

Government Shutdown Facts

During my listening sessions and meetings with constituents in Tennessee I have been getting a lot of questions about what a shutdown of the Federal Government actually means for hard-working taxpayers. The reality is that each individual agency is required to submit a report to the Office of Management and Budget in regards to how they will operate under a government shutdown. Despite what you may have heard, even under a shutdown, your money is not safe in the hands of bureaucrats in Washington. The spending will go on. That is why I am always working to find real solutions to cut spending, not to just keep going with the status quo.

There is a lot of information being circulated by various groups about how a shutdown would affect the way your taxpayer dollars are being spent, so I wanted to share with you some facts from the Congressional Research Service that I hope you will find helpful.

Federal Spending

The Office of Management and Budget (OMB) provides executive branch agencies with instructions on how to prepare for and operate during a funding gap in its annually revised Circular No. A-11. The circular cites the two Civiletti opinions and the 1995 OLC opinion as background and guidance. The circular establishes two “policies” regarding the absence of appropriations:

- a prohibition on incurring obligations unless the obligations are otherwise authorized by law and
- permission to incur obligations “as necessary for orderly termination of an agency’s functions,” but prohibition of any disbursement (i.e., payment).

The circular also directs agency heads to develop and maintain shutdown plans. Prior to the 2011 revision of Circular No. A-11, the circular broadly indicated that the plans were to be submitted to OMB when initially prepared and also when revised. The plans themselves were required to contain summary information about the number of employees expected to be on-board before a shutdown and also the number of employees who would be “retained” (i.e., excepted from furlough) during a shutdown. With the August 2011 revision of the circular, however, OMB newly required that these plans contain more detailed information, be updated under certain conditions, and be updated at a minimum on a four-year schedule, starting August 1, 2014. OMB’s change in instructions occurred four months after Congress and the President almost came to an impasse in April 2011, on FY2011 appropriations. At the time, OMB instructed agencies to create or revise shutdown plans and to post them publicly on the Internet shortly before funding was scheduled to expire. Because no shutdown occurred, however, it is not clear what the effects of a shutdown would have been under these plans.

Under OMB’s current instructions from Circular No. A-11, agency heads are to use the DOJ opinions and the circular, in consultation with the agencies’ general counsels, to “decide what agency activities are excepted or otherwise legally authorized to continue during an appropriations hiatus.”

Furthermore, plans are to address agency actions in two distinct time windows of a shutdown: an

initial period of one to five days, which OMB characterized as a “short” hiatus, and a second period if a shutdown were to continue. Among other things, a shutdown plan is required to include

- a summary of agency activities that will continue and those that will cease;
- an estimate of the time to complete the shutdown, to the nearest half-day;
- the number of employees expected to be on-board (i.e., filled positions) before implementation of the plan;
- the total number of employees to be retained, broken out into five categories of exceptions to the Antideficiency Act, including employees
 1. who are paid from a resource other than annual appropriations;
 2. who are necessary to perform activities expressly authorized by law;
 3. who are necessary to perform activities necessarily implied by law;
 4. who are necessary to the discharge of the President’s constitutional duties and powers; and
 5. who are necessary to protect life and property.

After a plan provides this information for an agency as a whole, the plan is required to further break out some of the information by major “component” (e.g., bureau-size entity within a department).

In general, the OMB circular refers to employees who are to be furloughed as “released,” and employees who will not be furloughed as “retained” or “excepted.” OMB’s circular also instructs agencies to take personnel actions to release employees according to applicable law and Office of Personnel Management (OPM) regulations.

OMB documents and guidance from previous funding gaps and shutdowns may provide insights into current and future practices. OPM has provided links to, and retyped copies of, previous OMB bulletins and memoranda for reference. These and other OMB documents also have been reproduced in several legislative branch documents.

Entitlement Programs

Programs that are funded by laws other than annual appropriations acts—for example, some entitlement programs—may, or may not, be affected by a funding gap. Specific circumstances appear to be significant. For example, although the funds needed to make payments to beneficiaries may be available automatically pursuant to permanent appropriations, the payments may be processed by employees who are paid with funds provided in annual appropriations acts. In such situations, the question arises whether a mandatory program can continue to function during a funding gap, if appropriations were not enacted to pay salaries of administering employees. As noted earlier in this report, according to the 1981 Civiletti opinion, at least some of these employees

would not be subject to furlough, because authority to continue administration of a program could be inferred from Congress's direction that benefit payments continue to be made according to an entitlement formula. That is, obligating funds for the salaries of these personnel would be excepted from the Antideficiency Act's restrictions during a funding gap. However, such a determination would depend upon the absence of contrary legislative history in specific circumstances.

Nevertheless, the experience of the Social Security Administration (SSA) during the FY1996 shutdowns illustrates what might happen over a period of time in these situations. The lack of funds for some employees' salaries, for example, may impinge eventually on the processing and payment of new entitlement claims. SSA's administrative history describes how 4,780 employees were allowed to be retained during the initial stages of the first shutdown.

The majority of these employees were "in direct service positions to ensure the continuance of benefits to currently enrolled Social Security, SSI and Black Lung beneficiaries." Avoidance of furloughs was possible, because "appropriations were available to fund the program costs of paying benefits, [which] implied authority to incur obligations for the costs necessary to administer those benefits." SSA furloughed its remaining 61,415 employees. Before long, however, SSA and OMB reconsidered. SSA had not retained staff to, among other things, respond to "telephone calls from customers needing a Social Security card to work or who needed to change the address where their check should be mailed for the following month." SSA then advised OMB that the agency would need to retain 49,715 additional employees for direct service work, including the processing of new claims for Social Security benefits. Further adjustments were made during the considerably longer second shutdown, in response to increasing difficulties in administering the agency's entitlement programs.

Pay for Federal Employees

An immediate shutdown effect is the "shutdown furlough" of certain federal employees—that is, placement of the employees in a temporary, nonduty, nonpay status. Shutdown furloughs are not considered a break in service and are generally creditable for retaining benefits and seniority.

Federal employees who have been furloughed under a shutdown historically have received their salaries retroactively. However, there appears to be no guarantee that employees placed on shutdown furlough would receive such pay. This may be the case, because if furloughed employees are prohibited from coming to work during a shutdown, the government arguably would not be incurring a legal obligation to pay them. Several considerations, including personnel costs, productivity, and retention, might be weighed when assessing the issue of retroactive pay for furloughed staff.

Executive Branch

Among the three branches of the federal government, the executive branch is the largest in number of personnel and size of budgets. Several types of executive branch officials and employees are not subject to furlough. These include the President, presidential appointees, and federal employees deemed "excepted."

OPM has described "excepted" employees, who are required to work during a shutdown, as

“employees who are funded through annual appropriations who are nonetheless excepted from the furlough because they are performing work that, by law, may continue to be performed during a lapse in appropriations.” Nevertheless, excepted employees who are normally paid from annual appropriations would not receive pay during the shutdown period.

Legislative Branch

Due to their constitutional responsibilities and a permanent appropriation for congressional pay, Members of Congress are not subject to furlough.

During a funding gap, congressional employees whose pay is disbursed by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives would not be paid if there is no appropriation to fund legislative branch activities. Any decision regarding requirements that a congressional employee continue to work during a government shutdown would appear to fall to his or her employing authority. Activities of legislative branch agencies would likely also be restricted, in consultation with Congress, to activities required to support Congress with its constitutional responsibilities or those necessary to protect life and property.

Judicial Branch

If a funding gap had occurred in FY2013, the judiciary would have continued to operate using funds derived from court filing and other fees and from no-year appropriations. The judiciary estimated that these funds, if used cautiously, could have sustained judiciary activities for approximately 10 working days after an appropriations lapse.

If a lapse in appropriations were to continue to exist after various fee balances like these were exhausted, the judiciary would continue to operate under the terms of the Antideficiency Act, which the judiciary said allows “essential work” to continue during a lapse in appropriations.

Such “essential work” includes powers exercised by the judiciary under the Constitution, including activities that support the exercise of Article III judicial powers (i.e., the resolution of cases). Consequently, in the judicial branch, judges would not be subject to furlough, nor would core court staff and probation and pretrial services officers whose service is considered essential to the continued resolution of cases. Each court would be responsible for determining the number of court staff and officers needed to support the exercise of its Article III judicial powers. Such staff performing “essential work” functions would report to work in a non-pay status while other staff would be furloughed.

Protected by a constitutional prohibition against a diminution in their pay, Supreme Court Justices and other Article III judges would continue to be paid during a lapse in appropriations.

Also, in the judiciary’s view, other judicial officers, such as U.S. Claims Court judges, U.S. magistrate judges, and U.S. bankruptcy judges, would continue to be paid as well. Staff, however, would not be paid until Congress enacts an appropriation.

For more information read the full report from CRS: <http://www.crs.gov/pdfloader/RL34680>