



Broadcasting
Board of
Governors

Operations During a Lapse in
Appropriations

December 15, 2011

Background

The United States Constitution provides that “[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law.” U.S. Const. art. I, § 9, cl. 7. The Anti-deficiency Act (ADA) seeks to ensure proper implementation of this constitutional requirement by prohibiting all officers and employees of the federal government from entering into obligations in advance of an appropriation. To that end, the ADA restricts the acceptance of services from federal personnel, entering into contracts and executing grants, except in cases of emergencies or as otherwise authorized by law. *See* 31 U.S.C 1341 et.seq.

In absence of an appropriation to continue operations, the ADA would prohibit many but not all government functions. The Office of Legal Counsel (OLC), the Office of Management and Budget (OMB), and the Government Accountability Office (GAO) recognize various activities that are excepted from the general prohibition against incurring obligations that would otherwise apply under the ADA (hereinafter, “excepted activities”). In respect of such excepted activities, Agencies may continue to incur obligations during a funding gap.

The ADA provides for the possibility of imposing significant criminal penalties for any employee or government official who knowingly and willfully violates the Act, including by continuing to incur obligations from non-excepted activities during a funding gap. These penalties may include fines of up to \$5,000 and imprisonment of up to two (2) years per violation. The Department of Justice has historically taken the position that it may seek to impose these penalties under appropriate circumstances against federal officials or employees who fail to cease applicable government functions during a funding gap (43 U.S. Op. Atty. Gen. 224, 229 (1980)). In addition to criminal penalties, the ADA also has significant administrative penalties for failure to comply.

Determination of Excepted Activities and Positions

Definition of Excepted Activities

Excepted activities that may be continued in an absence of appropriations include those activities which are (i) necessary to execute an orderly shutdown of affected operations, (ii) necessary for *the safety of human life or the protection of property*, and (iii) necessary for *conducting foreign relations essential to the national security*. Employees performing excepted activities will continue to report to work and perform their duties.

Please note that the definition of an employee of the federal government only includes those individuals who are directly employed by the U.S. government. The definition does not include contractors, such as purchase order vendors, stringers and other individuals or entities who maintain contractual relationships with the Agency. The treatment of contractual services is covered in a later section of this guidance.

Essential Activities for the Protection of Human Life and Property

To qualify as an essential activity for the protection of human life and property, there must be some reasonable connection between the activity and the safety of human life or the protection of property. There must also be some reasonable likelihood that such safety and protection would be compromised to some degree by delay in the performance of the function in question. At BBG, this would include the protection of all government property, including headquarters, domestic and overseas transmitting stations, overseas bureaus, and equipment used in BBG operations. It would also include reasonable support services related to the protection of human life and property. As many BBG employees are Foreign Service Specialists (FSS) stationed overseas or are on travel status and may need to be recalled, BBG should maintain minimal operations to protect such personnel in case emergency travel is warranted or to the extent required to recall personnel to their duty stations or to the United States. Activities that fall under this category represent 2% of the BBG workforce or an estimated 30 staff.

Conduct of foreign relations activities essential to the national security

The BBG Office of General Counsel has issued a memorandum establishing that there is a sufficient legal basis for the Board's determination that United States international broadcasting activities of the BBG qualify as "foreign relations essential to the national security" and are, therefore, excepted activities which may continue during the appropriations lapse. These excepted activities represent the minimum activities necessary to produce and distribute Voice of America (VOA) and Office of Cuba Broadcasting (OCB) programming and to distribute programming of the BBG. Federal employees who are covered by this exception include the minimum VOA, OCB and International Broadcasting Bureau (IBB) employees required to produce and distribute relevant programming.

The scope of this excepted activity is based on the following programming assumptions:

- Minimum operations necessary to keep the BBG global distribution network operational
- Current programming schedule remains, with minimum operations necessary to stay on the air
- Highest priority live news programs continue
- Breaking news is covered
- No new programs or projects are initiated
- Evergreen and pre-recorded material will be used to the highest extent possible
- Internet and new media operations continue as appropriate
- Excepted employees are those essential to produce and distribute these programs

Activities that fall under this category represent 57% of the BBG workforce or an estimated 999 staff.

Other categories of excepted activities

The BBG is not planning on and does not maintain any activities that engage in military law enforcement or health care. In addition, the BBG is not requesting an exemption to continue operations for employees whose compensation is financed by resources other than the annual appropriation. As such, no BBG employees fall into this category.

Shutdown Preparation Activities

To prepare for a shutdown, each BBG office should assemble a list of those activities, inclusive of personnel requirements that are essential to performance of excepted activities. Information must, at a minimum, include the amount of time required to implement shutdown of non-excepted activities, the number of employees expected to be on board at the implementation of the plan, minimum number of employees to be retained under the plan, segregated by those employees essential for the protection of human life and property and those employees essential to the conduct of foreign relations essential to the national security as well as justifications as to why those functions qualify as an excepted activities.

The CFO will assemble the information, update shutdown plans and submit those plans to OMB as required. Shutdown plans should be regularly updated.

In the event of an actual shutdown, the CFO will request a list of the names of employees who will be reporting to work in support of excepted activities in accordance with the shutdown plans. The list should be accompanied by a certification from the IBB Director or IBB Deputy Director, the VOA Director or the OCB Director, as appropriate indicating , “Obligations for salaries for the attached list of employees are necessary to carry out excepted activities, as outlined in the BBG shutdown plans, in the absence of an appropriation.” The CFO will also provide the list of employees to the Office of Human Resources so that appropriate employee notices may be prepared.

The CFO will provide templates to Senior Agency management to assist with the processes identified above.

Orderly Shutdown of Non-Excepted Activities

All employees scheduled to work on the first workday following a lapse in appropriations should report to work. Non-excepted employees should perform only those tasks necessary to safeguard property, records, and information. In addition, non-excepted personnel should take measures to secure files; make external contacts necessary to communicate the office's status, such as notifying parties of the cessation of normal business; cancel non-essential meetings, conferences, and other previously arranged business; document the status of cases and projects so that they can be resumed, transferred, or otherwise appropriately handled when the Agency's operational status is regularized; complete and record time and attendance for all employees through noon on the first work day of the shutdown; perform those tasks necessary to protect confidential

information; and perform necessary functions to process all unpaid bills on hand for obligations incurred prior to the shutdown. It is anticipated that these activities will take approximately four (4) hours.

After performing the functions necessary for an orderly suspension of non-excepted operations, employees performing “non-excepted” activities will be furloughed. Managers are reminded that the Federal Government cannot accept voluntary services; therefore, no employee may work if he or she is in a non-excepted status. These employees should listen to the news for information about the appropriation. The BBG will post information about the status of the shutdown in the BBG website, www.BBG.gov, and provide information about when furloughed employees should report to work. The BBG has also established a phone line (202-382-8222) where employees may call in to determine the status of the shutdown. If another continuing resolution or an appropriation bill is enacted (passed by the House and the Senate and signed by the President), employees will be directed to report back to work on their next scheduled workday, unless otherwise told to do so earlier (e.g., for rotation or other purposes).

Personnel

The Office of Human Resources (OHR) will distribute furlough notices to BBG offices. The notices should be given to individual furloughed employees as quickly as possible on the first work day of the shutdown. If a shutdown occurs, managers are responsible for forwarding a copy of the furlough letter to non-excepted domestic employees who are not at work. Managers should also distribute furlough notices to impacted overseas employees and are requested to advise OHR of the names of those non-excepted employees on leave or travel in the U.S. who are not expected back within the following two weeks. Managers should confirm that each employee has received the notification as they return to duty. If there is difficulty in delivering furlough notices, managers should notify OHR and request assistance in delivering the notices and getting acknowledgement of receipt. Managers should cite this guidance in support of their respective requests.

For other non-excepted employees whom managers are not able to contact within two (2) weeks due to lack of a contact address, managers should advise OHR of those employee and their expected date of return to the Agency or duty station. If possible, OHR will try to locate these employees.

The CFO will examine the text of any subsequent appropriation or continuing resolution to determine if Congress has authorized retroactive pay for employees.

Furlough Decision Notice Due to Lapse of Appropriations (5 CFR PART 752)

The text of the notice of furlough appears below.

In the absence of an FY 2012 appropriation or a continuing resolution for the Broadcasting Board of Governors (BBG), no further financial obligations may be incurred by BBG, except for those related to the orderly suspension of BBG operations or performance of excepted activities as defined in the

Office of Management and Budget memorandum for Heads of Executive Departments and Agencies dated (Date).

The agency has determined that your services are not needed for orderly suspension of operations or for one of the functions excepted from furlough. Therefore, you are being placed in a furlough status effective (enter date), 2011. This action is being taken because of a sudden emergency requiring curtailment of the agency's activities; for that reason, no advance notification is possible. The customary 30-day advance notice period and opportunity to answer are suspended under the provisions of 5 CFR 752.404 (d)(2) and under 5 CFR 359.806(a) for Senior Executive Service (SES) career appointees.

This furlough is not expected to exceed 30 days. You should listen to public broadcasts for further information. When you hear that a continuing resolution or an FY 2012 appropriation that covers BBG has been approved, you will be expected to return to work on your next regular duty workday. During the furlough period, you will be in a non-pay, non-duty status. You are not permitted to serve as an unpaid volunteer and must remain away from the workplace unless and until recalled to duty. Any paid leave (annual, sick, court, etc.) approved for use during the furlough period is cancelled.

Appeal Rights

Employees who have completed a probationary or trial period or one (1) year of current continuous employment in the Competitive Service under other than a temporary appointment may appeal this action to the Merit Systems Protection Board (MSPB). Employees in the Excepted Service who have veterans preference may appeal to the MSPB if they have completed one year of current continuous service in the same or similar positions as the one now held. Employees in the Excepted Service who do not have veterans preference and who are not serving a probationary or trial period under an initial appointment pending conversion to the Competitive Service may appeal to the MSPB if they have completed two years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to two years or less.

An appeal to the MSPB must be filed within 30 calendar days after the effective date of your furlough. Employees have a right to representation in this matter and may be represented by an attorney or other person of their choosing.

SES career appointees adversely affected by the furlough also may file an appeal to MSPB.

Information on MSPB regulations and an appeal form are available at www.mspb.gov.

Grievance Rights

Bargaining unit employees may grieve this action in accordance with their applicable negotiated agreement or may appeal to MSPB in accordance with the procedures outlined above, but not both. To obtain information on filing a grievance under the negotiated grievance procedure, contact your union representative.

Other Information

If you have questions about any of the information in this notice, you should contact the Office of Human Resources at (202) 382-7500.

Deciding Official

Date

I acknowledge receipt of this decision.

Employee's Signature

Date

Hiring and Recruitment During the Furlough

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

All non-excepted personnel support activities are suspended.

Foreign Service Nationals/Foreign National Personal Services Contracts

Foreign Service Nationals (FSNs) or Foreign National Personal Services Contracts personnel (FS PSCs) may, under local foreign law, be required to be paid whether or not work is performed. FSNs and FS PSCs may continue work if they can be supervised properly. Supervisory American staff may not be justified as “excepted” employees during a furlough solely on the basis of their supervisory role; their “excepted” status must be independently justified based on the categories of excepted activities discussed above. If supervisory staffs are not excepted, and FSNs and FS PSCs cannot operate without such supervision, these employees must be put on administrative leave.

Part-Time and Intermittent Employees

For part-time employees, time spent in non-pay, non-work status will be prorated based upon the number of hours normally worked during a pay period.

Intermittent employees are non-full-time employees without a regularly scheduled tour of duty. This group of employees may be called to work during a furlough only to perform excepted functions.

Rotation of Personnel

In the past, shutdowns of the Agency based on a lapse of appropriations have been of a short duration, therefore, the BBG does not foresee the necessity for the rotation of personnel. In addition, rotations are discouraged for several reasons, including that rotations may affect the eligibility of individuals for unemployment compensation, may impair continuity in BBG functions, and may entail an unnecessary administrative workload required to bring employees in and out of furlough status.

Decisions on rotations must be made on the basis of the BBG's needs related to the positions needed to carry out the excepted activities and the qualifications of individual employees in those positions.

Personnel rotated into and out of furlough status require the processing of two (2) SF-52 forms, Request for Personnel Actions: an SF-52 Furlough action to take the employee out of pay status and an SF-52 Return to Duty action to enable the employee to return to an excepted function. Offices are responsible for producing SF-52 forms, obtaining authorizing signatures, and submitting these forms to the Office of Human Resources each time an employee is rotated into or out of furlough status.

Should the shutdown extend longer than a few days, VOA, OCB or IBB senior management should be consulted regarding whether rotations of personnel are warranted. Any such requests should be provided in writing. These decisions will be made on a case-by-case basis.

Travel

Travel should be limited to that absolutely necessary for emergencies involving the safety of human life or the protection of property or that considered absolutely necessary for the creation, production or distribution of BBG programming which has been deemed to constitute the conduct of foreign relations essential to the national security. All other travel plans should be suspended.

All travel authorizations must be approved by IBB Director or Deputy Director, VOA Director or OCB Director, as appropriate as well as the Chief Financial Officer.

Travel should not be initiated unless clearly in support of an excepted activity. If personnel are in travel status overseas at the time of the lapse but are not performing excepted activities, they should stop work and await further instructions. Because funding for overseas travel is obligated when the travel commences or when any cost is incurred for the travel (i.e. prior to the lapse), and because it is likely that any hiatus in funding will be temporary, managers should not instruct personnel in non-excepted travel status abroad to return to their home duty stations, unless otherwise directed. If such personnel are not performing excepted activities, they should be furloughed.

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

Please note that during a lapse in appropriations, it is anticipated that U.S. Department of State Passport and Visa operations will be suspended, except for emergency reasons.

Training

In accordance with the shutdown plan, employees enrolled in training should not attend class. This applies to all training, whether conducted by BBG employees or contractors.

Those domestic personnel in training who are designated as necessary to perform “excepted functions” should return to their positions; those not so designated will be furloughed.

Contracts

As the Government Accountability 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 provides a framework for consistent treatment of contractual commitments by BBG during a shutdown 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 adequate oversight of contractor performance during a shutdown period cannot be accomplished or the goods or services are not deemed necessary during a shutdown. If adequate monitoring of contractor performance cannot be provided, 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 BBG’s future contractual rights by unilateral stop work orders or directions to reduce the scope 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. In conjunction with their Contracting Officer, Offices should review contracts to determine whether suspension or reduction in performance of non-excepted services is authorized by the terms of the contract. Contracting Officers should coordinate any such adjustments to the contracts, as appropriate.
- B. For previously awarded contracts and leases that (in the absence of funding) require renewal or modification during a lapse in appropriations, obligation of additional funds for continued performance may be authorized only if necessary to support excepted activities authorized for continuance under the BBG’s shutdown plan. The necessity for such renewals or modifications must be certified to the Contracting Officer by the IBB Director or Deputy Director, VOA Director or OCB Director, as appropriate, and authorized on a case-by- case basis by the Chief Financial Officer. Requests must be accompanied by a written statement/justification of the basis for such necessity as well as the statement signed by the appropriate Director: “The obligation is necessary to carryout excepted activities in the absence of an appropriation.” 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. Unfunded

contractual commitments should be kept to the minimum cost and duration that will meet the essential need.

- C. New contractual commitments during a lapse in appropriations may be made only if necessary to support excepted activities authorized for continuance under the BBG's shutdown plan. The necessity for such renewals or modifications must be certified to the Contracting Officer by the IBB Director or deputy Director, VOA Director or OCB Director, as appropriate, and authorized on a case-by-case basis by the Chief Financial Officer. Requests must be accompanied by a written statement/justification of the basis for such necessity. Requests must also be accompanied by the statement signed by the appropriate Director: "The obligation is necessary to carryout excepted activities in the absence of an appropriation." Unfunded contractual commitments should be kept to the minimum cost and duration that will meet the essential need.
- D. No new grants or cooperative agreements may be entered into during the period of a lapse in appropriations. This includes travel grants.
- E. Foreign national personnel with personal services contracts/agreements should be treated in the same manner as foreign service national direct hires, where local labor law necessitates. Personal services contractors should be treated in the same manner as similarly situated civil service or foreign service employees, retaining only if necessary to perform an excepted activity.

Obligations and Disbursements

No obligations, or adjustments to existing obligations, may be incurred against BBG annual accounts during any lapse of Fiscal Year 2012 appropriations. However, during a funding lapse, obligations may continue to be incurred for excepted activities only and must only be incurred for the minimum amounts necessary. All BBG personnel must operate under strict constraints that ensure the BBG is in compliance with Government Accountability Office (GAO) and Office of Management and Budget (OMB) guidelines.

While the BBG has legal authority to incur obligations to continue excepted activities during a lapse in appropriations, obligations cannot be formally recorded in our accounting system, as there are no appropriations to record the obligations against. Such obligations must be kept to a minimum and must be manually tracked and immediately recorded in the financial management system when Agency appropriations are received. All paper documents are official records and must be scanned and attached to the financial transaction in the financial management system when appropriations are received.

Payments will not be processed or disbursed during the lapse period, as the Treasury will be suspending all payment transactions.

All obligations, adjustments to obligations, and obligating documents issued during the lapse period must be approved by the IBB Director or Deputy Director, VOA Director or OCB Director, as appropriate, as well as the Chief Financial Officer and have the following statement

affixed and signed by the appropriate Director: “This obligation is necessary to carry out excepted activities in the absence of an appropriation.” This should be accompanied by a written justification on how the transaction qualifies under the “excepted” activities. All paper documents are official records and must be scanned and attached to the financial transaction in the financial management system when appropriations are received.

Time and Attendance Reporting

During a lapse of funding, appropriations are not available for the payment of any obligation, including payroll. A subsequent continuing resolution or the FY 2012 appropriations bill must contain a provision that authorizes payments for payroll obligations incurred during the shutdown period. Until the appropriation is passed, the exact terms of the provision, including retroactive compensation for furloughed employees, remain unknown.

Accurate time and attendance records should be maintained for all excepted employees utilizing processes in place in each office to record time worked.

The following guidance should be utilized only if a subsequent continuing resolution or the FY 2012 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. Additional guidance for timekeepers will be transmitted to the CFO Timekeepers group email distribution.

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. Once new legislation is enacted, we will inform you whether to implement this guidance. Therefore, allowances, differentials, and other payments will be paid as if an employee actually continued to work. Unless the new legislation overrides existing statutes and regulations, the only exception to this rule would be Sunday Premium Pay, which is only paid to eligible employees who are scheduled to work during Sunday and actually worked on that day.

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 administrative leave. 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.

Reporting Time for the First Workday of A Lapse and Subsequent Days with A Lapse in Appropriations

Special attention should be paid to reporting time and attendance for employees for the first workday of a lapse since the shutdown may occur during the workday and non-excepted employees would work varying periods of time before departing on furlough. A determination should be made on the amount of time each non-excepted employee worked on the first furlough day. The remaining period of time in the employee's duty day would then be considered furlough time and **must be reported as administrative leave**, even if the employee had been previously scheduled to take paid leave later in the day.

Representation Events

It is important to consider the perception of a representation event during a government shutdown.

Domestic Representation

As a general rule, no domestic representation events should be held during the shutdown period. Events already scheduled should be cancelled and no new events planned until the shutdown is over. The CFO may authorize a domestic representation event only if it is necessary to support excepted activities. Any such request for representation funds must be previously approved by the IBB Director or Deputy Director, VOA Director or OCB Director, as appropriate.

Overseas Representation

As a general rule, no overseas representation events should be held during a shutdown period. The CFO may authorize a representation event abroad only if it is necessary to support excepted activities. Any such request for representation funds must be previously approved by the IBB Director or Deputy Director, VOA Director or OCB Director, as appropriate.