

**International Boundary and Water Commission  
United States Section**

**FY 2014  
Absence of Appropriations Plan**

**September 27, 2013**

***Subject: Operations plan and composite guidance during a lapse in appropriations***

1. The purpose of this guide is to establish policy on IBWC operations during a lapse in appropriations. We will need an amendment to a current continuing resolution, if one is passed, or the enactment of the FY 2014 Appropriations Bill to continue normal agency operations after 30 September 2013.

- I. Determination Of Excepted Functions And Positions
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***I. Determination of Excepted Functions and Positions***

A. Definition of Excepted Functions:

"Excepted" functions that may be continued in an absence of appropriations include those necessary for emergencies involving "the safety of human life or the protection of property," and those necessary for activities essential to the national security. Employees performing "excepted" functions will continue to report to work and perform their duties, as will employees performing duties for which funds are still available. For example, functions funded by no-year appropriations (with remaining available balances) and *Clean Rivers* funding will continue as long as there is funding available and work to be performed. If funds for these activities later become exhausted, then the applicable **shutdown** plan will become operative and only excepted functions will be continued.

B. Employees under a lapse of appropriations must be determined by position as to whether they meet the criteria of "excepted" in the absence of appropriations. As indicated above, if the salary of a US Citizen employee is derived from appropriations that have not lapsed, e.g., an appropriation has been enacted or no-year funds are available, that employee may continue to work.

C. Administration department operations offices will, for all practical purposes, be closed. Emergency contracting needs will be provided as part of an orderly **shutdown**. A Contracting Officer will remain on the job to review and process invoices for on-going contracts and services, and to process expedited procurements that result out of emergencies to protect life and property only. The Finance & Accounting Office will have two staff employees for processing, scheduling, and issuing payment of invoices.

D. Engineering department operations will cease routine operations and will, for all practical purposes, be closed. Only those services deemed excepted tied to oversight of on-going construction projects will be provided.

E. Operations department will continue to operate critical functions at the San Diego, CA and Nogales, AZ International Wastewater Treatment Plants; Falcon Dam and Falcon Power Plant; Amistad Dam and Amistad Power Plant. These operations require 24/7 operations to ensure the safety of lives and property in these regions. Water delivery and accounting operations will continue at Falcon Dam, Amistad Dam, Anzalduas Dam, Retamal Dam, and American Dam in compliance with 1944 and 1906 water treaty obligations. Oversight of flood control operations is also required of the Upper and Lower Rio Grande Flood Control systems to manage the potential of floods events.

List of “Excepted” positions as follows:

**Furlough  
Excepted Employees Roster  
Effective October 1, 2013 12:01 AM EDT**

**Total Commission (77) ([HQ Contact List](#))**

*Commissioner, Ed Drusina*

*D.C. Special Assistant, Russell Frisbie*

*Legal Counsel, Luisa Alvarez*

*Foreign Affairs Officer – Sally Spener*

**Administration (8)**

Chief Administrative Officer – Diana Forti

**Finance and Accounting Division**

Certifying Officer – Maria Medina, Accounting Technician

Transmitting Official – Rick Livengood

**Budget Division** – Budget Officer, Jean Pena

Budget Analyst, Helen Quezada

**Acquisition Division** – Supervisory Contracting Officer, Frank Delgado

Purchasing Agent – Sylvia Grindstaff

**Information Management Division** – Supervisory IT Specialist, Zenon Mora

**Engineering (8)**

**Engineering Services Division**, Jose Nunez, Supervisory Engineer

COR duties – Engineer, Andrea Glover

COR duties – Engineer, Isela Canava

COR duties – Inspector, Hector Delgado

COR duties – Engineer, Frank Duran

COR duties – Engineer, Ramon Navarro

Texas Clean Rivers Program (funded by the State of Texas)  
Program Manager – Leslie Grijalva  
Environmental Quality Assurance –Lisa Ramirez

**Operations (58)**

Principal Engineer, Carlos Pena

**Safety, Security, and Emergency Management Division (20)**

Aaron Haynes, Assistant Chief Security Officer

**Security (shift work) - Upper Rio Grande Field Office**

Jennifer Rossin, Lead Security Guard  
Jessie Hernandez, Security Guard  
Eric Rios-Carroll, Security Guard  
Roman Estrada, Security Guard

**Security (shift work 24/7 coverage) - Amistad Dam Field Office**

Luise Martinez, Lead Security Guard  
Ernest Aycock, Security Guard  
Cheryl James, Security Guard  
Steve Sanchez, Security Guard  
Mark Rodriguez, Security Guard  
Francisco Lopez, Security Guard  
Christopher Bean, Security Guard

**Security (shift work 24/7 coverage) - Falcon Dam Field Office**

Julio Oyervides, Lead Security Guard  
Lauro Cantu, Security Guard  
Leonardo Reyes, Security Guard  
Lorenzo Medina, Security Guard  
Rumaldo Rosas, Security Guard  
David Rodriguez, Security Guard  
Victor Solis, Security Guard  
Esteban Martinez, Regional Security Officer

**Water Accounting Division (2)**

Billy Finn, Supervisory Hydrologist  
Adrian Cortez, Hydrologist

**Operations & Maintenance Division (35)**

Sheryl Franklin, O & M Manager  
Luis Hernandez, Engineer, Safety of Dams (SOD)

**Power Production Unit (PPU) (10)**

Alberto Hinojosa – operations oversight/Amistad Dam Power Plant remote operations

**PPU - Falcon Dam Power Plant**

**Power Plant (shift work)**

Juan Escobar, Powerhouse Superintendent  
Arturo Ramos, Electric Power Controller  
William Rogers, Electric Power Controller  
Lloyd Canales, Electric Power Controller  
Roque Reyes, Electric Power Controller  
Ignacio Serna, Electric Power Controller

Raul Salinas, Machinist  
Ismael Guerra, Industrial Equipment Mechanic  
Efren Carrera, Electronics Mechanic

**Yuma Field Office (1)**

Anna Morales, Area Operations Manager (AOM)

**San Diego Field Office (1)**

Steven Smullen, AOM

**Nogales Field Office (6)**

John Light, AOM

**Wastewater Treatment Plant Operations (shift work)**

Richard Balmes, Operations Supervisor  
Jose Andrade, Wastewater Treatment Plant Operator  
Raymond Berger, Wastewater Treatment Plant Operator  
Jorge Lerma, Wastewater Treatment Plant Operator  
Alton Bryant, Wastewater Treatment Plant Operator  
Richard Topping, Wastewater Treatment Plant Operator

**Upper Rio Grande Field Office (1)**

Tony Solo, AOM

**Presidio Field Office (1)**

Hector Hernandez, AOM

**Amistad Dam Field Office (2)**

Pablo Garza, AOM

**Safety of Dams**

Paul Gibson, Safety of Dams Technician

**Falcon Dam Field Office (2)**

Mario Gomez, AOM

**Water Treatment Plant Operations (7 days per week operations)**

Angel Sosa, Water Treatment Plant Operator

**Lower Rio Grande Field Office (9)**

Rodolfo Montero, AOM

Francisco Martinez, AAOM (management duties/SOD work)

Raymond Munson, Maintenance Supervisor

**Anzalduas Dam (shift work)**

Aurelio Garza, Supervisory Dam Operator

Michael Gaffner, Operator

Jimmy Hutchinson, Operator

Carlos Chapa, Operator

Robert Carrera, Lock/Dam Mechanic

Emilio Garcia, Dam Operator

***B. Furlough for Civil Service Employees:***

In the absence of either an FY 2014 Appropriation or a Continuing Resolution for the Department Of State - IBWC, no further financial obligations may be incurred by the agency, except for those related to the orderly suspension of the agency's operations if deemed necessary or performance of excepted activities as defined in the Office of Management and Budget memorandum for heads of executives departments and agencies dated November 17, 1981 and subsequent guidance. Specific guidance is included in **Attachment 1 – Memorandum to Furloughed Employees.**

Additional Information can be found under *Appendix A. General Furlough Questions*

***II. Personnel***

A. An immediate hiring freeze will apply during a lapse in appropriations. Entry-on-board dates for prospective employees with employment offers are suspended until the funding lapse is over. No new job offers may be made.

We will need to examine the text of any subsequent appropriation or continuing resolution to determine if the congress has authorized retroactive Pay.

All non-excepted personnel support activities must be suspended.

***Excepted personnel may work if they are properly supervised. Supervisory staff may not be solely justified as "excepted" employees merely because of their supervisory role; their "excepted" status must be independently justified.***

B. Part-time and intermittent employees - furlough of part-time employees must comply with the procedures of 5 CFR Part 752 or Part 351 if the employees are otherwise covered. In scheduling such furloughs, it would be equitable to compute the furlough days in the same proportion to those days scheduled for full-time employees, based on work schedules (the hours might be computed as a percentage of the work schedule for full-time employees). Intermittent/WAE (when-actually-employed employees) or seasonal employees are called to duty at identified periods of the year in accordance with pre-established conditions. Intermittent employees are non-full-time employees without a regularly scheduled tour of duty. Whether either group is called for work during the period in which furloughs are scheduled is discretionary with agencies, but must be to perform excepted functions.

***C. Rotation of personnel***

While rotation of personnel is discouraged for several reasons, including eligibility for unemployment compensation, continuity in functions, and administrative workload, rotation of personnel is supported after considering the following:

-- Management should take into account the impact the rotation schedule may have on unemployment compensation eligibility for the employee, based on unemployment insurance policies.

-- Decisions on rotations for specific positions should balance the agency's need for continuity and equity to the employees.

-- Determine on what basis rotations may take place (e.g., daily or for longer periods), but due consideration should be given to continuity and fairness.

-- Personnel rotated into and out of an excepted function must have the requisite qualifications to perform the function. All decisions to rotate employees must be documented.

Additional Information can be found under *Appendix B. Leave Questions, Appendix D. Retirement Questions, and Appendix F. Unemployment Compensation*

### ***III. Travel***

Travel shall be limited to that necessary for emergencies involving the safety of human life or the protection of property, or that necessary for activities essential to the national security, including the conduct of foreign relations essential to the national security. This may include the Negotiation of major treaties; attending a significant bilateral or multilateral meeting; maintaining excepted operations; emergency visitation, medical, or other ordered evacuation; or providing food, medicine, or other essential services. All travel authorizations must be approved by the department head.

Reassignment of personnel already planned may be continued, such as movement related to changes in assignment, only if funds have been previously obligated.

Travel should not be initiated at the end of the Continuing Resolution period (September 30, 2013), unless clearly in support of an excepted activity. Personnel in domestic travel status who are not performing excepted functions should make arrangements to return to their duty city as soon as practicable. Personnel in domestic travel status who are performing excepted functions may continue to do so.

### ***IV. Training***

In accordance with the **shutdown** plan, all training will be cancelled. Class attendance will be suspended. Those personnel in training who are designated as necessary to perform "excepted functions" should return to their positions; those not so designated will be furloughed.

Additional Information can be found under *Appendix E. Travel/Training Issues*

### ***V. Contracts***

As the General Accounting Office has long recognized, funding gaps due to lapses in appropriations raise particularly thorny issues in the area of contractual commitments, where generally applicable anti-deficiency act requirements may be in apparent conflict with orderly **shutdown** activities and with continuation of excepted functions. The following guidance is directed toward providing a framework for consistent treatment of contractual commitments by IBWC contracting activities that is consistent with the overall agency **shutdown** plan and that will minimize ultimate costs and disruptions.

A. Previously awarded contracts that continue in performance during a lapse in appropriations and have adequate funding previously obligated to permit continued performance during a **shutdown** period should generally be permitted to continue unless the contracting activity cannot provide adequate oversight of contract performance during a **shutdown** period. If adequate monitoring of contractor performance cannot be provided, a suspension or reduction in performance of non-excepted services should be considered if authorized by the terms of the contract or if the contractor will negotiate such a suspension or reduction. Care should be taken not to incur unnecessary costs or jeopardize the government's future contractual rights by unilateral stop work orders or directions to reduce the scopes of work that are not authorized by the terms of the contract or that will cause the contractor to incur costs that could subsequently be charged to the government.

B. Previously awarded contracts and leases that would, in the absence of funding, require renewal or modification during a lapse in appropriations to obligate additional funds for continued performance may be authorized to continue only if necessary to support excepted activities authorized for continuance under the department's **shutdown** plan or if genuinely needed to protect government property or human safety. The necessity for such renewals or modifications must be certified to the contracting officer by the department head with a written statement of the basis for such necessity. Budget division personnel must certify that funds are available within the annual financial plan targets provided. Incurring unfunded obligations for such services during a funding gap does not violate the anti-deficiency act, but payment of such unfunded obligations must be deferred until appropriations are provided by the congress.

C. New contractual commitments may be made during a lapse in appropriations only if necessary to support excepted activities authorized for continuance under the agency's **shutdown** plan or if genuinely needed to protect government property or human safety. The necessity for such unfunded commitments must be certified to the contracting officer by the respective department head with a written statement on the basis for such necessity. Additionally, the administrative officer must certify that funds are available within the annual financial plan targets provided. Unfunded contractual commitments should be kept to the minimum in cost and duration that will meet the essential need.

D. You should not enter into any new grants or cooperative agreements during the period of a lapse in appropriations.

E. You should suspend unfunded non-real estate leases during the period of a funding lapse unless necessary to support excepted activities, you may continue previously awarded construction and renovation projects for which adequate funds were obligated unless adequate supervision cannot be provided, in which case consider suspension of work if contractually permitted and practically feasible. Funded leases and real estate purchases may continue under regular rules and procedures.

F. Managing ARRA requirements – respective ARRA recipients should be notified prior to lapse of operations and informed of such as it may impact their ability to access and report on federal reporting websites or obtain helpdesk information. Recipients should be assuring they are up-to-date on their CCR, DUNS and ORCA registrations as lapse of operations may affect it system support.

Credit card utilization – all legitimate emergency credit card actions shall be processed by the Acquisition Division.

## ***VI. Obligations and Disbursements***

### **A. Obligations**

During any lapse of FY 2014 single year appropriations, obligations against lapsed appropriations may continue to be incurred for excepted activities. Single year appropriations must operate under strict constraints that ensure the agency is in compliance with OMB, GAO, and Office of Management and Budget guidelines. Specific guidance is as follows:

During a lapse in appropriations the agency has legal authority to incur obligations to continue excepted activities. However, GAO has advised us that the incurred obligations cannot be formally recorded (posted) in our accounting systems as there are no appropriations against which to record the obligations. The agency must ensure that such obligations are not sent to the Finance & Accounting Office to be recorded in official accounts or recorded in GFMS.

Per OMB guidance, payments cannot be disbursed against lapsed appropriations for obligations incurred after the lapse begins. Disbursements can be made for obligations incurred before the lapse period, in this case, on or before September 30, 2013.

All obligations and obligating documents issued during the lapse period must be approved by the respective department head and have the following statement affixed and signed by the Commissioner: ***"This Obligation Is Necessary To Carry Out Excepted Activities In The Absence Of An Appropriation."***

Requesting office should maintain detailed records of all obligations incurred that cannot be recorded at this time. As soon as obligation authority is obtained, all obligations should be recorded immediately.

#### B. Disbursements

The agency can certify and can make payments against valid obligations established against prior year annual appropriations including 2013 established only through the end of September 30, 2013.

The agency can certify and authorize payments against valid obligations in o-year appropriations for which funding remains available. These payments should be routinely sent to FSD for processing.

The agency cannot certify and authorize payments against agency obligations incurred after September 30, 2013 and against any lapsed single year appropriations.

#### C. Specific situations

The following are typical agency obligation/payment categories and how they should be handled:

1. Salaries, benefits, and allowances - while obligations can continue to be established for payrolls for persons performing "excepted" and **shutdown** activities, payments for salaries and allowances may only be made for services rendered through September 30, 2013.

2. Travel - Only travel in fulfillment of excepted activities can be performed. Per guidance above, even in cases of travel in this category, obligations made after any lapse of appropriations should not be recorded on official accounts even though obligations have been incurred. Travel voucher reimbursements can be processed only if against obligations incurred and recorded for prior years or for FY 2013, if obligated prior to September 30, 2013, or for no-year appropriations.

Travelers who hold official government travel cards may charge advances against these cards for any approved trips as credit card charges do not create advances to official accounts. Cash withdrawals reportedly will be allowed for travelers who identify their card number and travel authorization number. Cardholders with problems can call Citibank at 1-800-790-7206.

3. Utilities - As with other categories of payments, utility payments for obligations established prior to September 30, 2013 can be processed and sent to Finance for payment. Obligations for utility costs after September 30, 2013 should not be recorded even though incurred, and utility payments for periods after September 30, 2013 cannot be made from lapsed appropriations. Agencies confronted with any emergencies in this regard should contact HQ as soon as possible.

4. Representation - Reimbursements for representation events held through September 30, 2013 may be certified and payments processed if funds are available within agency representation allotments. Reimbursements may not, repeat not be made for approved representation events held after September 30, 2013.

5. Security - As with other categories of payments under single-year appropriations, security payments for obligations established prior to September 30, 2013 may be processed and sent to for payment.

6. Purchase order payments - Generally, purchase order obligations and payments are to be governed by the above guidance. Obligations for purchase orders prior to September 30, 2013 should have been recorded. Payments against these obligations can be processed. Obligations incurred for purchase orders after September 30, 2013 appropriations cannot be recorded and payments against these obligations cannot be made.

7. Collections – Agency cashiers can continue to process all collections normally.

8. Certifying officer responsibility – Finance & Accounting Certifying Officers have the responsibility to ensure that only authorized obligations are recorded, and only payments against authorized obligations are certified for payment and forwarded for disbursement. The GFMS System should ensure that payments are not processed unless a valid obligation has been recorded. Do not de-obligate funds previously obligated prior to September 30, 2013 and re-obligate to new obligations after September 30, 2013. We do not have authority to record obligations. The responsibility for proper payments and obligations rests with the Finance & Accounting office.

9. Absolutely necessary payments - We all realize it is difficult for agencies to maintain even minimal levels of excepted activities within the guidance provided. To reiterate, and consistent with OMB guidance, we have authority to incur obligations but cannot make payments for excepted activities after September 30, 2013. Per GAO, however, we cannot post (record) obligations due to the lapse of appropriations even though obligations have been incurred, nor can we make payments against the incurred but not recorded obligations for FY 2014 single year appropriations. Despite this guidance, there may be certain situations in which it is necessary to make payments in emergency situations (e.g., to safeguard life and property). Each request should provide details of the date the funds are needed, the amount, the justification and any other relevant information. Requests of this type should be limited to extreme cases and submitted to HQ to the Chief Administrative/Financial Officer to request funding as mentioned above.

Additional Information can be found under *Appendix H. Contracting, Grant Administration and Payment Processing*

## ***VII. Time and Attendance Reporting***

This guidance has been coordinated with other agencies in Washington, D.C. and should be utilized only if a subsequent Continuing Resolution or FY 2014 Appropriations bill contains provisions for retroactive compensation for furloughed employees.

Additional guidance will be provided if no appropriations bill or continuing resolution is passed to provide retroactive compensation. If timekeepers require additional guidance for situations not addressed by these instructions, the Points of Contact for the agency should contact the National Finance Center.

A. Pay for the furlough period - For the furlough period, employees must receive the same compensation they would have received had they performed their normal duties

B. Reporting hours during the furlough period - During the lapse in appropriations, employees must be either: (1) at work performing excepted activities, or (2) furloughed. They therefore cannot be in a paid leave status (i.e., annual leave, sick leave, other paid leave or compensatory time off) during that period. Normal hours worked during the furlough period by excepted employees should be reported as regular duty hours. Except as provided below, absences resulting from the furlough of non-excepted employees should be reported as furlough time (code "74"). These absences should not be charged to regular duty hours or any form of paid leave (i.e., annual leave, sick leave, other paid leave or compensatory time off). If an excepted employee had an emergency which precluded them from working during this period, their time should be reported as a furloughed employee for that time period. In the case of employees who were on approved leave without pay during the lapse of appropriations, these absences must continue to be charged to leave without pay.

Additional Information can be found under *Appendix C. Payroll Questions*

### ***VIII. Emergency Points of Contact***

#### ***Operations***

***P.E. Operations, Carlos Pena (915) 832-4118***

***O&M, Sheryl Franklin (915) 832-4741 (915) 258-2731***

***Water Accounting, Billy Finn (915) 832-4789 Mobile (915) 503-4397***

***Security Officer (915) 832-4178 Mobile (915) 497-8780***

#### ***Administration***

***Chief Administrative Officer, Diana Forti (915) 832-4123 Or Mobile (915) 276-2719***

***Finance and Accounting, Mark Duncan (915) 832-4132***

***Acquisitions, Frank Delgado (915) 832-4711 Mobile (915)996-0585***

***Information Management, Zenon Mora (915) 832-4755***

#### ***Engineering***

***Engineering Services, Jose Nunez (915) 832-4710 Mobile (915) 433-0680***



OFFICE OF THE COMMISSIONER

UNITED STATES SECTION

## INTERNATIONAL BOUNDARY AND WATER COMMISSION

### UNITED STATES AND MEXICO

October 1, 2013

Dear Fellow IBWC Employees,

RE: Absence of FY 2014 Appropriations

In the absence of either an FY 2014 Appropriation or a Continuing Resolution for the Department Of State - IBWC, no further financial obligations may be incurred by the Commission, except for those related to the orderly suspension of the agency's operations. Therefore, you are being placed in a furlough status effective October 1, 2013 12:01 AM EDT. In the event of an absence of appropriation, you should return to work Tuesday morning, 1 October 2013 to conduct an orderly shutdown of your area. 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. ***The Use Of Issued Government Owned Property And Equipment Is Prohibited While On Furlough Status.***

Personnel in domestic travel status who are not performing excepted functions should make arrangements to return to their duty city as soon as practicable

In accordance with the **FY 2014 Absence of Appropriations Plan**, all training will be cancelled. Class attendance will be suspended. Those personnel in training who are designated as necessary to perform "excepted functions" should return to their positions; those not so designated will be furloughed.

It is uncertain how long the furlough, e.g., non-pay non-work status, will last but do not expect it to exceed 30 days. You should listen to public broadcasts and when you hear that a continuing resolution or an FY 2014 appropriation for the agency has been approved, you will be expected to return to work on your next regular duty day.

Attached are valuable Questions and Answers to assist you thru this period. If there are any further questions, please contact your department manager.

Sincerely,

Edward Drusina  
Commissioner

Attachment: Appendices A-H

## XI Appendices

### Appendix A. General Furlough and Shutdown Questions

Q. What is a furlough?

A. A furlough is the placing of an employee in a temporary non-duty, non-pay status because of lack of work or funds, or other non-disciplinary reasons. A furlough could occur if a Continuing Resolution or appropriations bill is not enacted, and would arise from a lack of funds due to a lapse in appropriations.

Q. Are individuals appointed by the President subject to furlough?

A. Individuals appointed by the President, with or without Senate confirmation, who otherwise are not subject to 5 USC 6301 and attendant regulations governing leave in the federal service, are not subject to furlough.

Q. Are employees in Schedule C and Non-Career SES positions subject to different rules?

A. No. Schedule C and Non-Career SES employees have no special status in determining who is "excepted" in case of a **shutdown**. They may or may not be deemed "excepted," depending on the duties they perform.

Q. When will I know if I'm occupying an "excepted" position?

A. The Chief Administrative Officer and/or the Human Capital Office will notify employees of any changes in the list of excepted employees prior to the anticipated furlough date.

Q. Can changes be made to the list of excepted positions once the furlough has begun?

A. Yes. It is understood that special requirements placed on offices, might necessitate bringing an employee back from furlough for a limited period of time. The employee can be called in to perform the excepted function and then can be placed back in furlough status when the assignment is completed. Offices must keep careful records of these changes in case it is necessary to prepare personnel actions at the end of the furlough.

Q. Isn't the agency required to provide me with a 30 days advance written notice before they can furlough me?

A. No. The advance written notice and opportunity to answer are not necessary for furlough due to unforeseeable circumstances, such as a lapse in appropriations.

Q. If I know that neither a Continuing Resolution or an appropriations bill has not been signed by the date of a lapse of appropriations, and I am not on the excepted list, will I have to report for duty on the next workday?

A. No. Unless required and notified to do so, non-except employees will be on furlough status. Official notification will be issued by the agency via e-mail, notice on the internet, and message on the emergency contact No. of the notice of official furlough.

Q. May an employee volunteer to work on a non-pay basis during a furlough?

A. No. Employees are prohibited from working during a furlough, unless they occupy an "excepted" position.

Q. May an employee take other jobs while on furlough?

A. An individual on furlough remains an employee of the government. Therefore, the standards of ethical conduct for the Executive Branch, 5 CFR Part 2635, which contain rules on outside employment,

continue to apply to employees on furlough. Although furloughed employees should review these rules and should contact an ethics official if they are concerned that there is a risk that outside employment would cause a conflict of interest, there is no formal prior approval requirement for outside employment for department employees in the US.

Q. Is a furlough considered to be a break in service?

A. No. It merely places the employee in a non-pay status

Q. If someone is declared non-expected but cannot be reached for notification, what is their status, i.e. someone on vacation?

A. Any employee who is not working in an expected position will be placed on furlough regardless of whether or not they have received formal notification. Every effort should be made to contact the employee, but if that is not possible then the employee should receive official notification of the furlough upon his or her return to duty.

Q. Will I be notified by the agency when the furlough is over and when I must report back to work?

A. All employees are advised to listen to the news to find out whether another continuing resolution or an appropriations bill has been enacted, to visit our website, and call the emergency contact number for further guidance. As soon as you hear that the furlough has ended, you should report back to duty on the next workday, or the next duty day, unless otherwise directed by your office.

Q. When may a non-expected employee grieve the decision not to except him or her?

A. Most employees will have the right to either appeal a final decision of furlough to the MSPB or file a grievance with the FSGB. We cannot, of course, offer any advice as to the possible success of such an appeal or grievance.

Q. If employees are injured while on furlough or LWOP, are they eligible for Workers' Compensation?

A. No. Workers' Compensation is paid to employees only if they are injured while performing their official duties. Employees on furlough or LWOP are not in a duty status for this purpose.

Q. How will the agency notify employees of a shutdown?

A. The agency will notify employees of a shut down when it receives official notification from OMB. IBWC will issue an e-mail, post notification on the internet at our website, and record a message on the emergency contact number.

Q. How will a furlough affect my contributions to my health and life insurance plans? Does my coverage continue?

A. FEHB premiums are deducted from the employee's pay. If the employee's pay is insufficient to cover the FEHB premium, he or she can pay the premium directly to the agency or have it withheld from pay when he or she returns to regular duty. The enrollment continues for up to 365 days of non-pay status. The non-pay status may be a continuous period or it may include an employee's return(s) to pay status for a period of less than 4 consecutive months.

FEGLI coverage continues, and contributions made by the employee and the employee's agency continue if the employee's salary in each pay Period is sufficient to cover deductions. If the employee's salary is insufficient to cover his or her withholding, the employee's coverage will continue for up to 12 months without cost to the employee or the employee's agency.

Q. Can an employee obtain a loan from his/her TSP account based on anticipated financial hardship resulting from the furlough?

A. No. Because TSP loan payments are made through payroll deductions. Thus if you are in a non-pay status (i.e., furlough), you are not eligible for a TSP loan.

Q. How long should "orderly shutdown" take?

A. Ordinarily, furloughed employees should take no more than *three or four hours* to provide necessary notices and contact information, secure their files, complete time and attendance records, and otherwise make preparations to preserve their work. OMB Circular A-II 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.

Q. 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?

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

Q. Does this mean that they can continue to work remotely over the preceding weekend?

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

## Appendix B: Leave Questions

Q. May an employee work on a furlough day in exchange for taking a day off at another time for religious observances?

A. No.

Q. May a non-excepted employee use annual or sick leave in place of furlough?

A. No. Annual or sick leave is not available when the furlough is for lack of funds because that would place the employee in a pay status, contrary to the requirement that pay obligations to non-excepted employees not be incurred during a lapse. If employees have been granted leave for a day subsequently designated as a furlough day that leave is automatically cancelled because the necessity to furlough supersedes leave rights.

Q. May an excepted employee use annual or sick leave in place of furlough?

A. No. An excepted employee may not take annual or sick leave during a furlough period. If an employee designated to fill an excepted position is unavailable to work that employee should be furloughed and another employee can be designated to fill the excepted position. When the employee who had originally been identified to fill the excepted position is able to return to work he/she can be returned to duty status, but if another person worked in the interim, that person must be placed on furlough.

Q. After the furlough begins may excepted employees take previously approved annual leave, sick leave, or other paid leave during the lapse in appropriations?

A. No. During a lapse of appropriations when an employee is not at work and performing the duties determined by the employing agency to be excepted activities, he or she cannot be in a paid leave status. Therefore, agencies must take one of the following actions:

- (1) Cancel any approved leave and require the employee to report for work; or
- (2) Furlough the employee for the period of the employee's absence from duty. An agency may subsequently terminate the furlough if the employee's services are still required for excepted activities following the absence.

Q. May excepted employees be granted new requests for annual leave, sick leave, or other paid leave during the lapse in appropriations?

A. No. During a lapse of appropriations, if an excepted employee requests paid leave or is unavailable to be at work and perform the duties determined by the employing agency to be excepted activities, the agency must take one of the following actions:

- (1) Deny the request for leave and require the employee to report for work; or
- (2) Furlough the employee during the period of unavailability. An agency may subsequently terminate the furlough if the employee's services are still required for excepted activities following the absence.

Q. If an employee is on leave under the family and medical leave act of 1993 (FMLA) during furlough days, do the furlough days count against the 12-week entitlement to FMLA leave?

A. No. An employee cannot take leave, either paid or unpaid, under the FMLA on days that coincide with the dates of furlough. Therefore, the furlough days do not count against the 12-week entitlement to FMLA leave.

Q. If an employee properly schedules use-or-lose annual leave but is unable to use some or all of the scheduled leave because of a furlough, does the furlough constitute an "exigency of the public business" that would permit the restoration of leave?

A. Employees in this situation should make every effort to reschedule "use or lose" annual leave for use before the end of the current leave year. However, if this is not possible, approving officials may use their discretionary authority to determine that an employee was prevented from using his or her leave because of an exigency of the public business--namely, the need to furlough employees because of lack of funds.

## Appendix C: Payroll questions

**Payroll questions and answers - The following questions and answers on reporting time and attendance during a lapse in appropriations is based on advice from OPM and NFC for the April 8 furlough and it is subject to change. It is provided for your reference based on the assumption that a future bill will provide for retroactive compensation during the lapse:**

Q. How should hours worked by excepted employees during the furlough be reported?

A. Hours worked by excepted employees should be reported as regular duty hours (code 01).

Q. How should furlough time for non-excepted employees be reported?

A. Absences resulting from the furlough of non-excepted employees should be recorded as furlough time (code 74).

Q. Can annual leave, sick leave, compensatory time off, or credit hours under a flexible work schedule be charged during a furlough?

A. No. None of these items can be reported during the furlough. If an excepted employee did not work during the furlough period, report the hours not worked as furlough time (code 74).

Q. If an employee was on approved leave without pay (LWOP) during the furlough, would LWOP continue?

A. Yes. LWOP will continue and should be reported as LWOP on the T&A.

Q. How do you record the time for an employee who had previously scheduled sick or annual leave that fell within the furlough period?

A. Employees may not be in a paid leave status during the furlough. Consequently, all sick and annual leave must be cancelled and is not reported. If an excepted employee is unavailable for work and performing his/her duties, then he or she should be furloughed and the hours for which they did not work would be reported as furlough time (code 74).

Q. Will allowances and differentials be paid?

A. Yes. They must be paid as if the employee actually continued to work.

Q. Will part-time or intermittent employees designated as non-excepted be paid?

A. Furloughed part-time or intermittent employees will be compensated if they were scheduled to work during the furlough. Their scheduled hours would be reported as furlough time (code 74).

Q. How will hours paid to non-excepted employees show on the earnings and leave statement?

A. Since furlough hours will be reported as furlough time for T&A purposes, they will show as regular hours on employees' earnings and leave statements.

Q. If an employee properly scheduled use-or-lose annual leave but is unable to use some or all of the scheduled leave because of a furlough, does the furlough constitute an "exigency of the public business" that would permit the restoration of leave?

A. Employees in this situation should make every effort to reschedule "use-or-lose" annual leave for use before the end of the current leave year. However, if this is not possible, approving officials may use their discretionary authority to determine that an employee was prevented from using his or her leave because of an exigency of the public business -- namely, the need to furlough employees because of lack of funds. For state employees, requests to restore annual leave can only be approved by HQ executives.

Q. If I am in a non-excepted position and am required to report for duty on the first workday after a lapse of appropriations, will I be paid for the time worked?

A. Undetermined. It will not be known until after the appropriations bill or Continuing Resolution has been signed.

Q. During a furlough due to a lapse of appropriations, will employees receive a paycheck for work performed up to that date?

A. Yes. The national finance center has authority to process payroll actions for work performed up to that date.

Q. What effect will the furlough have on payroll allotments?

A. Any required withholdings (i.e., federal and state taxes and social security) are based upon a percentage of actual earnings. Therefore, if an employee is furloughed, his or her withholdings would be reduced in turn. The employee's specific allotments would not change (e.g., credit union loans and others), unless the employee completes a new allotment request increasing or decreasing the amount withheld.

Q. If I am in an excepted position, when will I receive my salary for work performed during the **shutdown**?

A. The agency will not be able to disburse any funds for work performed during the **shutdown** before an appropriations bill or another continuing resolution has been signed. Salary payments for those employees who were excepted will be made as soon as possible after the appropriations bill or CR has been signed.

Q. If I am furloughed, will I receive my salary and allowances in full after an appropriations bill has been signed?

A. If Congress retroactively authorizes payment of salary and allowances that have been suspended, then such payments may be made. Although this has been the practice, no guarantee exists that congress will continue to do so.

## **Appendix D: Retirement Questions**

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

A. It is lost unless Congress takes action to restore pay. Retirement contributions are based on, and are deducted, only when an employee has base pay. If an employee is not in a pay status, then no deduction would be made, nor would a "make up" deduction be made. When an employee resumes paid duty status, the normal deductions for that employee will be made and the normal government share will also be paid.

Q. When a furlough occurs during the three years of service prior to retirement, what effect will time in a furlough status have on an employee's high-3 average?

A. Generally there is no effect on the high-3 average unless the furlough causes the employee to be in a non-pay status for more than 6 months during the calendar year.

Q. What about people scheduled to take the buyout during the furlough - what affect will it have on that process?

A. The date of the buyout will not be affected. The incentive payment will be made after the appropriations bill has been signed.

Q. Will my service computation date be affected by the furlough status?

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

## **Appendix E: Travel/Training Issues**

Q. What happens to employees in non-excepted positions who are on TDY travel during a furlough?

A. If employees are not performing an excepted activity, such persons should be furloughed.

All supervisors and managers are requested to review proposed TDY plans prior to an anticipated furlough. If the TDY activity is non-excepted, the TDY activity must be rescheduled. If a lapse occurs, employees in TDY status, who are performing a non-excepted function, should make arrangements to return to their home duty station as soon as practicable.

Q. If a private sector training course is funded, and travel orders have been issued against FY2013 appropriations, can an employee who was told not to come to work attend the training?

A. No. Although travel expenses may have been obligated, salary expenses have not. Training is not an excepted activity; therefore, the employee could not be paid for attending the training; voluntary services may not legally be accepted.

Q: 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?

A: 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.

## **Appendix F: Unemployment Compensation**

Q. What is unemployment compensation for federal employees?

A. Unemployment compensation for federal employees is a program, under the direction of the Department Of Labor, which provides protection against loss of wages to federal employees who become unemployed through no fault of their own. The program is administered by participating states and benefit amounts are determined under the law of the state in which the individual works (last official duty station).

Q. Who is eligible for unemployment benefits?

A. Federal employees are eligible to collect unemployment benefits during periods that they are out of work. If a furlough is lengthy and uncompensated, all federal employees who have met the individual state's requirements are entitled to the same benefits as any employee on a temporary layoff. Benefits are based on gross weekly earnings.

Q. How long must the furlough continue for employees to be eligible for unemployment benefits?

A. In most states, an employee would have to be in furlough status at least four days to be eligible for a partial weekly benefit amount. Generally, one or two days in furlough status would not qualify an employee for benefits under most state laws.

Q. How are unemployment compensation benefit amounts determined?

A. Benefit amounts are generally determined and paid under the unemployment law of the state in which the employee worked. An employee's official duty station, as indicated on their most recent SF-50, Notification of Personnel Action, serves as the basis for this determination. States use a base period of earnings to calculate weekly benefit amounts. This is usually the last 6 quarters of earnings preceding the effective date of the claim.

Q. When can I expect my first check?

A. Most payments are made within ten days after the initial claim. However, due to number of claims from federal employees, that an employee can expect payment three to four weeks after filing.

Q. Am I liable for repayment of unemployment benefits if I do receive pay for the period I am furloughed?

A. Generally, the answer is yes. You should check with the local employment office of the state in which your wages were assigned.

Q. Are my benefits taxable?

A. Yes. Benefits are subject to federal income tax. The tax will not be withheld from the unemployment benefits. However, the employee will receive a form 1099-G reporting the amount of benefits received which should be included on the annual tax return. The employee should contact the applicable state and local government tax authority for information regarding taxable income since each state is different.

## Appendix G: Information Technology

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

A. 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 Anti-deficiency Act, or where their continuation is necessarily implied from a congressional authorization or appropriation of other continued functions. *See* "Basic Principles of Agency Operations During a Lapse in Appropriations," in FAQs on Contracting, Grant Administration, and Payment Processing During a Lapse in Appropriations.

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

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

Q. 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?

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

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

A. If an agency's website is shut down, users should be directed to a standard notice that the website is unavailable during the period of government shutdown. If any part of an agency's website is

available, agencies should include a standard notice on their landing pages that notifies the public of the following: (a) information on the website may not be up to date, (b) transactions submitted via the website might not be processed until appropriations are enacted, and (c) the agency may not be able to respond to inquiries until appropriations are enacted.

Q. What if the cost of shutting down a website exceeds the cost of maintaining services?

A. 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.

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

A. 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.

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

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

## **Appendix H. Contracting, Grant Administration, and Payment Processing**

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

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

The outline and Q&As are based on the legal opinions issued by the Justice Department (DOJ), and the guidance issued by the Office of Management and Budget (OMB), regarding agency operations during a lapse in appropriations (see, generally, OMB Circular A-II, 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 Anti-deficiency 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 Anti-deficiency 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 explainable connection between the obligation (in this case, involving a contract or grant) and the safety of life or the protection of property, and
- (b) Some reasonable likelihood that either the safety of life or the protection of property would be compromised in some significant degree by failure to carry out the function in question --and that the threat to life or property can be reasonably said to be near at hand and demanding of immediate response.

As the Anti-deficiency 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 the Justice Department has explained, "authority may be inferred from the Anti-deficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies"),

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

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

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

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

## **II. Questions and Answers on Contracts and Grants.**

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

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

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

#### **A. Incurring New Obligations for Contracts or Grants:**

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

A1: No -except in very limited circumstances. The Anti-deficiency 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 LA.-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 LA.2. above, and the DOJ opinions that address the emergency exception.

Q3: Mayan 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 LB. above).

Q4: Mayan 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 and 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 LB. 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 LA. above (i.e., express statutory authorizations, emergency circumstances, and the President's constitutional authorities), or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Another situation in which the duration of a funding lapse can have a significant impact on the analysis is where the agency had previously awarded a contract or grant, and -under the analysis in Q&As 5-7 -the contractor or grantee could continue to perform during the initial period of the funding lapse. However, if the funding lapse extended for a sufficiently long period, a situation might arise in which continued performance could occur only if the agency obligated additional funds to the contract or grant. Whether the agency could obligate such additional funds would depend on whether the lapse of appropriations includes the funding for the contract or grant payments, and/or for the contract or grants administration, and whether the continued performance would be wasteful because of the impact of the funding lapse on other agency activities. The agency would therefore need to undertake the analysis under Q&As 2-8 to determine how to proceed in that situation. If the agency determines that the contract or grant performance should discontinue due to the funding lapse, then the agency would not obligate additional funds to the contract or grant, and the 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: No -except in very limited circumstances.

During a lapse in appropriations, the activity of making contract and grant payments on a timely basis does not, by itself, qualify as one of the limited circumstances for which obligations can be incurred under the Anti-deficiency Act (as outlined in 1 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 Anti-deficiency 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 LB, above. There may be very limited circumstances where making a payment, during the funding lapse, is necessary because the agency's failure to make the payment during the funding lapse itself would result in an imminent threat to life or property, or would critically impair the President's

constitutional functions, or would prevent or significantly damage the execution of a congressionally authorized and funded function. In that latter situation (applying the analysis in I.B.3., above), the agency must determine that (1) the continuation of the program during the funding lapse has been contemplated by Congress in authorizing or appropriations legislation, (2) the agency's failure to make the payment during the funding lapse would delay contract or grant performance, and (3) this delay in payment would significantly damage the execution of the terms of the authorizing or appropriations legislative provision.

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

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

#### **D. Can Non-furloughed Employees Perform Other Work?:**

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

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

However, there may be cases in which an employee is required to perform this "excepted" support function intermittently throughout the course of the day, and the intervals in between are too short to enable the employee to be furloughed and then recalled in time to perform the function. In such cases, the employee may remain at work, and may perform non-"excepted" functions during these intervals. In such situations, agencies must minimize the number of employees who are performing "excepted" functions on an intermittent basis, by consolidating the "excepted" functions, to the extent possible, for performance by a smaller number of employees (e.g., agencies should not except, from furlough, multiple employees in order to perform intermittent "excepted" work, when instead the agency could have fewer employees perform the "excepted" work on more of a full-time basis). In this way, the agency properly minimizes its reliance on the Anti-deficiency Act to incur obligations for which the appropriation has lapsed.