

Office of the General Counsel Contingency Plan

Scope

This plan of action is developed based on the latest guidance for shutdown planning and activities for this organization, as relayed by the Office of Management and Budget (OMB) and the Department. This plan is subject to amendment as developments require and provided such amendments are consistent with applicable law.

The functions and activities described herein are to be executed in accordance with all applicable statutes, regulations, policies, and delegations of authority.

OMB provides guidance on how to prepare for and operate during a funding gap in OMB Circular A-11. The circular establishes two policies regarding the absence of appropriations:

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

The Anti-Deficiency Act (<https://www.gao.gov/legal/appropriations-law/resources>) prohibits agencies from incurring obligations in advance of, or that exceed, an appropriation. Thus, with certain limited exceptions, an agency cannot incur obligations when the funding source for the obligation is an appropriation that has lapsed. Any activities that would incur a new obligation must be suspended and are prohibited. Activities that are under way that would lead to an increased obligation or incurred costs must cease.

There are, however, limited exceptions to this general rule, including obligations incurred performing activities that protect life and/or property, incurred to accomplish an orderly shutdown of the normal functions of the agency, or where such payment activity is necessarily implied.

An agency must otherwise continue certain activities despite a lapse in their appropriations because the lawful continuation of other funded or excepted/exempted 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 Department of Justice 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) "Excepted" activities including functions:
 - a. Authorized by statute or other legal requirement expressly authorizing an agency to obligate funds in advance of appropriations;
 - b. That address emergency circumstances such that the suspension of the function would imminently threaten the safety of human life or the protection of property;
or
 - c. That are necessary to the discharge of the President's constitutional duties and powers.
- 3) Congressionally authorized or appropriated functions 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.

Office of the General Counsel

In the event of a lapse in appropriations for the Department of Agriculture (USDA), the Office of the General Counsel (OGC) with 257 employees as of September 2023 will initiate the following actions:

- Provide direction to all employees in travel status to return to their duty stations;
- Issue notices of cancellation of ongoing activities with the assistance of the Office of Human Resources Management and the Office of Operations;
- Secure all personal and real property for appropriate disposition;
- Review court calendars, litigation deadlines, and other commitments in order to seek their cancellation or postponement as necessary;
- Determine whether it is necessary to engage in bargaining with OGC's bargaining unit with respect to impact and implementation of any furlough affecting bargaining unit members; and
- Adopt and implement a communications plan by which all OGC managers and staff, in Washington, D.C., and all field office locations, will be kept informed of developments during the course of any necessary furlough of employees.

Upon completion of the above items, all personnel who have not been determined to be excepted or exempted from furlough requirements, *i.e.*, all personnel who are not required for the performance of functions necessary for emergencies involving the safety of human life or the protection of property, who are not funded by user fees or no-year funds, or who are not required to accomplish an orderly shutdown of the normal functions of OGC, will be placed on immediate furlough. We anticipate working with other USDA agencies and offices to identify areas of legal services required to be continued in support of major excepted or exempted functions. Individual OGC attorneys, administrative personnel, and support staff will be excepted or exempted from the shutdown in areas where (1) their continued service is required for the provision of legal services to the Office of the Secretary, the Deputy, Under, and Assistant Secretaries, and other general officers concerning the shutdown; (2) the provision of legal services is required to support USDA functions related directly to activities respecting the safety of human life or the protection of property; (3) the provision of legal services is required for the continued performance of particular excepted or exempted functions of the Department; (4) continued service is implied from the Constitutional function of the judiciary for cases in litigation that are not postponed during the shutdown; and (5) continued service is required to accomplish the orderly shutdown of the Office of the General Counsel**.

After the steps described above have been taken, we anticipate that not more than twelve OGC employees agency-wide will remain to provide the required legal services for the Department (falling to six by Day 10), and that two employees may continue to provide services in support of user fee funded programs which require no appropriation in advance, and thus fall within Category

I, and that up to 15 employees may be recalled sporadically over the course of the shutdown after Day 10 to deal with ongoing litigation matters.

Orderly shutdown activities of day 1 (first day funds are not available).

All employees will be directed either to report to their duty stations or to report to their supervisors by Teams meetings to receive assignments of duties or other pertinent information to assure an orderly shutdown of activities. Managers and supervisors will coordinate the following activities intended to affect an orderly shutdown of OGC's operations:

- Communicate shutdown instructions and procedures to all employees.
- Distribute furlough notices at OGC headquarters and all OGC field offices to all employees who have not been determined to be necessary for OGC's shutdown activities.
- Contact any employees on leave and inform them that their leave is cancelled.
- Contact any employee in travel status and direct them to return to their duty stations.
- Ensure all records, personal property, and real property are secured.
- Cancel all meetings, hearings, and other previously scheduled OGC business.
- Validate existing OGC communications strategy and employee contact information for future communications requirements.
- Assure that all employees complete time and attendance reports for the portion of the pay period through the first day of the pay period as directed by OHRM or OCFO and that such time and attendance reports are certified. **

Second half of day 1.

Excepted or exempted employees will coordinate the following activities intended to affect an orderly shutdown of OGC's operations:

- Document the status of cases and projects so they can be resumed, transferred, or otherwise handled as required when OGC's ultimate funding situation is determined.
- Excepted or exempted managers will document justification and obtain General Counsel approval for additional employees to be retained or recalled to manage ongoing litigation or other matters necessarily implied from ongoing work of agencies. **
- Excepted or exempted managers will issue recall notices or additional subsequent furlough notices as appropriate. **
- Excepted or exempted managers will consult with the President of the union on ongoing issues related to the furlough as appropriate. **
- Complete identification of employees who will be required to perform functions associated with the orderly cessation of OGC functions, including:
 - Name of each employee required to continue shutdown operations.
 - Title of each employee identified.
 - The shutdown functions that each identified employee will perform.

Day 2+

- Only employees who have been (1) identified previously as required to perform excepted or exempted functions, (2) are needed to perform functions necessary for orderly shutdown of OGC functions and activities, or (3) that have been approved to be recalled for episodic work on cases continuing in litigation during the shutdown or other implied by law duties arising from the Category III activities of the agencies, will report to work.
- Employees performing work identified as excepted or exempted from shutdown procedures will continue to work.
- Employees will be directed to perform only those activities identified earlier.
- The General Counsel will report to appropriate Departmental contacts regarding the status of OGC's shutdown procedures.
- Excepted or exempted managers will document justification and obtain General Counsel approval for additional employees to be retained or recalled to manage ongoing litigation or other matters necessarily implied from ongoing work of agencies. **
- Excepted or exempted managers will issue recall notices or additional subsequent furlough notices as appropriate. **
- Excepted or exempted managers will consult with the President of the union on ongoing issues related to the furlough as appropriate. **

Day 3+ and continuing until the end of the lapse in appropriations.

- Only employees who have been (1) identified previously as required to perform excepted or exempted functions, (2) are needed to perform functions necessary for orderly shutdown of OGC functions and activities, or (3) that have been approved to be recalled for episodic work on cases continuing in litigation during the shutdown or other implied by law duties arising from the Category III activities of the agencies, will report to work.
- Employees performing work identified as excepted or exempted from shutdown procedures will continue to work.
- Employees will be directed to perform only those activities identified above.
- There will be daily communications by the General Counsel with appropriate Departmental contacts regarding the status of OGC's shutdown procedures.
- Excepted or exempted managers will document justification and obtain General Counsel approval for additional employees to be retained or recalled to manage ongoing litigation or other matters necessarily implied from ongoing work of agencies. **
- Excepted or exempted managers will issue recall notices or additional subsequent furlough notices as appropriate. **
- Excepted or exempted managers will consult with the President of the union on ongoing issues related to the furlough as appropriate. **

** Asterisked items denote lessons learned.

FY 2023 List of Excepted or Exempted OGC Employees+

<u>Employees</u>	<u>Number</u>
Immediate Office General Counsel or Principal Deputy General Counsel (if General Counsel is vacant) (Excepted by statute)	2
Special Assistant to the General Counsel/Principal Deputy General Counsel (communications and support)	
Natural Resources and Environment* Associate General Counsel (Forest Service emergency issues, including fire and law enforcement)	1
General Law and Research Division Associate General Counsel Assistant General Counsel (appropriations, general law issues, and all litigation issues, disaster-related commodity purchase programs)	2
Int'l Affairs, Food Assistance, and Farm and Rural Programs* Associate General Counsel Assistant General Counsel (SNAP, school lunch and other nutrition programs, international food aid and CCC) Senior Counsel (Support critical international trade negotiations that are not cancelled)	3
Civil Rights, Labor, and Employment Law Division 1 Assistant General Counsel (Legal issues addressing human resources, employee, and Labor Relations)	1
Marketing, Regulatory, and Food Safety Programs* Assistant General Counsel (food safety programs administered by the Food Safety Inspection Service)	1
OGC's Regions (Kansas City Office) * Regional Attorney (all field-based inquiries related to to foreclosures, Rural Development programs, and commodity procurement issues, litigation)	1

Marketing Regulatory, & Food Safety Attorneys Funded by User Fees Attorney 2

TOTAL 13

*By day 10, these are estimated to be at best half day activities.

+Estimated number does not include staff that may need to be recalled for episodic work on cases continuing in litigation during the shutdown or other implied by law duties arising from the Category III activities of the agencies.

OGC Post-Lapse Startup Plan

Day before resumption of appropriations: Once OGC receives reliable notice that appropriations will be provided the next day:

- OGC will provide email notice to employees to report to work on normal schedules the next day.
- Ensure all IT functions are working properly.

First day agency is open after lapse:

- Employees will complete revised time and attendance reports for the shutdown period as directed by managers or supervisors.
- Managers will ensure that employees complete revised time and attendance reports for the shutdown period as directed by OHRM or OCFO and ensure such reports are certified.
- Employees will check on revised litigation schedules with DOJ counsel or per the directions of relevant administrative tribunals and update their managers and supervisors as appropriate.
- Ensure all IT functions are working properly

IRA, ARPA, and BIL funds are available for certain functions and appropriate staffing will be determined later.

Office of Ethics (OE)

In the event of a lapse in USDA appropriations, the Office of Ethics (OE) will initiate the following actions:

- Provide direction to all OE employees;
- Issue notices of cancellation of ongoing activities;
- Secure, shutdown, and lock all offices, personal and real property for appropriate disposition;
- Review OE calendar to cancel or postpone Ethics Training, as necessary; and
- Adopt and implement a communications plan by which all OE managers and staff will be kept informed of developments during the course of any necessary furlough of employees.

Upon completion of the above, all personnel who have not been determined to be excepted from furlough requirements, i.e. all personnel who are not required for the performance of functions necessary for emergencies involving the safety of human life or the protection of property, who are not funded by user fees or no-year funds, or who are not required to accomplish an orderly shutdown of the normal functions of the Office of Ethics, will be placed on immediate furlough.

We anticipate working with other USDA agencies and offices to identify areas of ethics services required to be continued in support of major excepted functions. Individual OE employees will be excepted from the shutdown in areas where (1) their continued service is required to provide ethics advice and guidance to avoid violations of criminal conflicts of interest laws for the Office of the Secretary, the Deputy Secretary, Under Secretaries, Assistant Secretaries, or to provide essential ethics advice to USDA's General Counsel concerning the shutdown; (2) the provision of ethics services is required to support USDA functions related directly to activities respecting the safety of human life or the protection of property; (3) the provision of ethics services is required for the continued performance of particular excepted functions of the Department; and (4) continued service is required to accomplish the orderly shutdown of the Office of Ethics.

After the steps described above have been taken, we anticipate that only two OE employees will remain to provide the required ethics services for the Department: The Director and Deputy Director of the Office of Ethics. The Director was appointed by the Secretary as the Department's Designated Agency Ethics Official (DAEO) and the Deputy Director serves in that role in the Director's absence. Ethics advice and rulings by the DAEO provide the necessary safeguard to ensure that officials can make critical decisions regarding the safety of human life and the protection of property in circumstances where a conflict of interest arises. In such circumstances, it is expected that the provision of ethics advice would be on an "as needed" or "as requested" basis during the shutdown to support USDA functions related directly to activities respecting the safety of human life or the protection of property or the provision of ethics services required for the continued performance of particular excepted functions of the Department or where continued service is required to accomplish the orderly shutdown of the Office of Ethics. The Director and Deputy Director will both report to the office or alternate depending on the workload of ethical inquiries from both furloughed and non-furloughed employees.

First half of Day 1 (first day funds are not available)

All 23 employees of the Office of Ethics (OE) will be directed either to report to their duty stations or to report to their supervisors by telephone to receive assignments of duties or other pertinent information to assure an orderly shutdown of activities. Managers and supervisors will coordinate the following activities intended to affect an orderly shutdown of OE's operations:

- Communicate shutdown instructions and procedures to all employees.
- Distribute furlough notices to all employees who have not been determined to be necessary for OE's shutdown activities.
- Contact any employees on leave and inform them that their leave is cancelled.
- Contact any employee in travel status and direct them to return to their duty stations.
- Ensure all records, personal property, and real property are secured.
- Cancel all meetings, training, and other previously scheduled OE business.
- Validate existing OE communications strategy and employee contact information for future communications requirements.
- (Managers and Supervisors only) Document the status of ethics matters and projects so they can be resumed, transferred, or otherwise handled as required when OE's ultimate funding situation is determined.
- (Managers and Supervisors only) Complete identification of employees whose presence at work will be required to perform functions associated with the orderly cessation of OE's functions including:
 - Name of the employee required to continue shutdown operations.
 - Title of the employee so identified.
 - The shutdown functions that the identified employee will perform.
- The Director of the Office of Ethics will report to appropriate Department contacts as needed regarding the status of OE's shutdown procedures.

Second half of Day 1 and continuing until completion of shutdown

- Only employees who have been (1) identified previously as required to perform excepted functions, or (2) are needed to perform functions necessary for orderly shutdown of OE functions and activities will report to work.
- Employees performing work identified as excepted from shutdown procedures will continue to work.
- Employees will be directed to perform only those activities identified earlier.
- Excepted managers will issue recall notices or additional subsequent furlough notices as appropriate.
- If requested by the OE Director, the Administrative Officer will be recalled for a half day per pay period in order to perform necessary tasks to ensure continuity of operations.
- These are estimated to be at best half day activities if the lapse in appropriations continues beyond 5 days.

List of Excepted OE Employees:

Director of the Office of Ethics

Deputy Director of the Office of Ethics

(As noted above, depending on the workload of ethical inquiries from both furloughed and non-furloughed employees, the Director and Deputy Director will either both report to the office or report to the office on alternate days to ensure availability.)

Employees Subject to Recall:

Administrative Officer, Office of Ethics

(May be recalled as needed/requested by the Director, Office of Ethics one half day per pay period)

OE Post-Lapse Startup Plan

Day before resumption of appropriations: Once OE receives reliable notice that appropriations will be provided the next day:

- OE will provide email notice to employees to report to work on normal schedules the next day.
- Ensure all IT functions are working properly.

First day agency is open after lapse:

- Employees will complete revised time and attendance reports for the shutdown period as directed by managers or supervisors.
- Managers will ensure that employees complete revised time and attendance reports for the shutdown period as directed by OHRM or OCFO and ensure such reports are certified.
- Ensure all IT functions are working properly