

## **Shutdown of Federal Trade Commission Operations Upon Failure of the Congress to Enact Appropriations**

### **Background**

This is the Federal Trade Commission's plan for dealing with a circumstance in which the Congress fails to enact regular appropriations, a continuing resolution, or needed supplements with a consequent interruption of fund availability. The plan is consistent with OMB Circular No. A-11 (2013); OMB Bulletin M-95-18 transmitting 8/16/95 Department of Justice opinion, (August 22, 1995); OMB Memorandum M-13-22, Planning for Agency Operations in the Absences of Appropriations (September 17, 2013) OMB Memorandum *Agency Operations in the Absence of Appropriations*, (October 5, 1990); OMB Bulletin No. 80-14, Supplement No. 1, *Agency Operations in the Absence of Appropriations*, (August 20, 1982); OMB Memorandum, *Agency Operations in the Absence of Appropriations*, (November 17, 1981); OMB Bulletin 80-14, *Shutdown of Agency Operations Upon Failure by the Congress to Enact Appropriations*, (August 28, 1980).

### **Summary of Plan**

In the absence of appropriations, Federal agencies may not incur any obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. Federal agencies may incur obligations as necessary to protect life or property and for the orderly termination of the agency's functions, but funds may not be disbursed. Thus, if it is necessary to close the agency's operations because of a lack of necessary appropriations, all Commission employees shall be furloughed except those: 1) performing work to address a threat to human life or property of such a nature that immediate action is necessary; 2) involved in the orderly shutdown of agency operations or otherwise performing duties where there is necessarily an implied authority to continue certain functions; or 3) otherwise allowed by operation of law. Because Commissioners are Presidential appointees who are paid an annual salary that is not dependent on the hours or days they work, they are excepted from furlough as a result of a shutdown. Accordingly, the Commission's Chairwoman and its Commissioners may continue to work.

OPM regulations provide for emergency adverse action furloughs without advance written notice of action. 5 C.F.R. § 752.404(d)(2). However, as soon as a funding hiatus is deemed likely, the Executive Director or his designee will notify Commission employees of the lack of necessary appropriations and the forthcoming furloughs first orally, and then in writing. Once appropriations have been restored, employees will be notified to return to work. Employees will be directed to view the OPM and FTC websites to learn when the appropriation has been approved and return to work on their next regular duty day.

## **Estimated Time to Complete Shutdown**

Most of the activities associated with the orderly shutdown of the agency's operations, including securing the agency's IT infrastructure and its records and notifying employees of the furlough should take no longer than a half-day. It may, however, take another half-day, or more, of work by a substantial number of agency lawyers and support staff to properly address the agency's law enforcement docket in the 108 active competition, consumer protection, and other matters pending in litigation. These activities will include notifying the courts and parties involved in certain agency matters of the cessation of normal business and negotiating suspensions of those actions; securing massive files and data bases containing PII and confidential, proprietary business information; and cancelling meetings, workshops, conferences, and hearings. In any event, furloughs will be issued on a rolling basis, as soon as each employee completes his or her shutdown activities.

Immediately upon learning of an absence of appropriations, the Chairwoman or the Executive Director will notify all bureau, regional, and office heads. These individuals, in turn, will notify their staffs orally or by email. Those employees in a travel status, including those overseas on short and long-term assignments, will be contacted and instructed, as appropriate, either to stay where they are (although in a furloughed status) or to return to their duty stations at the earliest practicable opportunity. The Human Capital Management Office (HCMO) will prepare, for the appropriate signature, a notice to all staff informing them of a furlough in accordance with applicable law and Office of Personnel Management guidance. Employees on approved annual leave will be notified that, upon the completion of shutdown activities, all leave is cancelled for the duration of the shutdown. These notices will be distributed through supervisory channels. Excepted employees in HCMO and the Financial Management Office will process personnel and pay records in connection with furlough actions at the earliest practicable opportunity. If appropriate, HCMO will notify the National Archives and Records Administration to arrange for orderly transfer of custody of the personnel records to the National Personnel Record Center (Civilian Records), for caretaking and protection of the records. HCMO will notify Union representatives of the furloughs and engage in impact and implementation bargaining as appropriate.

Employees responsible for law enforcement matters in litigation will, in the cases where there is no immediate risk to life or property, notify opposing parties and the courts of the government shutdown and attempt to negotiate suspensions of dates for hearings and filings. In connection with its merger and consumer protection enforcement work, as well as its economic research functions, the agency maintains huge databases and vast volumes of paper records that contain confidential information, including PII and company proprietary information. Agency employees responsible for those cases and research, along with those charged with maintaining the agency's records and files, will perform such tasks as are necessary to secure and protect this confidential information. If the suspension is prolonged, this work will require that all case and investigation files be reviewed, and that they be secured in an appropriate fashion, such as, documenting the

status of cases and projects so they can be resumed, transferred, or otherwise appropriately handled if or when the agency's funding is restored.

As part of its mission, the Commission benefits consumers through research reports and advocacy and by holding workshops, seminars, conferences and hearings to exchange and gather information on significant competition and consumer protection-related issues. Employees who have such workshops, meetings, conferences or hearings scheduled, here and abroad, will notify the public and the parties to those meetings and hearings of the absence of appropriations and will cancel those events. Staff will inform the parties that where possible the meetings and hearings will be rescheduled once appropriations are restored.

Employees responsible for the agency's IT infrastructure will take action to ensure that certain of the agency's IT assets are properly turned off, powered down, or, where necessary, dismantled to ensure the security of the agency's infrastructure and data.

Except for matters necessary to protect a vital Commission litigation position in a matter involving a threat to life or property and requiring continued action, the Commission may cancel hearings being conducted before the administrative law judges and, if so, will notify the parties to those actions.

### **The Number of Employees Expected to be On-Board Before Implementation of the Plan**

The Commission currently has 1,178 employees and does not anticipate that this number will change significantly before implementation of the Plan.

### **The Number of Employees Expected to be Retained Under the Plan**

Consistent with OMB Circular No. A-11 (2013), the employees who may be excepted from furlough under the Plan include the following:

- **The total number of employees whose compensation is financed by a resource other than annual appropriations:** None
- **The total number of employees whose activities are expressly authorized by law.** None
- **The total number of employees whose activities are necessarily implied by law.** Up to five
- **The total number of employees who are necessary to the discharge of the President's constitutional duties and powers.** None

- **The total number of employees, not otherwise exempt, to be retained to protect life and property:** After the initial half-day period estimated as necessary to affect an orderly shutdown, at any given time, as many as 248 employees could be excepted from furlough and required to report for duty to protect life and property through the prosecution of enforcement actions. An Executive Committee consisting of the agency's Executive Director, the Chairwoman's Chief of Staff, the General Counsel and his Principal Deputy, and the Directors of the Bureaus with exempt employees working will meet each day to make recommendations to the Chairwoman regarding which excepted employees may be furloughed or whether employees must be excepted from furlough and called to work to meet the demands of law enforcement actions to protect against immediate harm to life or government property interests or protect the agency's excepted personnel, property and IT infrastructure. *See* discussion immediately below.

While the Commission will not know for certain how many employees will be required to be excepted from furlough until a shutdown is announced, what is certain is that the Commission will only do that which it must do to effectuate the shutdown, to protect Commission excepted personnel, property, and data, and to conduct essential law enforcement activities that are mandated by law and required to protect against an imminent threat to life or property. The Commission will except from furlough only those lawyers, economists and support staff necessary to: 1) conduct those law enforcement actions where it is unable to obtain an extension or stay of action or where, absent pursuit of the matter, there would be a significant risk of harm to property or life; and 2) protect Commission excepted personnel, property, and data. After the initial half-day period estimated as necessary to affect an orderly shutdown, at any given time, as many as 253 employees could be excepted from furlough and required to report for duty. However, depending on the number and character of the cases pending at the time of the shutdown and whether courts will grant stays of pending actions during the shutdown, the number of excepted employees could be considerably less. The above estimate, which exceeds 5% of the number of employees on-board at the beginning of the hiatus less those exempt, is justified as follows.

### **Excepted Work That Will Continue During Shutdown**

The Commission is first and foremost a law enforcement agency, with two core goals: protecting consumers and maintaining competition.

**The Bureau of Competition:** At present, the Bureau of Competition has 285 employees on board. On the competition side, the agency engages principally in the following activities: 1) accepting premerger notification reports under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR"); 2) reviewing premerger reports and conducting investigations to determine whether to challenge reported transactions under the antitrust laws; 3) litigating, either judicially or administratively, cases that challenge

mergers or acquisitions; and 4) investigating and challenging, either judicially or administratively, anticompetitive practices that do not involve mergers or acquisitions.

As to item 1) above, the Commission has coordinated with the Department of Justice (DOJ) on how they will handle the agencies' joint statutorily-mandated responsibility to accept Hart-Scott Rodino (HSR) filings. Recently, the Commission has received an average of 25 HSR filings per week. The Commission's Premerger Notification Office will be open but very limited HSR staff will be excepted from furlough as necessary to accept new filings and to organize those filings.

As to item 2) above, the HSR establishes a statutory time limit in which the Commission or the Department of Justice may challenge a transaction before it is consummated. Although a failure by either agency to initiate a challenge within the statutory period does not preclude the agencies from ever challenging the transaction, the nature of the available relief changes dramatically once a merger or acquisition is consummated. To the extent that the circumstances of a reported merger or acquisition indicate that a failure by the government to challenge the transaction before it is consummated will result in a substantial impairment of the government's ability to secure effective relief at a later time, the Commission will continue HSR investigations during the pendency of a shutdown.

As to items 3) and 4), above, all non-merger investigations will be suspended during the pendency of a shutdown. As to litigated matters, in cases in which preliminary relief has already been obtained or where there has been no plan to seek preliminary relief, Commission attorneys will notify opposing parties and courts of the government shutdown, and request suspensions of dates for trials, hearings and filings, or similar relief to preserve the government's claim. Pending court action on such motions for stay, staff may need to continue working in order to meet upcoming deadlines and protect the Commission's interests in the litigation.

Currently, BC has a docket of approximately 250 active matters, including HSR matters being actively investigated and four of which are in active litigation. On average, it takes anywhere from three attorneys, one to two economists, plus two administrative and technical support personnel to staff a case at the initial phase. It typically takes 15+ attorneys, two to three economists, plus five to six administrative and technical support personnel to handle each case when in litigation. Depending on the status and nature of the cases in the docket at the time of shutdown, the Commission estimates that it may require up to 82 employees to staff excepted competition matters, which includes nine employees for support (five (drawn from a pool of nine employees) to manage intake and review of HSR filings; two for operations; and two for BC IT case support) and the Director of BC and two front office supervisors.

All the Bureau employees who would be excepted from furlough during a shutdown would be exempt because they are necessary to protect life and property. Should a court deny a Commission request for an extension due to the shutdown, the Commission's failure to continue to pursue its claims or defenses in the litigation will be

a substantial impairment of the government's legal interests and may foreclose its ability to vindicate its position at a later date. A small number of employees would also be excepted from the furlough because they are engaged in activities that are necessarily implied by law. In this regard, the HSR Act requires parties to notify the Commission and the Department of Justice before they may consummate certain proposed mergers and acquisitions. The HSR form must be physically delivered to, and date stamped by, the Agencies. Once those documents are delivered to the Commission, they must be reviewed and processed – and where appropriate, investigated -- immediately to determine whether the US Government has a cognizable interest in challenging the transaction before it is consummated. Because the parties have a statutory right to file their Premerger Notification Reports, the Agencies have an implied responsibility to have adequate staff on hand to receive and promptly process the filings.

**The Bureau of Consumer Protection:** At present, the Bureau of Consumer Protection has 331 employees on board. On the consumer protection side, the Commission works to protect consumers from fraudulent, deceptive and unfair practices in the marketplace. Although the Commission does not enforce any criminal laws, the bulk of its consumer protection cases deal with conduct that is either criminal or near-criminal in nature – fraudulent financial relief or mortgage foreclosure rescue schemes, bogus health cures, and data security issues that lead to identity theft and other substantial consumer losses. The Commission often works closely with state or federal criminal law enforcement authorities and frequently seeks immediate injunctive relief in federal district court -- temporary restraining orders with asset freezes or appointments of receivers or preliminary injunctions. Emergency relief is frequently needed for these cases to stop such harmful deceptive acts and to prevent the dissipation of assets or the continuation of harm that would prejudice the government's property interest in the claim if it were unable to secure an asset freeze or TRO.

At any given time, attorneys from the Bureau of Consumer Protection (BCP), which includes staff in Headquarters and in the eight Regional Offices, are actively litigating approximately 75 cases in federal district courts throughout the country and one or two cases in administrative litigation in Washington, DC. Additionally, at any given time BCP typically has several hundred open investigations and roughly 15-25 investigations that are nearing completion and close to being filed in federal court. As with the cases in BC's docket, BCP cases vary tremendously in terms of where they are in the lifecycle of litigation, from cases where complaints and requests for preliminary relief have just been filed or are about to be filed, to cases that are approaching significant deadlines, such as discovery cut-offs, summary judgment deadlines or trial on the merits. The complexities of cases vary, but the typical case is staffed by two to four attorneys and one investigator or paralegal, as well as outside experts as needed. An agency economist often assists in assembling the evidence for trial and sometimes provides expert testimony at trial. Each supervisor in the litigating Divisions and Regions manages several active BCP litigations, and for every case that continues during a shutdown, it is essential that a supervisor who is familiar with that matter remain in order to provide continuing guidance and feedback for litigating staff.

In assessing which BCP matters will be pursued during a shutdown, BCP, in consultation with the General Counsel, will carefully review every consumer protection matter (including investigations that are nearing completion), focusing on the cases where there is the highest threat of immediate harm and on cases where the harm is ongoing. In the event of a shutdown, the Commission will seek continuances in all BCP cases in which preliminary relief has been obtained, as appropriate. Attorneys in those cases or where there is no plan to seek preliminary relief, will notify opposing parties and courts of the government shutdown, and request suspensions of dates for hearings and filings, as appropriate. Pending the responses from the courts (including non-responses), staff may have to continue working in order to meet upcoming deadlines and protect the Commission's interests in the litigation. Excepting such staff from furlough is essential to protect the Commission's rights and interests in the litigation. Depending on the status and nature of the cases in the docket at the time of shutdown, the Commission estimates that it may need to except up to 96 employees from furlough to staff consumer protection cases. The Director of BCP and three front office employees will be excepted from furlough to supervise this work.

All the Bureau employees who would be excepted from furlough during a shutdown would be exempt because they are necessary to protect life and property. Should a court deny a Commission request for an extension due to the shutdown, the Commission's failure to continue to pursue its claims or defenses in the litigation will be a substantial impairment of the government's legal interests and may foreclose its ability to vindicate its position at a later date.

**The Bureau of Economics (BE):** At present BE has 114 employees on board. As noted above, BE supports pending BC and BCP litigation. Up to 33 BE staff might be excepted from furlough to support on-going litigations if the courts do not grant requested extensions, which number includes the Director of BE and three front office employees to supervise the work. All the Bureau employees who would be excepted from furlough during a shutdown would be exempt because they are necessary to protect life and property. Should a court deny a Commission request for an extension due to the shutdown, the Commission's failure to continue to pursue its claims or defenses in the litigation will be a substantial impairment of the government's legal interests and may foreclose its ability to vindicate its position at a later date.

**Office of General Counsel:** At present, the Office of General Counsel has 29 active litigations, with 53 employees on board, up to eight of which may be excepted from furlough. The General Counsel, his principal Deputy, and up to one other attorney at any given time would be excepted from furlough to support excepted law enforcement personnel who would be working and to work with the Chairwoman and the Executive Director to manage the agency during the shutdown. As many as three additional attorneys, at any given time, from the Office of the General Counsel might be excepted from furlough to handle any emergency appeals that might need to be filed or handle pending cases where a motion for stay is denied. All the General Counsel employees who would be excepted from furlough during a shutdown would be exempt because they are necessary to protect life and property. Should a court deny a Commission request for

an extension due to the shutdown, the Commission's failure to continue to pursue its claims or defenses in the litigation will be a substantial impairment of the government's legal interests and may foreclose its ability to vindicate its position at a later date. In addition, some small number, up to two at any given time, of General Counsel employees may be excepted from the furlough to help Commission witnesses prepare should Congress schedule any hearings involving Commission staff during the shutdown.

**Office of the Executive Director:** At present, the Office of the Executive Director has 135 employees on board. Excepted staff would be those necessary to protect the lives of those excepted Commission employees who will remain at work and to protect the Commission's property, including its IT and physical infrastructure and data. In addition to the Executive Director, who will be excepted from furlough to oversee agency operations during the shutdown, the Commission estimates that up to 29 of the following employees in the Office of the Executive Director may be excepted from furlough. The continuation of certain of these functions is authorized by in order to protect life and property.

**Information Technology:** The agency anticipates that as many as six employees will be exempted from furlough to continue to work to ensure the integrity and security of the agency's IT infrastructure and its availability for use by exempt employees pursuing excepted and essential law enforcement actions during the shutdown. These individuals will manage IT contract support that is funded and may continue to operate during some period of, or the entire, shutdown. In the absence of such contract support, they will provide direct support of the agency's network and telecommunications services; operate the agency's data center; monitor systems and rotate back-up media for off-site storage; provide on site data base administration support; provide continuous monitoring of FTC systems; and otherwise support excepted employees' IT needs.

**Financial Management:** The agency anticipates that as many as six employees may be excepted from furlough and required to continue to work to manage the agency's budget, finance, contracting, and travel support functions in support of the work of the exempt employees staffing continued law enforcement actions.

**Administrative Services:** The Commission anticipates that as many as six employees may be excepted from furlough to secure the Commission's three buildings in Washington, DC, provide support services for excepted employees, and ensure the security of the personnel working at those locations. One of the six employees may be called in to support ongoing and funded construction of the agency's space at the Constitution Center.

**Records and Filings Support Services:** The Commission anticipates that as many as three employees may be excepted from furlough to support excepted personnel litigating law enforcement matters not stayed in federal court and administrative Part 3, including securing court reporters for depositions.

**Human Capital Management:** The Commission anticipates as many as five employees may be excepted from furlough to provide continuing human resources support for the excepted agency law enforcement personnel.



**Other Staff:** The Chairwoman, the Chief of Staff and the Commissioners will be excepted from furlough. Other staff may also be excepted from furlough to support the work of the Commission during the shutdown only to the extent necessary to protect life and property or to assist the Commission in meeting its core activities.

### **The Work that Will Not Be Done During the Shutdown**

During the shutdown the Commission will not process FOIA requests; and does not anticipate engaging in rulemaking; dealing with ethics issues or, unless required to do so by reason of a court not continuing litigation deadlines, defending EEO or other suits against the agency; engaging in economic research; pursuing its on-going studies; issuing reports and guides; attending or conduct workshops, roundtables, hearings or conferences; or making its views known through letters or comments to other agencies. Similarly, no staff in its Regional Offices will be available to answer inquiries from the public or do any other work that does not directly support the protection of life and property. The Commission will not work on intergovernmental task forces of which it is a part, provide testimony or engage in consumer protection education and outreach. The Commission will not pursue the vast bulk of its competition and consumer protection investigations and prosecutions.

The Commission will not engage in multilateral competition fora to promote convergence of sound competition policy choices or participate in bilateral negotiations and consultations to promote and support competition or consumer protection enforcement coordination with international partners. The Commission will not participate in the International Competition Network in which it has a leadership role, the Organization for Economic Cooperation, the United Nations Conference on Trade and Development, or the Asia-Pacific Economic Cooperation Forum with respect to competition or consumer protection policy or enforcement issues. The Commission will not participate in or help lead the London Action Plan, a global network of industry representatives and law enforcement agencies from more than 20 countries that works together to fight spam, phishing, and other online threats. Nor will the Commission coordinate with Canada on cross border fraud. It will call home those employees who are providing technical assistance to new and emerging foreign competition and consumer protection agencies.

The Consumer Response Center operated by the Commission collects key information from, and provides key information to, consumers and law enforcement authorities, handling tens of thousands of inquiries and complaints weekly. Complaint information collected by the Commission is entered into a secure online database within the Commission's Consumer Sentinel Network, which the agency shares with more than 1,700 law enforcement organizations in the U.S. Canada and Australia. The agency also maintains the Do Not Call Registry to protect consumers from receiving unwanted commercial telemarketing calls, and for the last ten years has maintained the Spam Database to which consumers and businesses can forward unsolicited commercial email or spam that serves as the basis for the Commission's CAN-SPAM Act enforcement program. Employees responsible for the agency's Consumer Response Center, Do Not

Call Registry, Consumer Sentinel, and Spam Database will suspend operations and notify consumers and law enforcement partners that these systems are unavailable.

The agency will not undertake records management functions beyond those necessary to shut down. Nor will it process personnel actions, update policies and procedures, conduct internal controls reviews and audits, engage in labor management negotiations, provide training, work on new data base applications; test new applications; work on IT initiatives; or undertake other than emergency building maintenance and support.

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In sum, upon the announcement of a shutdown, the Commission will promptly commence an orderly shutdown during which it will review its cases then in litigation and will attempt to secure stays or extensions. Where it is unable to obtain such relief, staff will be excepted from furlough to litigate those cases. In addition, the Commission will except from furlough only those lawyers, economists and support staff necessary to continue law enforcement actions in order to protect the government's interest in the litigation positions it had advanced or where there would be a significant, immediate harm to life or property if action were not continued or taken. Finally, only such support staff as are necessary to support the activities of and to protect the excepted law enforcement personnel, the Commission's physical and IT infrastructure and data will be excepted from furlough.