

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

Background

This is the plan of the Federal Trade Commission (FTC or Commission) 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 (2015); 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); and 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. If the agency determines it is necessary to close the FTC'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 Chairman 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. If employees have problems returning to work on the day specified, flexibilities available to supervisors include telework, adjustments to regular work schedule, or the use of annual leave, compensatory time off, or credit hours.

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 for the 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 Chairman 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 via email. 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, if 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 agency 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.

Execution of the Plan

An Executive Committee consisting of the agency's Executive Director, the Chairman'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 Chairman 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 Commission'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 effect an orderly shutdown, at any given time, the number of employees that could be excepted from furlough and required to report for duty might exceed 5% of the total number of Commission employees on board at the beginning of the hiatus. 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. Should the number of excepted employees exceed 5% of the number of employees on-board at the beginning of the hiatus, the Commission's shutdown activities are justified as follows. *See* attached Tables 1-3: Table 1 - the total number of Commission employees on board at the beginning of the hiatus; the total number of employees on board and estimated to be excepted by each bureau and office with excepted employees; Table 2 – Excepted Employees by Category; and Table 3 – the average number of Hart-Scott-Rodino Antitrust Improvements Act (HSR) filings per week and the number of active cases/matters on bureau and office dockets.

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 (BC): On the competition side, the agency engages principally in the following activities: 1) accepting premerger notification reports under the 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. (*See* Table 1 for the number of BC employees on board and the estimate of those employees who would be excepted.)

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 HSR filings. (*See* Table 3 for estimated HSR filings) 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.

On average, it takes anywhere from three BC 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. Commission estimates for the number of staff required to support exempted competition matters depends on the status and nature of the cases in the docket at the time of shutdown. (*See* Table 3 for an estimate of active matters on BC's dockets) All the BC 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 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 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 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 (BCP): 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 work at home or debt collection 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 and 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 BCP, which includes staff in Headquarters and in the eight Regional Offices, are actively litigating numerous cases in federal district courts throughout the country and administrative courts in Washington, DC. (*See* Table 3 for an estimate of BCP's active federal court and administrative litigations.) 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 BCP 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. 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. 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. The total number of BCP employees excepted from furlough depends on the status and nature of the cases in the docket at the time of shutdown. The Director of BCP and up to three front office employees may be excepted from furlough to supervise this work. (*See* Table 1 for the total number of BCP employees on board and the estimated number of employees excepted from furlough and Table 3 for the total number of active BCP federal court and administrative litigations)

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): As noted above, BE supports pending BC and BCP litigation. BE staff might be excepted from furlough to support on-going litigations or critical pre-merger investigations if the courts do not grant requested extensions, which number also includes the Director of BE and a limited number of front office employees to supervise the work. (*See* Table 1 for the total number of BE employees on board and the estimated number of employees exempted from furlough) All the BE 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 (OGC): Several OGC employees 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 Chairman and the Executive Director to manage the agency during the shutdown or otherwise give advice relating to the shutdown. As many as two additional attorneys, at any given time, from the OGC 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 OGC 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 the OGC employees may be excepted from the furlough to help Commission witnesses prepare should Congress schedule any hearings involving Commission staff during the shutdown. (*See* Table 1 for the total number of OGC employees on board and for the estimated number of OGC employees excepted from furlough and Table 3 for the number of active litigations on OGC's docket)

Office of the Executive Director (OED): OED includes the Office of the Chief Information Officer, the Financial Management Office, the Human Capital Management Office, and the Office of the Chief Administrative Services Officer. OED's 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 and two of his staff, who will be excepted from furlough to oversee agency operations during the shutdown, the Commission estimates that OED employees from its constituent offices may be excepted from furlough to engage in the below described activities. The continuation of certain of these functions is authorized in order to protect life and property. (*See* Table 1 for the total number of OED employees on board and for the estimated number of OED employees excepted from furlough)

Office of the Chief Information Officer (OCIO): The agency anticipates that several OCIO 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 intranet, collaboration, and internal communication sites; provide continuous monitoring of FTC systems; and otherwise support excepted employees' IT needs. When notice of the agency's return to normal operations is announced, exempted IT staff will coordinate the safe restoration of any IT systems that may have been affected by the lapse of appropriations. (*See* Table 1 the total number of OCIO employees on board and for the estimated number of OCIO employees excepted from furlough)

Financial Management Office (FMO): The agency anticipates that several FMO 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. During this time and in preparation of a return to normal operations, exempted financial management and acquisitions staff will evaluate steps to resume all paused contracts, evaluate fund and resource availability, and ensure timely payment of all vendors and ongoing contracts. (See Table 1 for the total number of FMO employees on board and for the estimated number of FMO employees excepted from furlough)

Office of the Chief Administrative Services Officer (OCASO): The Commission anticipates that several employees may be excepted from furlough to secure the Commission's two buildings in Washington, DC, provide support services for excepted employees (including securing court reporters for depositions for law enforcement matters not stayed), and ensure the security of the personnel working at those locations. (See Table 1 for the total number of OCASO employees on board and the total number of OCASO employees excepted from furlough)

Human Capital Management Office (HCMO): The Commission anticipates that several HCMO employees may be excepted from furlough to provide continuing human resources support for the excepted agency law enforcement personnel. (See Table 1 for the total number of HCMO employees on board and for the estimated number of HCMO employees excepted from furlough)

Other Staff: The Chairman, 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. It 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 conducting 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, the International Competition Enforcement Network, 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 law enforcement organizations throughout the U.S., as well as 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 database applications; test new applications; work on IT initiatives; or undertake other than emergency building maintenance and support. Additionally, while the agency's website, www.ftc.gov, will be available, it will not be updated.

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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 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 pre-merger investigations with statutory deadlines and law enforcement litigation in order to protect the government's interest in the legal positions it had advanced or where there would be a significant, immediate harm to life or property if such 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.

The information contained in the following tables is provided for illustrative purposes only. Actual numbers will vary, based on the factors described in the agency's overall plan (see above), including the actual on-board totals as of the date of any lapse in appropriations.

Table 1: FY 2017 Federal Trade Commission Contingency Plan

FTC Bureaus and Offices with Excepted Personnel			
Bureau / Office	Total On-Board	Excepted Total	Excepted Percentage
Bureau of Competition	306	132	43%
Bureau of Consumer Protection	430	84	19%
Bureau of Economics	105	10	9%
Office of General Counsel	50	3	6%
Office of the Executive Director (OED)	4	3	75%
OED's Office of the Chief Information Officer	36	7	19%
OED's Financial Management Office	28	6	21%
OED's Office of the Chief Administrative Services Officer	33	9	27%
OED's Human Capital Management Office	28	5	18%
Chairman, Chief of Staff, and the Commissioner	20	3	15%
Commission-wide <i>(all Bureaus & Offices)</i>	1124	262	23%

Table 2: FY 2017 Federal Trade Commission Shutdown Plan Excepted Employees by Category

Categories	Employees Excepted from Furlough
Category 1	0
Category 2	0
Category 3	≤ 10
Category 4	0
Category 5	262

Category 1 = Employees whose compensation is financed by a resource other than annual appropriations.

Category 2 = Employees necessary to perform activities expressly authorized by law.

Category 3 = Employees necessary to perform activities necessarily implied by law (including presidentially appointed, Senate-confirmed employees and the Director of the SMART Office in OJP).

Category 4 = Employees necessary to the discharge of the President’s constitutional duties and powers.

Category 5 = Employees necessary to protect life and property.

Table 3: FY 2017 Federal Trade Commission Additional Statistics

Categories	Total
Average number of Hart-Scott-Rodino filings per week	35
Bureau of Competition's docket of active matters	224
Bureau of Consumer Protection cases being litigated in federal district courts	67
Bureau of Consumer Protection's administrative litigations	0
Office of General Counsel active litigations	6