

Potential Impact of Government Shutdown on Health Care Priorities

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Agenda

Rules Governing Shutdowns

Impact on Key Health Programs

Key Takeaways

Statutory Rules Governing A Shutdown



General Rule: The *Antideficiency Act* prohibits federal employees from spending money that Congress has not appropriated. *31 U.S.C. § 1341.*

Exceptions: The *Antideficiency Act* includes several exceptions to the general rule. *31 U.S.C. § 1342.*



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



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.



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



Other available appropriations can be leveraged.

FY 2024 OMB Directives to Agencies (1)

Last updated September 27, 2023

Frequently Asked Questions During a Lapse in Appropriations

Each operational decision during a lapse in appropriations requires individual, and often difficult and rapid, judgments about facts and the law. In preparing contingency plans for potential future lapses in appropriations, agencies should ensure that this analysis is undertaken carefully, but with a view towards allowing funded and excepted activities to continue in an effective manner. The information below is meant to address the most frequently asked questions by agencies that arise during a lapse in appropriations. If you have further questions, please consult your agency counsel or your appropriate points of contact within the Office of Management and Budget (OMB).

Below is an outline of the general principles that govern an agency's operations during a lapse in appropriations. Following this outline are Q&As based on these principles that frequently 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 OMB, regarding agency operations during a lapse in appropriations (see generally, OMB Circular A-11, Section 124). For further guidance, consult your 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, with certain limited exceptions.

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

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

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

In very rare situations, an agency has statutory authority to incur obligations in advance of appropriations. The best-known example is the Civil War-era Feed and Forage Act (50 U.S.C. § 6301), which provides authority to the Department of Defense to contract for subsistence, forage, fuel, quarters, transportation or medical and hospital supplies in the absence of appropriations. Other examples are the authorities provided by 25 U.S.C. § 9001 (Indian Affairs contracts for goods and supplies) and 41 U.S.C. § 6302 (Army contracts



Orderly Shutdown:

- Furloughed employees should take no more than 3 or 4 hours to provide:
 - Necessary notices and contact information
 - Secure their files
 - Complete time and attendance records
 - Pay invoices for obligations incurred prior to the lapse, and
 - Otherwise prepare to preserve their work.
 - OMB requires agencies to provide written justification for the conduct of orderly shutdown activities in excess of a half-day.
- ## Length of Shutdown:
- In evaluating if Federal employee activities should continue during a lapse in appropriations, agencies should consider whether these activities or the performance can be postponed until after appropriations are enacted.

<https://www.whitehouse.gov/wp-content/uploads/2023/09/Agency-Lapse-FAQs-9.27.2023.pdf>; SECTION 124—AGENCY OPERATIONS IN THE ABSENCE OF APPROPRIATIONS (whitehouse.gov)

FY 2024 OMB Directives to Agencies (2)

Contracts and Grants:

- Generally, an agency cannot incur a new obligation when the funding source for that obligation would be the lapsed appropriation.
 - Ex. signing a new contract or grant, or by extending a contract or a grant, or by exercising a renewal option .
- When performance under an already-issued contract or grant is not impacted by a lapse, the contractor or grantee may continue to proceed with its work during the lapse period.
- Agency employees who are paid with annual appropriations and who perform an activity associated with contract or grant administration should generally not continue work during a lapse in appropriations.

Re-Opening Checklist:

- Outlines processes to facilitate orderly startup of government functions impacted by a shutdown.

<https://www.whitehouse.gov/wp-content/uploads/2023/09/Agency-Lapse-FAQs-9.27.2023.pdf>; [SECTION 124—AGENCY OPERATIONS IN THE ABSENCE OF APPROPRIATIONS \(whitehouse.gov\)](#); [Government Reopening Check List - Items for Consideration January 2019 \(whitehouse.gov\)](#)

Impact on Regulatory Activity



NATIONAL
ARCHIVES

Office of the
Federal Register

General Rule

- Drafting, review, and publication of policy and regulatory documents (such as proposed or final regulations, submitted comments, guidance documents and other publications) must be paused during a shutdown.

Exceptions

- The Federal Register (OFR) is allowed to publish documents from unfunded agencies (whether or OFR is funded) **if the documents are directly related to the performance of governmental functions necessary to address imminent threats to the safety of human life or protection of property.**
- Publication of some documents may be allowed if the publication of the document is necessary to support funded agencies or activities or an excepted activity of unfunded agencies.
- Agencies can extend comment periods during a funding gap but are not required to.

<https://www.federalregister.gov/reader-aids/office-of-the-federal-register-blog/2019/01/what-happens-to-the-federal-register-if-there-is-a-government-shutdown>

Impact on Regulatory Activity (2)



Example:

- During the 2019 shutdown, agencies without appropriations who wished to submit a document to the OFR were required to attach a special handling letter to the document which states that ***publication in the Federal Register is necessary to safeguard human life, protect property, or provide other emergency services consistent with the performance of functions and services excepted under the Antideficiency Act.***

FY 2024 Contingency Planning – HHS



Staffing:

- Approximately 51,293 staff (58 percent) will be retained.
- 37,325 staff (42 percent) will be furloughed as of day 2 of a FY 2024 funding hiatus.
- 1,145 HHS staff will be excepted from furlough to assure an orderly phase-down and suspension of activities.

Programs:

- Will continue to support activities with advance appropriations, carryover balances including carryover user fee funds, emergency supplemental balances, or third party funding.
- Will rely on exceptions in the ADA to continue to protect human life and property, which does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.
- Will also retain a limited number of staff to perform necessarily implied activities in support of funded activities, such as Medicare, Medicaid, and other mandatory health program payments.



<https://www.hhs.gov/about/budget/fy-2024-hhs-contingency-staffing-plan/index.html>

Potential Impact: CMS



Staffing:

- 3,236 (49 percent) of CMS staff will be retained including 2,928 (45 percent) who are exempt (their activities or position are already funded or otherwise exempt) and 308 (5 percent) who are excepted staff (their activities are deemed necessary by implication).

Programs:

- Generally, mandatory spending entitlement *benefits* such as Medicare, Medicaid, and ACA subsidies will continue during a lapse in appropriations.
- CMS expects to have sufficient funds for Medicaid in the 1st quarter of FY 2024, based on the advance appropriation provided in the FY 2023 appropriation.
- CMS will maintain the staff necessary to make payments to eligible states for CHIP.
- CMS will continue Federal Exchange activities, such as eligibility verification, using Federal Exchange user fee carryovers.
- Non-discretionary activities including Health Care Fraud and Abuse Control and CMMI activities will also continue.

<https://www.hhs.gov/about/budget/fy-2024-cms-contingency-staffing-plan/index.html>

Potential Impact: FDA (1)



Staffing:

- 15,602 (81 percent) of FDA staff will be retained including 12,300 (64%) who are exempt and 3,302 (17%) who are excepted.
- Of the staff retained, 998 would be working directly on COVID-19 response activities.

Programs:

- FDA activities funded through carryover user fee funding will continue including certain activities related to the regulation of human and animal drugs, biosimilar biological products, medical devices, and tobacco products.
- FDA activities that can be carried out with COVID-19 supplemental funding include work on emergency use authorizations to respond to the COVID-19 pandemic, mitigation efforts related to potential drug and medical product shortages and other supply chain disruptions, medical device infection control, work on enforcement actions for fraudulent, counterfeit and misbranded products related to COVID-19, and work on medical countermeasures, therapies, and vaccines and important generic and biosimilar treatment options.

<https://www.hhs.gov/about/budget/fy-2024-fda-contingency-staffing-plan/index.html>

Potential Impact: FDA (2)



FDA User-Fee Supported Activities :

- Carryover user fee funding can be used for certain FDA activities involving products covered by user fee programs including the approval of new medical products, the ability to review requests to conduct important clinical research, issue guidance, and conduct other necessary activities to help patients have access to new therapies and important generic and biosimilar treatment options.
- During the FY 2019 shutdown, the FDA did not accept user fees associated with new medical product applications and as a result, could not initiate reviews of any new medical products.

<https://www.hhs.gov/about/budget/fy-2024-fda-contingency-staffing-plan/index.html>

Potential Impact: Public Health Agencies



SAMHSA

- 127 SAMHSA staff will be retained
- According to HHS, most SAMHSA grants awarded in the prior year will have funds that remain available to be spent by the grantee, including for example the 988 and Behavioral Health Crisis Services program, the State Opioid Response Grant program, and the mental health and substance abuse block grants.
- SAMHSA staff will continue to perform vital tasks related to imminent threats to human life including ensuring the ongoing operations of the Suicide Prevention Hotline reviewing suicide letters and ensuring they are quickly addressed by Suicide Prevention Centers and reviewing opioid prescription limit waivers.

National Institutes of Health | HHS.gov; <https://www.hhs.gov/about/budget/fy-2024-cdc-contingency-staffing-plan/index.html>; Substance Abuse and Mental Health Services Administration | HHS.gov

Potential Impact: Public Health Agencies



NIH

- 4,427 (22.4%) of NIH staff will be retained.
- Continuing NIH activities will focus mainly on the ongoing operations at the NIH Clinical Center, to maintain the safety and continued care of its patients.
- In previous government shutdowns, NIH was generally unable to enroll new patients into ongoing studies or start new studies, “except for patients with life-threatening or urgent medical problems.”
- NIH is also likely to suspend grant review and award action activities and reschedule the review process for pending grant applications.

National Institutes of Health | HHS.gov; <https://www.hhs.gov/about/budget/fy-2024-cdc-contingency-staffing-plan/index.html>; Substance Abuse and Mental Health Services Administration | HHS.gov

Potential Impact: Public Health Agencies



CDC

- 6,176 (41%) of CDC staff will be retained.
- Activities such as maintaining laboratory functions, the President's Emergency Plan for AIDS Relief (PEPFAR), and the agency's 24/7 emergency operations center will continue.
- The World Trade Center (WTC) Health Program, the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), and the Vaccines for Children (VFC) program are supported through mandatory funding and will not be impacted. .
- CDC's immediate response to urgent disease outbreaks and critical investigation needs in areas such as food, healthcare, vectors (mosquitoes and ticks), and high-consequence pathogens would continue.
- CDC would collect data being reported by states, hospitals, and others, and report out critical information needed for state and local health authorities and providers to track, prevent, and treat diseases.

National Institutes of Health | HHS.gov; <https://www.hhs.gov/about/budget/fy-2024-cdc-contingency-staffing-plan/index.html>; Substance Abuse and Mental Health Services Administration | HHS.gov

Potential Impact: Other HHS Programs

Indian Health Service (IHS)

- For FY 2024, IHS has an advanced appropriations, so 15,230 (100%) employees will be exempt from furlough.

Public Health Service Commissioned Corps

- Commissioned officers cannot be furloughed.
- As a result, HHS will retain an additional 1,496 Commissioned Corps personnel on board during a hiatus in annual appropriations in addition to those working in the exempt or excepted statuses described above.

Advanced Research Projects Agency for Health (ARPA-H):

- ARPA-H has been appropriated three-year appropriations in Fiscal Years (FYs) 2022 and 2023.
- HHS believes the FY2024 carryover balances from these two appropriations are sufficient to support ARPA-H operations during a lapse of appropriations.

<https://www.hhs.gov/about/budget/fy-2024-ihs-contingency-staffing-plan/index.html>; FY 2024 HHS Contingency Staffing Plan | HHS.gov; [Advanced Research Projects Agency for Health | HHS.gov](https://www.hhs.gov/about/budget/fy-2024-aspr-contingency-staffing-plan/index.html); [Agency for Healthcare Research and Quality | HHS.gov](https://www.hhs.gov/about/budget/fy-2024-aspr-contingency-staffing-plan/index.html); <https://www.hhs.gov/about/budget/fy-2024-aspr-contingency-staffing-plan/index.html>

Potential Impact: Other HHS Programs

Patient-Centered Outcomes Research Trust Fund (PCORTF)

- ARHQ will continue activities funded through the PCORTF.
- Activities are focused on building data capacity for conducting patient-centered outcomes research designed to produce new scientific evidence that better informs and supports health care decisions of both providers and patients.

Administration for Strategic Preparedness and Response (ASPR)

- 498 (47%) of ASPR staff will be retained.
- ASPR will continue support of COVID-19, hurricane and other emergency responses.
- Plans to continue administration of funded programs to ensure continued support for disaster responses, MCM management, timely payments to grantees and contractors, and performing minimal timekeeping and budgetary operations to ensure an orderly phase down.
- All active disaster response operations or deployments that are ensuring the safety of human lives will continue regardless of current funding sources.
- Plans to continue activities supported by multi-year appropriations such as BARDA and the Strategic National Stockpile (SNS).

<https://www.hhs.gov/about/budget/fy-2024-ihs-contingency-staffing-plan/index.html>; FY 2024 HHS Contingency Staffing Plan | HHS.gov; [Advanced Research Projects Agency for Health | HHS.gov](https://www.hhs.gov/about/budget/fy-2024-aspr-contingency-staffing-plan/index.html); [Agency for Healthcare Research and Quality | HHS.gov](https://www.hhs.gov/about/budget/fy-2024-aspr-contingency-staffing-plan/index.html); <https://www.hhs.gov/about/budget/fy-2024-aspr-contingency-staffing-plan/index.html>

FY 2024 Contingency Planning – DOL



Staffing:

- Approximately 4,074 of DOL's 51,363 staff will be retained.
- For the Employee Benefits Security Administration, 165 of the 908 EBSA employees will be retained during a shutdown.

Programs:

- EBSA has supplemental appropriations granted by No Surprises Act – P.L. 116-260 (part of the Consolidated Appropriations Act (CAA)) that can be used for:
 - Investigations conducted under the Surprise Billing Project.
 - Preparations for enforcement of Title I (No Surprises Act) and Title II (Transparency) of the CAA which have effective dates beginning December 27, 2021 and January 1, 2021.
 - Surprise Billing inquiries assistance and other technical assistance as needed.
 - Implementation of enacted legislation through rulemaking and guidance to ensure compliance with new protections related to surprise medical bills, price transparency in health care.
 - Implementation activities would also include enforcement of certain provisions which have already taken effect, such as enhanced requirements for group health plans related to compliance with the Mental Health Parity and Addiction Equity Act.



[Department of Labor PLAN FOR THE CONTINUATION OF LIMITED ACTIVITIES DURING A LAPSE IN APPROPRIATIONS \(dol.gov\)](https://www.dol.gov)

Key Takeaways

Impact of a government shutdown on specific health care stakeholders will be determined by several factors, including:



- Length of a shutdown.
- Availability of other sources of funding to a program or activity (FDA- user fees, Medicaid- state funding, public health – emergency COVID supplementals).
- How long it takes an agency or program to implement an “orderly phase-down”.
- How the Biden administration prioritizes staff and programs.
- If it is a complete or partial shutdown (meaning some agencies have FY 2024 appropriations enacted and some don’t).
- If the program or activity meets a statutory exemption, such as an imminent threat to the safety of human life or the protection of property.



At the Forefront of Navigating
Change in Healthcare

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