will be obligated to provide pay at an overtime rate for those hours after the lapse has ended will depend on whether Congress, in conjunction with the legislation restoring appropriations, provides retroactive pay for hours during which employees were furloughed. If pay is provided for furlough hours, those hours would count as hours of work in applying overtime rules.)

Q23: Does this mean that an employee can continue to work remotely until he or she reports to duty to perform orderly shutdown activities?

A23: No. Following a lapse in appropriations, the Antideficiency Act bars non-excepted work by such employees other than to perform orderly shutdown activities.

Q24: In the event of a lapse on a Friday, when would employees whose regular schedule includes weekend (i.e., Saturday and/or Sunday) work and who are funded by annual appropriations be expected to conduct orderly shutdown activities?

A24: A non-excepted weekend employee generally should report to work on the next day on which the employee would have been scheduled to work—for the sole purpose of engaging in orderly shutdown activities. Agencies should take into consideration an employee's previously scheduled leave, AWS day off, or holiday(s) that takes place during the furlough period and generally allow the employee to complete orderly shutdown activities on the next workday on which the employee had been scheduled to return to work. For example, the employee described in this question would report to perform orderly shutdown activities on Saturday, if the employee had been scheduled to work on that day. If the employee was scheduled to be on paid leave on the days right after the lapse commenced, the employee would report to perform orderly shutdown activities on the first workday after the planned period of leave—even though the leave was cancelled by the lapse.

Q25: In the event of a lapse on a Friday, when should excepted employees report for duty?

A25: Unless the employee’s agency specifically directs otherwise, excepted employees should generally report for duty on the next day on which they are scheduled to work. Agencies should take into consideration an employee’s previously scheduled leave, AWS day off, or holiday(s) that takes place during the furlough period and generally allow the employee to be excused from duty through a furlough action on the days the employee had planned to be absent—unless the agency determines there is a need for the employee to report to work. An excepted employee must be furloughed if excused from duty on a holiday or regular workday.

If an agency directs an excepted employee to work on a holiday or the employee’s AWS or other regular day off, any hours performing work would count as hours in applying applicable premium pay rules (e.g., for holiday premium pay or overtime pay). Excepted employees will be paid for any earned overtime pay or holiday premium pay when Congress restores appropriations.

V. Travel

Q26: 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?

A26: 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.

VI. Entitlement to Payment for Excepted Work

Q27: How will excepted employees be paid for excepted work required during the lapse in appropriations?

A27: 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.

VII. Carryover Funds

Q28: What happens to apportioned unobligated amounts provided under a continuing resolution (CR) during a lapse?

A28: Unobligated amounts provided under a CR and apportioned by OMB do not carry over during a lapse unless those amounts have a clear period of availability extending beyond the last day of the CR (e.g., a full-year appropriation).

Tribal Notification on Status of Federal Funding

Dear Tribal Leader:

As you are aware, the current continuing resolution for Fiscal Year (FY) 2019 funding that the Indian Health Service (IHS) is operating under ends on Friday, December 21, 2018, and neither an Appropriation Act for FY 2019 nor another continuing resolution has been enacted yet. In the event a continuing resolution or a FY 2019 budget is not enacted and a lapse of funding occurs, I want to provide you with information related to your IHS-funded activities.

Your current Indian Self-Determination and Education Assistance Act (ISDEAA) agreement is funded by appropriations that will be affected by the government shutdown should one occur. However HHS has determined Tribally-managed programs operating under ISDEAA agreements are “excepted programs” in which functions must continue under the following criteria defined by OMB: addresses emergency circumstances, such that the suspension of the function would imminently threaten the safety of human life or the protection of property.” This designation means that the IHS may incur the obligation to enter into the agreement, but the agency cannot pay Tribes or Tribal organizations contracting under the ISDEAA until appropriations are enacted. Therefore, there will be no funding available from the IHS until such time as appropriations are enacted and available for such purpose. We acknowledge that this circumstance may result in insufficient funds to carry out the terms of the agreement and that the program may cease to operate.

To the extent that you have amounts available from prior year funding under your ISDEAA agreement, those amounts are available to continue the contracted/compacted activities on the same basis as they normally would be.

I also want to make you aware of information related to any federal employees who are working within your Tribal programs under Intergovernmental Personnel Act (IPA) agreements or Memorandum of Agreements (MOA). Commissioned Officers will continue work as normal under their MOAs. Employees working for Tribally-managed programs under IPAs are designated as Excepted employees, since they are working in an Excepted program. Therefore, they will receive a notice that informs them of this status.

We know this notice does not answer all of the questions you may have. This is an informal notice and if a lapse in appropriations does occur, we will follow up with additional information.

<https://www.ihs.gov/newsroom/announcements/2018-announcements/tribal-notification-on-status-of-federal-funding/>

FY 2019 HHS Contingency Staffing Plan for Operations in the Absence of Enacted Annual Agriculture and Interior Appropriations

Fiscal Year 2019

Topics on this page: [Summary Data](#) | [Summary of Activities to Remain Open and to be](#)

[Closed](#) | [Methodology](#) | [Summary by Category of Exception](#)

The mission of the U.S. Department of Health and Human Services (HHS) is to enhance and protect the health and well-being of all Americans by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services. HHS would use the full extent of the authority under the Antideficiency Act to protect the health of Americans under a lapse in appropriations. This plan represents initial estimates for HHS activities under a lapse. Over the duration of any lapse, HHS would continue to review its resources and authorities to minimize impact of such a lapse.

Since most of HHS's Operating Divisions were funded through FY 2019 by the Labor, Health and Human Services, and Education appropriation (which represents approximately 60% of HHS staff overall), the contingency staffing plans detailed here represent only the Operating Divisions and programs funded through the Agriculture and Interior appropriations.

Summary Data

As shown on the [attachment - PDF](#), HHS' contingency plans for agency operations in the absence of appropriations for Agriculture and Interior would lead to retaining approximately 24,927 staff and furloughing 7,997 staff as of day two of a near-term funding hiatus. Put another way, more than 76% of HHS employees would be retained and 24% would be furloughed. These percentages vary among HHS' agencies and offices, agencies with a substantial direct service component like the Indian Health Service (IHS) having most of their staff retained. Food and Drug Administration (FDA) will continue core functions to handle and respond to emergencies – such as monitoring for and quickly responding to outbreaks related to foodborne illness and the flu, supporting high-risk food and medical product recalls when products endanger consumers and patients, pursuing criminal and certain civil investigations when we believe public health is at risk, screening the food and medical products that are imported to the U.S. to protect consumers and patients from harmful products, and addressing other critical public health issues.

Summary of Activities to Remain Open and to be Closed

Consistent with legal advice that activities authorized by law, including those that do not rely on annual appropriations, and activities that involve the safety of human life and protection of property are to be continued, some of the HHS activities that would *continue* include:

- **Indian Health Service (IHS)** – IHS would continue to provide direct clinical health care services as well as referrals for contracted services that cannot be provided through IHS clinics.
- **Agency for Toxic Substances and Disease Registry (ATSDR)** – ATSDR experts will continue to provide a 24/7 response to toxic chemical exposures, hazardous leaks and spills, environmentally-related poisonings, natural disasters and terrorist acts. ATSDR would continue activities supported with funding not affected by the lapse in appropriations, such as: the Per- and Polyfluoroalkyl Substances (PFAS) Contamination in Drinking Water study and related activities, certain asbestos exposure-related activities in Libby, Montana, as well as activities funded with supplemental funding for the 2017 hurricane season response.
- **Food and Drug Administration (FDA)** – The FDA would continue specific activities within the scope of its user fee funded programs, including those for prescription drugs, generic drugs, biosimilars, medical devices, animal drugs, and tobacco products. The tobacco program has sufficient user fee carryover to continue all programmatic work. User fee work supports the approval of new medical products, our ability to review requests to conduct important clinical research, issue guidance, and other necessary activities to help patients have access to new therapies and important generic and biosimilar treatment options. The FDA would also continue vital activities to respond to emergencies, manage high-risk recalls, pursue criminal enforcement work and civil investigations related to imminent threats to human health or life, review import entries to determine potential risks to health, and respond to other critical public health issues, as appropriate. The FDA would also continue to address existing critical public health challenges, including drug shortages, and outbreaks related to foodborne illness and infectious diseases.

Activities that would *not continue* include:

- **IHS** – IHS could only perform national policy development and issuance, oversight, and other functions necessary to meet the immediate needs of the patients, medical staff, and medical facilities. IHS would be unable to provide the majority of funds to Tribes and Urban Indian Health programs.
- **NIH-NIEHS** – Superfund Research Program (SRP) staff would be furloughed. NIEHS would suspend fiscal oversight and scientific accountability work for approximately 50 grant awards.
- **ATSDR** – HHS would use the full extent of the authority under the ADA to protect life and property under a lapse in appropriations. For environmental exposure assessment activities not directly related to protection of life and limiting disease progression, limits on ATSDR staff resources under the lapse would result in more time to review, analyze, and report out public health information. ATSDR would be unable to support most environmental health professional training programs, continuous updating of health exposure assessments and recommendations, and technical assistance, analysis, and other support to state and local partners.
- **FDA** – FDA would be unable to support some routine regulatory and compliance activities. This includes some medical product, animal drug, and most food related activities. FDA will also pause routine establishment inspections, cosmetics and nutrition work, and many ongoing research activities.

Methodology

The HHS contingency staffing plan for agency operations in the absence of appropriations has been updated consistent with the requirements in Section 124 of OMB Circular A-11. The plan was prepared based on the Department of Justice legal opinions of April 25, 1980, January 16, 1981, and August 16, 1995, and the memoranda and Q's and A's that OMB provided to Departments and Agencies in 1995, 1996, April 2011, December 2011, and August 2013 on this topic. To the degree that updated government-wide guidance is released, or there are events that affect the programmatic activities that HHS needs to carry out during an absence of annual appropriations, the plan would require additional updating. In cases of public health disasters at home or abroad that demand the attention of a range of agency experts to secure and protect human life, the HHS plan would also have to be modified. This plan reflects the anticipated number of staff who would be on-board the second business day of a near-term funding hiatus, after initial shutdown activities would have been completed. HHS expects to complete initial shutdown activities within the first day after OMB notification to implement the contingency plans. The plan is updated for staffing levels and funding levels as of the end of November, 2018.

As in previous periods without enacted annual appropriations, the number of excepted staff would vary daily, depending on the amount of excepted work that needs to be done. For example, at the end of a pay period, time keepers would need to be excepted for the amount of time to prepare and enter into the timekeeping system the hours worked in pay status, hours worked in non-pay status, and hours in furlough status. Also, the second-day staffing level is likely to include more contract officers than some later days, as contract officers must complete their notifications of those contractors whose performance would need to be changed.

The information on staff who would not be furloughed is broken into the two broad categories of "authorized by law" and "safety of human life and protection of property," consistent with Department of Justice legal opinions.

"Authorized by law" includes:

- Employees who are "exempt" from furlough because they are not affected by a lapse in appropriations – These staff would be working in a pay status, as funding would continue to be available to pay their salaries.
- Officers appointed by the President –This includes all presidential appointment with Senate confirmation and presidential appointment officials and members of the uniformed services (Commissioned Corps).
- Staff performing activities authorized by necessary implication.

For activities related to the safety of human life and the protection of property, HHS relied on the guidance provided by the Attorney General in 1980, as modified by the Department of Justice in 1995 to reflect relevant statutory changes in the intervening years.

For safety of human life, the numbers needed to continue medical services that HHS provides are separately identified. For protection of property, the plan provides separate information on the number of staff excepted to protect on-going medical experiments, to maintain computer data, and to maintain animals and protect inanimate government property.

HHS, Program Support Center (PSC), Financial Management Portfolio (FMP) Payment Management Services (PMS) and Financial Management Service (FMS) Division of Payment Management (DPM) will be operational and retain the necessary staffing in an excepted status to ensure delivery of grant

payments for excepted programs. The PMS and DPM will follow specific processes to ensure payment of permissible disbursements. In addition, HHS will maintain Grants.gov system in an operational status, but with reduced federal support staff presence. The Grants.gov Contact Center will remain available, and provide assistance to callers. HHS will provide the federal grantor community with guidance and updates in the event of a government shutdown.

Summary by Category of Exception

The sections on the staffing table display the staff that would be exempt according to which category their funding falls or the activities they fulfill. This section summarizes the highlights of those totals across HHS.

Staff performing activities without funding issues

Some HHS agencies have mandatory, carryover, or user fee funds which are not affected by a hiatus in annual appropriations. FDA also has carryover funding from user fees paid by industry. IHS has the most reimbursable activities, which includes collections from third-party billing for health services, including from private insurance, Medicaid, and Medicare.

Officers appointed by the President

The Officers appointed by the President at HHS include the Secretary, Deputy Secretary, Assistant Secretaries, and many agency heads, which total 1 on board. Other Officers appointed by the President include Commissioned Corps personnel. HHS would retain 2,975 on board.

Staff performing activities authorized by necessary implication – support of funded activities The HHS plan includes 593 staff performing activities authorized by necessary implication, other than law enforcement and orderly shutdown.

ATSDR – 86 staff would be carrying out excepted activities for hurricane response, to protect the safety of human life and protection of property, to support operations necessary for funded activities to continue such as travel, procurement, grants, finance, and payment services. Funded programs include: ALS Registry, Asbestos Activities in Libby Montana, PFAS studies and some of ATSDR's reimbursable activities.

Staff performing activities authorized by necessary implication – orderly phase-down and suspension of operations

HHS has identified 143 staff that would be excepted to assure an orderly phase-down and suspension of activities. This designation include staff that would be needed to assure an orderly process for determining, as conditions change, what activities should be re-initiated and what activities may no longer be excepted. This number also includes non-PAS shutdown staff carrying out responsibilities described in the November 17, 1995 OMB memorandum to the President's Management Council on PAS shutdown responsibilities, and the estimated number of OGC staff who would be excepted to ensure that HHS responds appropriately to orders from the Judicial branch.

Safety of human life – direct medical services

IHS – 9,015 IHS staff would be excepted for the provision of direct medical care. This number reflects FTE at all of the IHS service unit facilities where direct health care is provided. The contingency plan provides for health care to continue at all of these locations. While some preventive health services would continue to be provided (e.g., well child exams or prenatal visits), the predominant care provided would be treatment services for acute conditions or monitoring of chronic diseases for complications. The IHS annual appropriation is not large enough to provide the level of medical services that, for example, Federal employees receive through FEHB and IHS already defers needed medical services. In addition, most IHS facilities are in remote locations, where there are few if any other providers. As a result of these factors, IHS does not anticipate further reducing the number of inpatient/outpatient visits during a hiatus. While the furlough percentage is lower than in FY 1996, the lower percentage reflects changes in the way IHS does business, including significant reductions in the number of headquarters administrative staff.

Safety of human life – activities other than direct medical services

FDA – 912 FDA staff would be excepted to support vital activities to respond to emergencies, manage high-risk recalls, pursue criminal enforcement work and civil investigations related to imminent threats to human health or life, review import entries to determine potential risks to health, conduct for cause inspections of regulated facilities, conduct surveillance of adverse events reports for issues that could cause human harm, and other critical public health issues, as appropriate. These staff will also be responsible for efforts to continue to address other critical public health challenges, including drug shortages, and outbreaks related to foodborne illness and infectious diseases.

Protection of property -- maintenance of computer data

HHS estimates that 286 staff (excluding those otherwise authorized by law) would be excepted for the protection of computer data, including staff at FDA (127) and IHS (157).

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<https://www.hhs.gov/about/budget/fy-2019-hhs-contingency-staffing-plan/index.html>

Special Instructions for Agencies Affected by a Possible Lapse in Appropriations Starting on December 22, 2018

In the event an agency and its employees are affected by a lapse in appropriations commencing on Saturday, December 22, 2018, the following special instructions apply. This supplements (and should be read with) general guidance—issued by the Office of Management and Budget (OMB) and the Office of Personnel Management (OPM) (<https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf>)—on administering an agency shutdown of operations due to a lapse in appropriations. It highlights certain matters of particular relevance to the specific scenario at hand. (Note: Lapse-affected employees include “furloughed employees” and “excepted employees.” “Excepted employees” may perform activities legally permitted as an exception to the general bar on performing work during a lapse in appropriations work, but may not be paid for that work until after the lapse is over.)

Payroll Implications:

- **Saturday, December 22**, is the last day of the **December 9-22** biweekly pay period. Timekeeping for that period would normally be finalized no later than December 24-26. Paychecks for that pay period should be issued at the normal time (generally, in the December 28 to January 3 time range).
- As necessary, agencies and payroll providers may finalize the processing of paychecks for the **December 9-22** biweekly pay period as an orderly shutdown activity. Assuming the lapse is in effect during the time that timekeeping is being finalized, the paychecks may not include pay for any work performed on Saturday, **December 22**. Agencies should document that work as well as any other later work performed during the lapse.
- Lapse-affected employees may not receive any pay for work (i.e., orderly shutdown activities or other excepted work) performed during the lapse until after the lapse has ended.
- If the lapse in appropriations continues during the **December 23-January 5** biweekly pay period, any excepted work performed during the lapse should be documented. No pay may be provided for excepted work during the December 23-January 5 pay period until the lapse in appropriations has ended. The treatment of the pay of employees during furlough periods will be determined by Congress in legislation enacted in connection with the restoration of appropriations.

Leave:

- All scheduled paid leave and other paid time off (including paid holiday time off) are cancelled for lapse-affected employees during a lapse in appropriations.
- Many employees are scheduled to take use-or-lose annual leave in late December and early January (before the end of the leave year on January 5, 2019, for those on the standard biweekly payroll cycle). As noted above, all leave is cancelled for lapse-affected employees during a lapse in appropriations. In general, if the cancellation of

annual leave due to a lapse causes an employee's annual leave balance to exceed the applicable annual carry-over limit at the end of the leave year, such cancelled leave may be restored to the employee's credit following agency procedures, since the lapse is considered an exigency of the public business. However, leave that had previously been restored may not be restored even if scheduled use of the previously restored leave is cancelled due to the lapse.

- Intermittent unpaid absences are permitted for excepted employees (e.g., on days the employee was previously scheduled to take leave or be in holiday time off status during the workweek beginning on December 23). Excepted employees must be furloughed when excused from duty, if the absence cannot be accommodated with other work schedule flexibilities.

Holidays:

- During a lapse in appropriations, holiday paid time off is cancelled for lapse-affected employees.
- Employees furloughed on a holiday (e.g., December 25) will not be paid for the holiday unless authorized by subsequent legislation.
- Holidays remain in force for the purpose of determining entitlement to holiday premium pay for excepted work performed on a holiday. Thus, if the lapse is in effect on a holiday (e.g., the December 25 Christmas holiday), an excepted employee who is required to perform work on the holiday during the employee's regular hours may earn holiday premium pay; however, payment cannot be made until after the lapse is over. Excepted employees who are not otherwise scheduled to work on a holiday are not required to work. If an excepted employee does not work on a holiday, the employee must be placed in a furlough status for the holiday.

Orderly Shutdown:

- Agencies should provide clear instructions to non-excepted employees (i.e., those who must be furloughed after performing orderly shutdown activities) regarding when they are expected to report to work to perform any necessary orderly shutdown activities.
- With respect to the issuance of furlough notices, agencies should follow OPM's general guidance, including the sample furlough notices for excepted employees who are furloughed on a holiday or for intermittent unpaid absences. Since it is the Christmas holiday season and the end of the leave year, many employees will be away from the office on an extended basis, complicating efforts to provide furlough notices. Agencies should do their best to provide notices as soon as possible given individual circumstances.
- As a general rule, agencies may allow an employee whose work is not otherwise excepted to perform up to 4 hours of **orderly shutdown activities**, as necessary, which may include time required to receive a furlough notice (in person, electronically, or

otherwise as determined by an agency). Unless the agency directs otherwise, employees are expected to perform any necessary orderly shutdown activities (including receipt of a furlough notice) on the **first workday the employee was scheduled to work** after the lapse commences. Employees generally should not be allowed to perform orderly shutdown work (up to 4 hours) on a day off (e.g., weekend day for employees with a Monday-Friday schedule, an Alternative Work Schedule (AWS) day off, or a holiday). Also, an agency generally should not direct an employee to perform orderly shutdown work on a day on which the employee had been scheduled to be on leave.

- OMB's general guidance addresses orderly shutdown activities. OMB expects agencies to minimize orderly shutdown activities. Individual employees may perform some preparatory orderly shutdown activities immediately prior to the lapse as a precaution in anticipation of a possible lapse. If an agency is aware that an employee will be absent on Friday, December 21 (due to scheduled leave or an AWS day off), the agency may direct the employee to perform precautionary orderly shutdown activities on the employee's preceding workday.
- If an employee was scheduled to be on leave on the workdays immediately after the lapse commences, the employee is not required to report to duty to perform orderly shutdown activities on a scheduled leave day, even though the leave has been cancelled. An agency may allow such an employee to perform required orderly shutdown activities (if any, including receipt of a furlough notice) on the first workday on which the employee had been scheduled to return to duty. Furloughed employees may not, however, perform any non-excepted agency work prior to conducting orderly shutdown. For example, if an employee was scheduled to return to work on Thursday, December 27, an agency could require the employee to report to duty to perform any necessary orderly shutdown activities on that day. (Note: The employee may have performed shutdown activities prior to going on extended leave, which would limit the need to perform orderly shutdown activities after commencement of the lapse. Additionally, agencies should make every effort to ensure that employees who will not be conducting orderly shutdown for several days following the commencement of the lapse are aware of their furlough status during that period.)
- If the employee described in the previous paragraph has a Flexible Work Schedule and a scheduled AWS day off on Wednesday, December 26, the employee could be allowed to move the AWS day off to Friday, December 28, so that the employee performs any required orderly shutdown activity on that Wednesday.
- If an agency directs an employee to perform orderly shutdown activities on a holiday or the employee's AWS day off, any hours performing orderly shutdown activities would count as hours in applying applicable premium pay rules (e.g., for holiday premium pay or overtime pay). (Whether the agency will be obligated to provide pay at an overtime rate for those hours after the lapse has ended will depend on whether Congress, in conjunction with the legislation restoring appropriations, provides retroactive pay for hours during which employees were furloughed. If pay is provided for furlough hours, those hours would count as hours of work in applying overtime rules.)

Excepted Employees:

- A lapse-affected employee is allowed to perform work only to perform orderly shutdown activities or other work that has been identified as excepted under guidance issued by OMB. Agencies must apply OMB guidance to determine which employees may perform excepted work activities—i.e., are “excepted employees.”
- If an excepted employee needs to be excused from duty, the employee must be furloughed. This means that an excepted employee must be furloughed if excused from duty on a holiday or regular workday. For example, if an excepted employee is excused from duty on Christmas, December 25, the employee must be placed in furlough status on that day. The sample furlough notices for excepted employees in OPM’s shutdown furlough guidance may be modified to so that a single notice can be provided to cover any holidays or other approved absence on a regular workday during the lapse in appropriations. Unless the employee’s agency specifically directs otherwise, excepted employees should generally report for duty on the next day on which they are scheduled to work.
- Under this unique timing of the lapse in appropriations, agencies should take into consideration an employee’s previously scheduled leave, AWS day off, or holiday(s) that takes place during the furlough period and allow the employee to be furloughed during the period the employee had been scheduled to take leave—unless the agency determines there is a need for the employee to report to work to perform excepted activities.
- If an agency directs an excepted employee to work on a holiday or the employee’s AWS day off, any hours performing work would count as hours in applying applicable premium pay rules (e.g., for holiday premium pay or overtime pay). Excepted employees will be paid for any earned overtime pay or holiday premium pay when Congress restores appropriations.

Department of Health and Human Services
Fiscal Year 2019 Contingency Staffing Plan
For Operations in the Absence of Enacted Annual Agriculture and Interior Appropriations (December 21, 2018)

Category	FDA	IHS	CDC ATSDR	NIH NIEHS	Total
Total on-board staffing	17,397	15,271	248	8	32,924
Staff Involved in Obligations "authorized by law:"					
<u>Staff performing activities without funding issues</u>					
Administrative funds appropriated in authorizing legislation.	-	61	10	-	71
Staff paid from carryover funding (including advanced appropriations)	7,399	145	-	-	7,544
User fees appropriated in authorizing legislation.	32	-	-	-	32
Reimbursable activities for which the reimbursement is not paid from funds provided by the FY19 appropriation.	4	2,825	22	-	2,851
<u>Officers appointed by the President</u>					
Commissioned Corps	1,141	1,805	29	-	2,975
HHS officers appointed by the President	1	-	-	-	1
<u>Staff performing activities authorized by necessary implication</u>					
Activities required to ensure that fully funded programs continue operation, and that funded entitlement benefits are paid	173	415	5	-	593
Law enforcement activities.	255	-	-	-	255
Orderly phase-down and suspension of operations	94	37	12	-	143
Other	8	-	1	-	9
Subtotal, authorized by law	9,107	5,288	79	-	14,474
Staff involved in the safety of human life or the protection of property					
<u>Activities related to the safety of human life</u>					
Direct medical services provided through clinics and hospitals that the OPDIV operates	11	9,015	-	-	9,026
Other	912	-	5	-	917
<u>Activities to protect property</u>					
Protect ongoing medical experiments.	133	-	-	-	133
Maintenance of animals & protection of inanimate government property	54	37	-	-	91
Maintain computer data	127	157	2	-	286
Other	-	-	-	-	-
Subtotal, safety of human life and protection of property	1,237	9,209	7	-	10,453
FY 2019 Summary Analysis					
Total on-board staffing as of 12/2018	17,397	15,271	248	8	32,924
Total number of staff to be retained	10,344	14,497	86	-	24,927
Number of staff to be furloughed	7,053	774	162	8	7,997
Percent Retained	59%	95%	35%	0%	76%
Percent Furloughed	41%	5%	65%	100%	24%
Life & Property as % non-accepted	15%	92%	4%	0%	57%

Note: The staff estimates reflect the number that would be accepted on the second day of a hiatus in appropriations. Some staff who are included might complete their activities within another day or so (such as those notifying contractors). This excludes staff (such as those who approve travel or file time and attendance reports) who would not be needed the second day, but would be excepted for short periods if the hiatus continued.

BUREAU OF INDIAN AFFAIRS
SHUTDOWN CONTINGENCY PLAN

December 2018



Overview

This Contingency Plan pertains to all offices and functions within the Bureau of Indian Affairs (BIA) including Central Office East (Washington, D.C.), Central Office West (Albuquerque, NM and Lakewood, CO), and BIA's Fire Center (Boise, ID), and the 12 BIA Regional Offices located in 34 states across the Nation. The direct impact of this plan will apply to 80 BIA agencies and field offices, with 9 Law Enforcement Districts and 17 Irrigation Projects, 138 high hazard potential dams on 41 Indian reservations, and 3 Power Projects.

In the event of a lapse in appropriations which brings about the need for contingency operations, the normal organization of the BIA will shift into the contingency organization. The focus of the BIA will shift from the current structure and functions of "business as usual" to the structure and functions of the BIA working toward essential operations for programs subject to annual appropriations.

The Basic Elements of the Contingency Plan are:

1. Identification of excepted employees.
2. Identification of employees and operations that can continue as they are not funded by lapsed appropriations.
3. Alternate means of communication, including voice, fax, and electronic.
4. Leadership and support services to Federal operations.

The primary objectives of this plan are:

1. Protection of human life, preventing harm, ensuring safety and well-being of employees and protection of property.
2. Ensure continued leadership.

Purpose

In the event of a lapse in appropriations, the Bureau of Indian Affairs (BIA) has prepared the following Contingency Plan (Plan) to designate excepted personnel for the protection of human life, property and to prevent harm.

Excepted Personnel

The Plan identifies Excepted Personnel in the following three categories: Protection of Human Life (Law Enforcement); Protection of Federal Property; and Preventing Harm. These personnel are the minimum required to enable the BIA to provide vital services, exercise civil authority, and maintain the safety of its employees and the general public.

Exempt Personnel

The Plan identifies Law Enforcement personnel that are retained for the protection of life and property and are funded from carryover. If funds are exhausted, these employees would continue to be on duty in excepted status.

In addition, exempt personnel are funded by other than annual appropriations including transportation, irrigation and power revenue projects. The Transportation, Irrigation and Power Revenue Projects are not funded through lapsing appropriations and operations will continue for these programs as they operate on the revenues collected for the sites.

A staffing summary of the Plan, if implemented, is provided as follows:

Office	Employees on Board	RETAINED				Subject to Furlough
		Excepted - Law Enforcement	Exempt - Funded by Other than Annual Appropriations	Excepted - Protection of Life and Property	Total Retained	
BIA	4,057	284	716	762	1,762	2,295

Non-Appropriated Funds:

Transportation, Irrigation and Power Revenue Projects are not funded through annual appropriations and operations will continue for these programs as they operate on the revenues collected for the sites not appropriated funds or two year funding from Federal Highway Administration. These employees total 716 (Funded by Other than Annual Appropriations).

Excepted Required Services And Activities

Required Services and Activities
Law Enforcement – 25 U.S.C. 2801 et seq. (Indian Law Enforcement Reform Act), 104 Stat. 473, P.L. 101-379, as amended; 124 Stat. 2262, P.L. 111-211 (Tribal Law and Order Act).
Human Services (Child Protection) – 25 Code of Federal Regulations 63 (Indian Child Protection and Family Violence Prevention Act)
Wildland Fire Management – 25 Code of Federal Regulations 163
Irrigation (Non-appropriated funds Fee-for-Service) – 25 Code of Federal Regulations 171
Safety of Dams (Early Warning System Operation) – 25 Code of Federal Regulations 175

Excepted Functions are summarized below.

Excepted Functions
Provide emergency response activities on tribal and allotted lands.
Provide critical services that address health and safety of tribes and tribal members and BIA employees.
Provide immediate response to allegations of child abuse and neglect.
Provide law enforcement and detention operations on Indian lands under Federal jurisdiction, coordinate Tribal law enforcement activities, and enforcement of Federal laws.
Protect Federal facilities and infrastructure.
Provide critical services for delivery of water and power to irrigation systems, dams, and communities.
Provide transportation infrastructure construction and maintenance on tribal lands.

Excepted Support Activities

The following summarizes activities which are necessary in the performance of excepted personnel to perform excepted functions.

Excepted Support Activities
Communicate with AS-IA employees, providing information on the status of operations.
Operate and maintain facilities for the health and safety of Federal employees and the protection of property.
Account for status of the workforce and recall employees to duty, as required.
Provide directorate communication about the status of appropriations.

BUREAU OF INDIAN EDUCATION SHUTDOWN CONTINGENCY PLAN

December 2018



Bureau of Indian Education Contingency Plan

Summary

This contingency plan is developed in accordance with OMB Circular A-11, Section 124 and extends to all offices within the Bureau of Indian Education (BIE) including Central Office East (Washington, D.C.), Central Office West (Albuquerque, New Mexico), Southwestern Indian Polytechnic Institute (Albuquerque, New Mexico), Haskell Indian Nations University (Lawrence, Kansas), three Associate Deputy Director offices (Albuquerque, New Mexico, Minneapolis, Minnesota, and Window Rock, Arizona) and 15 Educational Resource Centers located in 23 states across the nation. The BIE oversees 53 bureau operated elementary/secondary schools, Two post-secondary institutions and provides technical assistance to 130 tribally controlled elementary/secondary schools, 29 tribally controlled community colleges, and two tribal technical colleges. This plan presents a management framework and establishes operational procedures to sustain essential activities during a lapse in appropriations within the BIE.

The basic elements of the plan are:

1. Identification of essential activities that must be performed;
2. Alternate locations for performing essential activities;
3. Excepted employees to perform the essential activities, including continued command and control of the organization;
4. Alternate means of communication, including voice, fax, and electronic;
5. Support services such as personnel and procurement, and;
6. Leadership and support services for the continued instructional and related services.

The primary objectives of this plan are to:

1. Protect the safety and well-being of employees, students, and others;
2. Minimize interruptions to essential functions;
3. Ensure continued leadership; and
4. Provide for an orderly means of addressing problems and restoring normal operations as quickly and safely as possible.

This plan includes the necessary implementation instructions for each subordinate Indian Affairs BIE organization/facility during a lapse in appropriations.

Bureau of Indian Education Contingency Plan

Contingency Operations

In the event of a lapse in appropriations, the normal organization of the BIE will shift into that of the contingency organization.

The Bureau of Indian Education contingency organization's primary duties are:

1. To continue instructional and related educational services within BIE-funded schools;
2. To protect employees, students, and others information assets until normal business operations are resumed;
3. To ensure that a viable capability exists to respond to an incident;
4. To manage all response activities, and;
5. To support and communicate with employees, system administrators, security officers, and managers.

Retained Employees

Consistent with guidance in OMB Circular A-11 Section 124, the following is an estimated number of employees that will be retained under each of the following categories:

Office	Total Number of BIE Employees	RETAINED				Employees Subject to Furlough
		Excepted - Law Enforcement	Exempt – employees funded by other than annual appropriations ¹	Excepted – employees responsible for continued operations ²	Total Retained	
BIE	3,344	0	3,199	105	3,304	40

Funding for BIE K-12 school programs are forward funded. Bureau of Indian Education funds are appropriated in the prior year. Therefore, the 2018-2019 K-12 School Year was funded in Fiscal Year 2018 appropriation bill and funding is available to support continued instructional and related educational services in FY 2019. The Department of Education has provided funds for the period July 1, 2018, through September 30, 2020. These and BIE funds will be used to maintain operations of education programs during a lapse of appropriations. Haskell and SIPI are also forward funded and funds were available July 1, 2018. Haskell and SIPI also have access to the Schweitzer Bequest Fund which has been used in the past for Title V employees to ensure continued instructional and related educational services.

Law Enforcement (0): School resource officers, assigned to BIE-funded schools are supervised by the Office of Justice Services (OJS). During a lapse in appropriations, activities will continue under the contingency plan of the BIA OJS.

Exempt Personnel (3,199): Staff that is funded by appropriations not impacted by a government shutdown (forward funding) including K-12 special education and supplemental education program staff, and school contract educators.

Bureau of Indian Education Contingency Plan

Excepted Personnel (105): Title V Personnel that enable the BIE to provide continued instructional and related educational services; protect employees, students; respond to a loss of life or property incident; and support and communicate with employees.

Contracting Staff (2) – Two employees have been identified to oversee the contracting process, which includes timely encoding and technical assistance to bureau operated schools' commercial contracts during a lapse of appropriations. The personnel identified will be the primary point of contact to assist and ensure commercial contracts are processed efficiently. It is also noted that all schools/offices operating during a lapse of appropriations will have one (1) person identified to initiate procurement activities. (53 bureau operated schools).

Administrative and Management Staff (99) – Employees working at the administrative level to support continued instructional and related educational services within BIE-funded schools and post-secondary institutions to ensure students and facilities are safe and secure.

Human Resources Staff (4) – Four employees have been identified to oversee the human resources (HR) activities and provide services to approximately 3,400 employees at bureau operated schools, including recruitment/placement, processing personnel actions, encoding payroll information, maintenance of HR information systems, employee and labor relations; and will also effect furlough procedures, answer employee inquiries, including provide an employee frequently asked questions (informational bulletin) to be distributed via e-mail and posted on the BIE website to answer plan related questions, and execute procedures to bring employees back to work.

Information Technology Staff (0) – Information Technology (IT) personnel at the schools/offices during a lapse of appropriations will be provided. Currently the IT personnel are located under the Office Chief Information Officer (OCIO) IT office within the Office of the Deputy Assistant Secretary for Management and will continue work activities under the contingency plan of the OCIO.

Shutdown activities will be completed within 4 hours.

Bureau of Indian Education List of Essential Functions

- The Director, Bureau of Indian Education (BIE) and senior management team must ensure the education process continues during the lapse of appropriations.
- Elementary and secondary schools must continue operations to meet all appropriate state academics standards. These schools are located in 23 states.
- Post-secondary institutions operated by the BIE must continue to operate to ensure class credits are not compromised and lost to the students.
- The Director, BIE must continue to provide a safe and secure environment for students in the elementary, secondary, and post-secondary institutions.
- The Bureau of Indian Education must continue to ensure funds and technical assistance is provided to tribally controlled schools, tribally controlled community colleges, and tribal technology colleges.
- The Bureau of Indian Education must continue to work with appropriate law enforcement officials and social services offices to address issues of child abuse and neglect.
- The Bureau of Indian Education must oversee human resources (HR) activities and provide services to approximately 3,400 employees at bureau operated schools including recruitment/placement, processing personnel actions, encoding payroll information, maintenance of HR information systems, employee and labor relations.
- The Bureau of Indian Education relies on the Deputy Assistant Secretary for Management (DASM) to provide services for tort claims (Office of Facilities, Property and Safety Management - Division of Safety and Risk Management), information technology (OCIO) and commercial contracting awards. During a lapse in appropriations, the BIE will rely on the DASM for these services. The DOI Solicitors office also provides guidance on tort claims and equal employment opportunity cases (EEO).
- The Bureau of Indian Education must continue to provide appropriate academic technical assistance and guidance to the bureau operated and tribally controlled schools, as mandated by Public Law No. 114-95, Every Student Succeeds Act (ESSA) of 2015, and Public Law No. 94-142, Individuals with Disabilities Act (IDEA) of 1990.
- The Bureau of Indian Education must be prepared to address emergencies (acts of violence, etc.) and critical incidents (suicides, bullying, etc.) at both the bureau operated and tribally controlled schools.

Bureau of Indian Education Contingency Plan

- The Bureau of Indian Education must continue to provide the following administrative services to the bureau operated elementary and secondary schools, post-secondary institutions, and tribally controlled grant schools:
 - Budget and finance procedures, processes and systems to execute all fiscal and accounting functions for education programs and schools.
 - Administration of all education contracts/grants under the provisions of Public Law 93-638, Public Law 100-297 and other Federal statutes and OMB Circulars.
 - Each bureau operated school, Haskell Indian Nations University, and Southwest Indian Polytechnic Institute will have available staff to assist procurement and finance activities.

¹ Includes 17 Division of Performance Accountability Title V employees.

² Includes 184 Title V employees at Haskell Indian Nations University and Southwestern Indian Polytechnic Institution that would be funded by the Schweitzer Bequest Fund given a government shutdown.