

Government Shutdown Update—Week Two

Highlights

- ✓ Most federal government services that are not “excepted” are shut down.
- ✓ Initially 800,000 federal workers were furloughed, but 350,000 Department of Defense employees have been recalled.
- ✓ Federal judiciary is operational, but number of decisions released has declined.
- ✓ Debt ceiling deadline is impacting funding negotiations.

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On October 1, the United States government was forced to suspend all but its most essential operations as the result of the U.S. Congress’ failure to agree upon appropriations that would have funded the government in fiscal year 2014. Since March 26, many government operations have been funded under the Consolidated and Further Continuing Appropriations Act, 2013 [*Pub. L. No. 113-6*].

Rather than on a calendar year, the federal government operates on a fiscal year that runs from October 1 – September 30, and Congress is required to appropriate funds for the approaching fiscal year by the beginning of that year, *i.e.*, October 1. Legislators often fail to do so, but usually they can agree upon a continuing budget resolution (CR) that provides temporary funding—typically at the previous fiscal year’s spending rates—for the short-term period(s) while negotiations for the full-year appropriations continue.

With a goal of repealing or systematically dismantling the Patient Protection and Affordable Care Act (PPACA) [*Pub. L. No. 111-148*], the Republican-led U.S. House of Representatives included within its initial version of the stop-gap appropriations resolution language that would have extended funds at FY 2013 levels through December 15, 2013, but defunded PPACA (*H. J. Res. 59*). The House passed that measure on September 20, but the Democratic-controlled U.S. Senate stripped out the anti-“Obamacare” language, pushed the funding expiration date up one month to November 15, and removed the U.S. Treasury’s authority to pay bills after the debt ceiling is reached. (The debt ceiling, or *debt limit*, is the total amount of money that the U.S. government is authorized to borrow in order to meet its existing legal obligations, including Social Security and Medicare benefits, military salaries, interest on the national debt, tax refunds, and other payments.) The amended bill was cleared by the upper chamber on September 27, and sent back to the House.

Undaunted, the House made two more attempts at re-adding language that affected PPACA in some fashion as the clock ticked down on the expiration of FY 2013 appropriations. The first attempt reinstated the December 15 funding expiration deadline and conditioned the appropriations upon a one-year delay in PPACA’s implementation and a repeal of the law’s medical device excise tax provision, while the later attempt rendered the funding contingent upon a one-year delay of the health care reform law’s so-called “individual mandate” and the elimination of federal subsidies for congressional staff to purchase coverage on the new health insurance marketplaces.

Both versions were rejected by the Senate along party-line votes of 54-46. Mid-night passed on September 30 without an agreement on temporary government

funding and, without the money to continue operating, all federally-funded agencies began a partial shutdown of their operations, in compliance with the Antideficiency Act [*Pub. L. No. 97-258*], which, among other things, prohibits a federal employee from making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law.

Political entrenchment continues.—As Democrats and Republicans continued to debate—and to lay blame upon one another for the failure to achieve an agreement—in the mid-morning hours of October 1, federal buildings across the country already had closed, access to national parks, monuments, and museums was restricted, and hundreds of thousands of non-essential federal employees were furloughed, *i.e.*, sent home without pay until the funding is restored.

To date, legislators still are at loggerheads over the PPACA defunding issue (Senate Majority Leader Harry Reid (D-Nev.) holding fast to his original stance that the Senate would not approve nor would the President sign anything but a “clean” budget resolution that is devoid of any anti-“Obamacare” language). In the intervening days since October 1, the House has attempted to fund various discrete services and/or agencies by passing and sending to the Senate a handful of additional resolutions, but the upper chamber thus far has refused to entertain FY 2014 funding on a piecemeal basis. Among those measures are those that would provide operating dollars for the National Institutes of Health (*H. J. Res. 73*), the Special Supplemental Nutritional Program for Women, Infants, and Children (*H. J. Res. 75*), the Food and Drug Administration (*H. J. Res. 77*) and the Federal Emergency Management Agency (*H. J. Res. 85*).

On Wednesday, October 2, President Obama called congressional leaders to the White House for a face-to-face meeting to jump-start the stalled process. The President said that he would not negotiate over the need for Congress to act to reopen the government or raise the debt ceiling to pay for already-incurred U.S. obligations. Other than bringing the opposing camps together in one room, the meeting had little apparent effect on softening the public stance of the leaders on either side of the aisle.

The rhetoric continued over the weekend and on the Sunday morning political talk shows, but no real progress on a budget agreement has been made. During an October 6 appearance on ABC’s “This Week,” House Speaker John Boehner (R-Ohio) vowed that he did not have the votes to pass a funding bill without giving Republicans some concessions. Meanwhile, in his

Saturday radio address, at an October 7 appearance at the Federal Emergency Management Agency (FEMA) headquarters in Washington, D.C., and again at a press conference on October 8, President Obama challenged Speaker Boehner to prove that the votes to pass a “clean” bill are lacking. “Let the bill go to the floor, and let’s see what happens. Just vote,” the President said.

The House was able to agree over the weekend on legislation that would grant back-pay to federal workers who have been furloughed during the shutdown. The Federal Employee Retroactive Pay Fairness Act (*H.R. 3223*) passed by a vote of 407-0, with 25 members not voting.

On October 8, the House passed the Deficit Reduc-

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tion and Economic Growth Working Group Bill of 2013 (*H.R. 3273*), which would establish a bipartisan panel of 10 House members and 10 Senate members to work on fiscal issues, similar to the panel created in 2011 that failed to reach an agreement and resulted in the current budget sequestration. The Obama Administration voiced its disapproval of such a panel.

As this Special Report went to press at mid-day on October 10, mainstream news sources were indicating a possible breakthrough in the stalled negotiations, with Speaker Boehner poised to propose a short-term increase in the debt ceiling through November 22, in order to facilitate discussions on the broader, thornier issues of deficit reduction and Obamacare. Notwithstanding those developments, the nation is in its second week without a federal budget to keep the government operating beyond the emergency services level.

OMB guidance.—The Office of Management and Budget issued a *memorandum on September 17, 2013*, detailing the responsibilities of federal agencies during a lapse in appropriations. The OMB guidance notes, “agency leaders should ensure that only those activities that are ‘excepted’ pursuant to applicable legal requirements would continue to be performed during a lapse

in the appropriation for those activities (unless the agency has a separate funding source for an activity that will remain available during a lapse and that the agency would use for the activity's continued performance)."

Based on this guidance and more specific guidance from the various agencies, what follows is the status of federal functionality. In general, the Internet websites of all Cabinet-level departments, most federal agencies, and the homepages of the White House, the Library of Congress, and the U.S. Courts contain a shutdown-related notice cautioning that the information posted on the site may not be up to date, some submissions may not be processed, and a delay in response to inquiries may be experienced.

U.S. Armed Services

The federal employee furloughs did not affect the U.S. Armed Services at home or abroad, which have continued to serve. Despite the political rancor and shortly before the funding ran out, House and Senate lawmakers agreed upon a measure that kept the paychecks coming for the nation's military personnel despite the absence of an overall accord—the Pay Our Military Act of 2013 (*H.R. 3210*) was signed by President Obama on September 30, 2013, and became Public Law No. 113-39. Therefore, the salaries of the nation's military personnel have continued undisrupted by the shutdown.

As for troops on reserve, the Pay Our Guard and Reserve Act (*H.R. 3230*), which makes appropriations for pay and allowances to members of the reserve components of the Armed Forces who perform inactive-duty training during FY2014, cleared the House on October 3 and currently is pending in the Senate.

Essential Services, Employees, and Law Enforcement Personnel

Among those essential employees and services excepted from the furlough (but unpaid until a retroactive pay law is enacted) are the following:

- Air traffic controllers and Transportation Security Administration security officers, screeners, and air marshals;
- Alcohol, Tobacco, Firearms and Explosives field agents and industry operations investigators;
- Border patrol agents;
- Drug Enforcement Administration field agents and tactical support personnel;
- Federal Bureau of Investigation agents and support personnel;
- Food safety inspectors, product testers, and epidemiological investigators employed by the Food and Drug Administration;
- Forest Service fire suppression, law enforcement, and emergency/defense preparedness personnel;
- Department of Justice immigration review personnel who process all immigration cases and appeals involving detained aliens, including criminal aliens;
- Parole Commission employees who respond to requests for emergency warrants and process parole certificates;
- Prison guards in the federal prison system;
- NASA Mission Control employees who support the astronauts serving on the Space Station;
- Department of Justice National Security Division employees are continuing to work on pending counterterrorism, espionage, export control, and sanctions violations, as well as coordinating and supervising the Department's international terrorism, domestic terrorism, and weapons of mass destruction matters; and continuing to review Committee on Foreign Investment in the United States matters, including responding to time-sensitive inquiries regarding the national security implications of corporate conduct in compliance with National Security Agreements;
- The Solicitor General, Assistant Attorneys General, and all U.S. Attorneys;
- U.S. Capitol police;
- U.S. Marshals employees associated with judicial security, prisoner custody, security, transportation, and fugitive apprehension; and
- U.S. Trustees who protect bankruptcy estate property.

A significant number of the Defense Department's approximately 400,000 civilian employees have been called back to work.

DOD Civilian Employees

On October 5, 2013, Secretary of Defense Chuck Hagel ordered back to work a significant number of the Defense Department's approximately 400,000 civilian employees after DOD attorneys concluded that the Pay Our Military

Act allows the Department to eliminate furloughs for employees whose responsibilities contribute to the morale, well-being, capabilities, and readiness of service members. Secretary Hagel said that the DOD has endeavored to exempt as many DOD civilian personnel as possible from furloughs, and will continue to try to bring all civilian employees back to work as soon as possible.

Government Contracts Administration

Both the *Armed Services Board of Contract Appeals* and the *Civilian Board of Contract Appeals* are continuing to accept docket filings while government operations are curtailed. The CBCA's website expressly cautions parties that any statutory limitations on the time within which a filing may be made will not be waived or tolled during this period. However, with the exception of statutory deadlines, each judge has the discretion to modify the deadlines established in a specific case that occur during and after this period.

The shutdown's ripple effects are beginning to impact government contractors, however, and some contractors had started to furlough their own workers before Secretary Hagel's recall order. In addition to funding issues, there are also problems due to the lack of government personnel for administration, inspection, and other contract-related tasks. From a legal standpoint, the shutdown will very likely lead to some complicated issues with respect to contractor costs for idle facilities and workers, deadlines for filing claims and issuing final opinions, and a variety of other matters.

Cabinet-Level Departments' Primary Agencies

Department of Labor.—The *Department of Labor's contingency plan* identified several sub-agencies that were to cease functioning altogether in the event of a shutdown. Among them are the Office of Federal Contract Compliance Programs (OFCCP), the Administrative Review Board, and the Veterans Employment and Training Administration. The operations of other DOL offices have been sharply curtailed, with the majority of staff furloughed for the duration of the shutdown.

Certain key operations are continuing in part, however. For example, Wage-Hour Division staff are available to conduct immediate investigations of incidents involving serious injury or death of an employed

minor or a housing safety violation resulting in serious injury or death of agricultural workers. The Occupational Health and Safety Administration (OSHA) and the Mine Safety and Health Administration (MSHA) also are operational for activities related to "emergencies involving the safety of human life or protection of property." Time-sensitive functions are continuing at the Office of Labor-Management Standards, such as criminal investigations of Labor Management Disclosure and Reporting Act (LMRDA) charges, union officer elections, or other functions with statutory deadlines. Similarly, the Employee Benefits Security Administration and Office of Inspector General are continuing with criminal investigations as well.

Equal Employment Opportunity Commission.—According to the *EEOC's shutdown plan*, the agency is continuing to docket new charges and federal sector appeals, and to examine new charges to determine whether prompt judicial action is necessary "to protect life or property" and, thus, whether preliminary relief must be sought. The agency also is continuing to litigate lawsuits for which a continuance has not been granted. In addition, EEOC is staffing operations to maintain the agency's information systems and the security of its offices and property—mostly in EEOC field offices.

However, the Commission does not have staff available to answer questions or correspondence from the public; investigate charges; litigate cases for which the agency was granted extensions; or take part in mediations during the shutdown. Nor is the agency conducting federal sector hearings or deciding federal employees' appeals of discrimination complaints. EEOC outreach and education events have been canceled, and FOIA requests are not being processed.

National Labor Relations Board.—The *NLRB's contingency plan* indicates that operations have been restricted to necessary court actions to protect federal legal actions that already have been taken; maintenance of the Office of Inspector General hotline; and any emergency contact deemed necessary "for safety of life and protection of property" or to protect those federal legal actions already taken. The Board noted it would ensure that it retains the ability "to respond to unfair labor practice incidents that might result in irreparable harm to the private sector economy" and, in order to protect legal actions already taken, to ensure that the agency remains equipped to deal with emergency situations that cannot be delayed during the shutdown period.

However, the NLRB has ceased all activities related to representation cases and unfair labor practice charges. Litigation activities (injunctions, enforcement, etc.) and

Administrative Law Judge (ALJ) and Board decisions (including remedial actions) have been suspended.

The NLRB also issued a *Federal Register* notice setting forth procedures for the public to follow in light of the agency's closure, and granted an extension of time to file or serve any documents for which extensions are permitted by law. The *Federal Register* notice also indicates when ALJ hearings will be postponed as a result of the shutdown of operations, and provides that all representation elections and pre- and post-election hearings scheduled to be held through October 11 have been postponed indefinitely. The notice also sets forth contingencies for postponement of hearings after that date.

E-Verify.—Immigration and Customs Enforcement (ICE) posted a notice on its website stating that E-Verify is unavailable during the federal government shutdown. Customer support and related services also have been closed.

Accordingly, employers are not able to access to their E-Verify accounts or otherwise enroll a company in E-Verify; verify employment eligibility; view or take action on any case; add, delete, or edit a User ID; reset passwords; edit company information; terminate an account; or run reports.

Because customer support and related services also are unavailable, employees are unable to resolve Tentative Nonconfirmations (TNCs). There is no telephone or email support during the shutdown. And, while employees can send emails, the agency staff cannot respond until the agency has reopened.

In light of the burden that the unavailability of E-Verify may place on both employers and employees, ICE announced the implementation of the following policies:

- The “three-day rule” for E-Verify cases is suspended for cases affected by the shutdown. Additional guidance will be provided when the agency reopens. This does NOT affect the Form I-9 requirement—employers must still complete the Form I-9 no later than the third business day after an employee starts work for pay.
- The time period during which employees may resolve TNCs will be extended. The that the federal government is closed will not count towards the eight federal government workdays that the employee has to go to the Social Security Administration or to contact the Department of Homeland Security. Additional time will be provided once the agency reopens.
- Federal contractors complying with the federal contractor rule should contact their contracting officer to inquire about extending deadlines.

ICE also stressed that employers may not take any adverse action against an employee due to an E-Verify interim case status, including while the employee's case is in an extended interim case status because of a federal government shutdown.

Department of Health and Human Services.—According to an HHS contingency staffing plan, 52 percent of HHS employees have been furloughed. This includes 65 percent of Centers for Medicare and Medicaid services (CMS) employees and 45 percent of Food and Drug Administration employees. The Medicare program is continuing uninterrupted, and both Medicaid and the Children's Health Insurance Program are fully funded.

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CMS also clarified that during the time that the partial government shutdown is in effect, Medicare Administrative Contractors are continuing to perform all functions related to Medicare fee-for-service claims processing and payment.

On the other hand, funding has stopped for CMS' *health care fraud and abuse strike force teams*. In addition, CMS has reduced the number of recertification and initial surveys for Medicare and Medicaid providers.

Food and Drug Administration.—The FDA said that agency operations are being limited to emergency work involving the safety of human life or the protection of property; criminal law enforcement work; and activities funded by carryover user fee balances. Carryover user fee balances will only be spent on activities for which the fees are authorized under the Federal Food, Drug, and Cosmetic Act.

Until either a fiscal year (FY) 2014 appropriations bill or a continuing resolution is approved by Congress, the FDA said that it does not have legal authority to accept user fees assessed for FY 2014 or accept any new regulatory submissions that require a fee payment.

National Institutes of Health.—At the National Institutes of Health, research into life-threatening

diseases and other areas has stopped, and new patients are not being accepted into clinical trials. According to several published reports, the NIH accepts about 200 new patients into new clinical trials each week. Six new trials were to start this week, but all new trials are on hold until the funding impasse in Congress is resolved. The NIH did recall some furloughed workers so it could reopen its website where patients could register for clinical trials.

Other impacts on health care providers.—A statement from the Association of American Medical Colleges noted that because of the congressional stalemate, “payments for physician training at children’s hospitals also will stop, placing further strain on the nation’s capacity to train the workforce needed as the nation heads toward a critical shortage of more than 90,000 doctors by 2020.”

The Centers for Disease Control and Prevention furloughed about 9,000 employees and is not updating its *weekly influenza surveillance report*.

PPACA implementation.—Ironically, neither the congressional standoff nor the government shut-down affected the October 1 start-date for enrollment in the health insurance marketplaces that are the centerpiece of “Obamacare.” Because PPACA’s implementation is not tied to the federal budget, the health care reform site, www.healthcare.gov, has been up and running despite the shutdown, if not slowed at times by the volume of users trying to access the site and enroll. The HHS contingency plan notes that CMS activities related to implementation of PPACA are largely unaffected by the shutdown. In particular, CMS still is providing support to state-based marketplaces in determining which people signing up for health insurance are eligible for Medicaid. CMS is continuing to provide insurance rate reviews for plans offered in the new marketplaces. Also, the operation of the new marketplaces in states that are running their own marketplaces have not been affected by the federal shutdown.

The *Congressional Research Service* (CRS) noted that most implementation activities relating to the PPACA will continue either because “agencies in the federal government will be able to rely on sources of funding other than annual discretionary appropriations to support implementation activities” or because a particular agency’s implementation activities may be considered “excepted” and thus not subject to stoppage.

The CRS report also noted that “a lapse in funding does not automatically result in the suspension of applicable laws, including the filing and payment deadlines applicable to taxes created by [PPACA].”

Further, PPACA imposed restrictions on health insurance companies, like prohibiting preexisting condition exclusions and requiring coverage of certain preventive services without cost-sharing, which could be still be enforced by state entities or via civil lawsuits.

Internal Revenue Service.—On October 8, the Internal Revenue Service updated its *online notice* about the government shutdown and reminded taxpayers on extension that the October 15 deadline is unchanged. The IRS emphasized that all tax deadlines remain in effect—including those affecting individuals, corporations, partnerships and employers. The regular payroll tax deadlines remain in effect as well. The agency encouraged taxpayers to file their returns electronically during the lapse in appropriations, and cautioned that paper returns would not be processed during the shutdown (the IRS is operating with minimal staffing during the shutdown) but would be considered timely filed if appropriately postmarked. Tax refunds will not be issued until normal government operations resume, the IRS reported. In addition, the agency’s determination letter, private letter ruling, and voluntary correction programs have been halted.

Other Treasury Department bureaus.—The Treasury Department released a *Department-wide lapse in appropriations contingency plan*. Operations of the following Treasury Department bureaus are funded from sources other than annual Congressional appropriations, and continue to operate normally during the shutdown: the Office of the Comptroller of the Currency (OCC), the United States Mint, and the Bureau of Engraving and Printing (BEP). Additionally, Public Debt functions of the Fiscal Service are authorized to continue in the absence of annual appropriations. On the other hand, the Financial Crimes Enforcement Network (FinCEN) has halted most Bank Secrecy Act regulatory and foreign and domestic law enforcement support functions, but is providing some support for its domestic and foreign law enforcement customers as is deemed necessary for safety and protection of property. The Special Inspector General for the Troubled Asset Relief Program (SIG-TARP) is using available prior-year balances during a short lapse of appropriations, but will re-evaluate in the event of a longer-term lapse.

Justice Department functions.—The Department of Justice’s Judicial Branch is operating during the furlough, with criminal litigation continuing without interruption as an activity essential to the safety of human life and the protection of property. However, civil litigation has been curtailed or postponed to the extent possible without compromising to a significant

degree the safety of human life or the protection of property, and the Department limited its civil litigation staffing to the minimum level needed to comply with the above mandate.

DOJ civil litigators were instructed to approach the courts and request that active cases (except for those in which postponement would compromise to a significant degree the safety of human life or the protection of property) be postponed until funding is available. The Department limited its civil litigation staffing to the minimum level needed to comply with the court's order and to protect life and property. The Department's Antitrust Division remains open with limited staffing to accept Hart-Scott-Rodino premerger filings during the government shutdown. All other agency functions will not be available during the lapse in appropriations, however.

In its contingency plan the *Department of Justice* noted that Health Care Fraud and Abuse Control programs will continue because they are "funded with permanent indefinite appropriations or other funding not subject to annual appropriation."

Patent and trademark administration.—Consistent with its practice during previous government shutdowns, the *U.S. Patent and Trademark Office* (USPTO) (an agency of the Department of Commerce) will remain open as usual for approximately four weeks, using prior year reserve fee collections to operate. All 11,789 employees of the agency will remain on the job during that time. Should reserve funds run out before a general government shutdown comes to an end, the agency would close, although a very small staff would continue to work to accept new applications and maintain IT infrastructure, among other functions. USPTO employees excepted from furlough would include the Deputy Director of the agency, the Chief of Staff, Chief Administrative Officer, Program Analyst, Director of Security, Chief Administrative Patent Judge, Chief Administrative Trademark Judge, General Counsel, Commissioner for Patents, Commissioner for Trademarks, senior level advisors, accountants, and financial specialists, and IT personnel.

Commodity futures regulation.—The Department of Justice's Office of Legal Counsel determined that government work that is necessary for the commodities and futures markets to continue to operate qualifies as an "excepted" function; therefore, the *Commodity Futures Trading Commission* is continuing to review and take any necessary actions related to emergency notifications by registered entities and intermediaries such as system malfunctions, cyber security incidents, financial emer-

gencies. However, CFTC is not processing filings for Commission discretionary or mandatory approval or any other actions that are not directly related to the safety of human life or the protection of property.

Among those actions not being processed are rules, rule amendments, and contract certifications filed with the Commission; rule amendments and contracts voluntarily submitted for Commission approval or review; requests for contract market designation, swap execution facility, swap data repository, derivatives clearing organization, and foreign board of trade registration; and other requests for Commission approval or other action. For pending matters as well as adjudicatory proceedings, all applicable deadlines are being tolled during the lapse in appropriations, with any time limit for Commission action to restart one day after the Commission resumes full operations. Similarly, comment periods that expire during the shutdown will be extended until one day after the full operations are resumed.

Consumer safety.—The *Consumer Product Safety Commission* and the *National Highway Traffic Safety Administration* are pretty much closed until further notice, except for situations of "imminent risks," where actions are required to "protect the safety of human life or protect government property."

Other Federal Agencies

Federal Reserve System and bank regulators.—Funded mostly by the interest it earns on the U.S. government securities the U.S. central bank trades and holds, the *Federal Reserve Board* continues to operate, as do bank regulators. Also operational is the Consumer Financial Protection Bureau, which derives its funding from the Fed and is not directly impacted by the shutdown. Similarly, federal agencies that do not rely on annual spending bills, including other federal banking regulators, such as the Federal Deposit Insurance Corporation, have not been impacted directly by the shutdown.

Trade regulation.—The *Federal Trade Commission* is largely closed, but has retained limited staffing to accept Hart-Scott-Rodino premerger filings during the government shutdown. According to the *FTC's shutdown plan*, however, other agency functions will not be available during the lapse in appropriations. Consumers may file Freedom of Information Act requests, but those requests will not be processed. No consumer complaints or registrations for the Commission-maintained "Do Not Call" list will be accepted. Exempt employees retained under the agency's contingency plan include are up to

five employees whose activities are necessarily implied by law and as many as 248 employees necessary to protect life and property through the prosecution of enforcement actions.

FTC will not pursue the vast bulk of its competition and consumer protection investigations and prosecutions, no rulemakings will be conducted, nor will the agency deal with ethics issues, engage in economic research, pursue ongoing studies, or issue reports or guides. Work that will continue during the shutdown includes: (1) those in the Bureau of Competition accepting premerger notification reports, reviewing premerger notification reports, litigating cases that challenge mergers and acquisitions, and investigating and challenging anticompetitive practices that do not involve mergers and acquisitions; (2) those in the Bureau of Consumer Protection actively litigating court or administrative cases as necessary to protect life and property; (3) those at the Bureau of Economics supporting ongoing litigations; (4) those at the Office of the General Counsel necessary to emergency appeals or pending cases where a motion for stay is denied; (5) those in the Office of the Executive Director necessary to protect the lives of excepted Commission employees and to protect Commission property, including its IT, data, and physical infrastructure; (6) those in the Information Technology department necessary to ensure the integrity and security of the agency's IT infrastructure; and (6) those necessary in the Financial Management, Administrative Services, Records and Filing Support Services, and Human Capital Management groups.

Securities regulation.—The *Securities and Exchange Commission* (SEC) will continue to operate until such time as there is a lapse in appropriations. If and when such lapse occurs, the SEC will be able to continue only certain types of functions that qualify as “exceptions” to the Antideficiency Act restrictions, including those needed to ensure the orderly shutdown of functions that will not continue during the lapse. The functions that qualify as exceptions include emergency enforcement matters, including temporary restraining orders and/or investigative steps necessary to protect public and private property; monitoring of the Commission's “tips, complaints, and referrals” system and web-based investor complaint system and processing of referrals from self-regulatory organizations and others to identify matters that are emergencies and take follow-up steps relating to such emergencies; ongoing litigation that cannot be deferred where there is a threat to property; and emergency examinations

and inspections to protect public and private property. Additionally, EDGAR filings will remain functional and market surveillance activities will continue. Functions that will be discontinued in the event of a lapse in appropriations include rulemaking, interpretive questions, exemptive relief, review and approval for registration, litigation not “excepted” as described above, oversight of self-regulatory organizations *Public Company Accounting Oversight Board* (PCAOB), FOIA requests and non-emergency assistance to foreign authorities. The full *operational plan* in the event of an SEC shutdown is available on the agency's *website*.

Campaign oversight.—The Federal Election Commission is closed during the government shutdown. Its website, though still accessible, is not being updated. The Commission will not pursue administrative fines against filers with reports due during the shutdown who fail to file on a timely basis, so long as they file within 24 hours after the agency resumes operations. This waiver applies to both paper and electronic filers (while the FEC's e-file system remains online, technical staff is unable to monitor its operation). The FEC will announcement on its website (www.fec.gov) when it resumes operations, which is expected to be the first regular business day after its funding legislation is enacted.

Civilian nuclear facilities oversight.—The Nuclear Regulatory commission announced on October 9 that it was shutting down its normal operations and, beginning on October 10, would begin scaled-down operations focusing on immediate public safety and security issues.

Federal Judiciary

The U.S. Supreme Court states on its *website* that it will be fully functional through October 11, and the Court building will be open to the public during its usual hours. Should the shutdown continue beyond that date, the Court will make a further determination on how to proceed.

Similarly, the other courts in the federal judicial system have adequate funding for the first 10 business days after the shutdown, and will reassess the situation if the funding lapse continues through October 15. Currently, all proceedings and deadlines remain in effect as scheduled, unless otherwise advised, and the Case Management/Electronic Case Files (CM/ECF) will remain in operation for the electronic filing of documents with courts.

That said, it's far from “business as usual” at the federal judiciary, as the issuance of decisions is estimated to be at some 40 – 50% of normal. Further complicating matters, because Department of Justice attorneys

and employees generally are prohibited from working even on a voluntary basis, functions necessary to support the federal government's litigation efforts are severely curtailed. Chief Judge Loretta A. Preska *issued an order* on October 1 staying all civil cases in the Southern District of New York, other than civil forfeiture cases, in which the U.S. Attorney's Office for the district has appeared as counsel. The stay ends the first business day after the President signs into law a budget appropriation. Court deadlines will be tolled during the duration of the government shutdown. A similar order was issued by the Northern District of Illinois.

Other court websites contain venue-specific information, including an *order* on the website for the U.S. Court of Appeals for the Federal Circuit which states that all filing deadlines remain in effect absent a motion for an extension of time in a particular case, and the court's CM/ECF system will remain in operation for filing all documents. In addition, all cases scheduled for oral argument, including those involving government counsel, remain scheduled for oral argument. Any motion requesting rescheduling of an argument will be transmitted to the panel assigned to hear the case.

In an *order* issued October 8, 2013, U.S. Court of Appeals for the Ninth Circuit Chief Judge Alex Kozinski deemed court staff to be essential personnel needed to fulfill the court's constitutional duty to continue to hear and resolve cases during the government shutdown. Court operations will continue in their normal fashion. The court will adhere to its published calendar of oral arguments. Filing and noticing requirements will be in force, although the court may show flexibility when warranted by the circumstances.

A statement by Chief Judge Hewitt on the *Court of Federal Claims'* website advises that the court will continue to hear and decide cases without interruption. Cases will be processed and argued, and judgments will be issued and enforced, as in the ordinary course of the court's conduct of affairs. The court does not expect to issue continuances based on the lapse of appropriated funds and will adhere to schedules currently in effect.

National Sites and Federal Lands

Every one of America's national parks and monuments, from Yosemite to the Smithsonian to the Statue of Liberty, were immediately closed on October 1 and will remain so for the duration of the shutdown.

Land and energy management.—Limited inspection and enforcement of existing oil and gas activities will continue at the Bureau of Land Management, but only as related to protection of human life and property. Processing of applications for permits to drill for oil and gas, as well as lease sale processing, have been suspended. At the Bureau of Ocean Energy Management, the emergency response systems remain operational, including the protection of life and property and site security. Most other activities, including work on ongoing offshore lease approvals, have ceased. Similarly, permitting, enforcement and investigative functions of the Bureau of Safety and Environmental Enforcement are operating, but other programs, such as the National Oil Spill Response Research and Renewable Energy Test Facility, have been suspended.

Congress continues to pass legislation but at a very slow rate.

National Archives and Other Document Collections/Resources

All National Archives facilities have been closed and all activities cancelled for the duration of the shutdown, with the exception of Federal Records Centers—17 facilities in nine regions across the country that store the nation's records—which are operating on a limited schedule. Due to the closure, requests for records (including Military Service Record Requests) submitted via the <http://www.archives.gov/veterans/military-service-records/> website are not being processed. Urgent requests for military records, such as those involving a medical emergency or time-sensitive funeral services for a deceased veteran, may be conveyed via telephone to (314) 801-0800 and subject to lengthy call holding times.

The Government Printing Office's *FDsys* website, which provides free online access to official publications from all three branches of the federal government, is continuing to process and post congressional materials, but the *Federal Register* services are limited to the posting of documents necessary to safeguard human life, protect property, or provide other emergency services consistent with the performance of exempted functions and

services. However, the remaining collections on *FDsys* (a complete listing of which appears at <http://www.gpo.gov/fdsys/browse/collectiontab.action>) currently are not being updated and will resume after funding is restored.

Also closed is the Copyright Office, as is the greater Library of Congress. As such, the Copyright Office is unable to update the information on its website, respond to inquiries, or process transactions. Copyright registration submissions will be accepted for the purpose of securing date of receipt, but will not be processed. The online copyright registration system is available, however, and filing a claim as soon as possible will help ensure the earliest possible effective date of registration, although copyright registrations will not be processed until the Office has reopened.

The U.S. Mail

The Postal Service is not affected by the government shutdown since it is self-funded. Postal employees continue to work, and the Service is postmarking and delivering mail on its usual six-day schedule.

Other Congressional Duties and Legislation

Congress continues to pass legislation but at a very slow rate. However, given the laggardly pace at which the 113th Congress has operated (a recent *Pew Research Center* study found that 2013 appears to be on track to be one of the least productive in congressional history), it is impossible to ascertain whether the recent slowdown is attributable to the shutdown or to the political gridlock that has persisted from the First Session convened in January 2013.

Several Senate hearings and/or votes on presidential nominees have been cancelled since October 1 due to the budget standoff, however, including the consideration of Chai Feldblum's bid for reappointment on the Equal Employment Opportunity Commission, as well as the appointments of Michael O'Rielly to the Federal Communications Commission and Terrell McSweeney to the Federal Trade Commission.

What Happens Next?

Looming ominously behind the current log-jam is the issue of the federal debt ceiling, which Congress must agree to raise before mid-month in order to prevent the government from defaulting on its debts. A *Treasury Department report* issued on October 3, warned of catastrophic economic consequences if the fractiousness

currently miring the budget issue were to transpire with respect to the debt-ceiling increase.

Sen. Reid, along with Senate Finance Committee Chairman Max Baucus (D-Mont.) introduced legislation on October 8 to suspend the debt limit until December 31, 2014 (S. 1569). With an October 17 deadline to extend the debt limit fast approaching, Reid hopes to move the crisis forward in advance of that deadline and the absolute drop-dead date of October 30 as claimed by some economists.

Given the delays, tolled deadlines, and pending requests, it's quite likely that once the budget impasse ends, there will be an influx of content while the shutdown-affected agencies "catch up" with lost time and services. The length of the shutdown and volume of delayed/deferred activity will dictate how long the catch-up period lasts, but it seems certain that the now scant *Federal Register* daily Table of Contents will, at least for a time, be larger than its pre-shutdown norms. ■

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