



U.S.COMMODITY FUTURES TRADING COMMISSION

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Office of the
Executive Director

MEMORANDUM

TO: Office of Management and Budget

FROM: Anthony C. Thompson
Executive Director

DATE: September 25, 2013

SUBJECT: CFTC Shutdown Plan

Pursuant to Section 124, Agency Operations in the Absence of Appropriations, OMB Circular A-11 (2013), the Commodity Futures Trading Commission (CFTC) is submitting its plan for an orderly shutdown in the event of a lapse of appropriations.

In the event that a lapse of appropriations occurs, the CFTC will severely curtail its operations until additional appropriations are enacted into law and expects that the vast majority of the agency's operations will cease. However, consistent with the exception set forth in the Antideficiency Act, 31 U.S.C. § 1342, the CFTC has identified certain employees needed to perform excepted or emergency functions that protect life or property during a lapse in appropriations. That determination is based, in part, on the opinion promulgated by the Department of Justice, Office of Legal Counsel (OLC) that:

In the absence of government supervision, the stock markets, commodities and futures exchanges would be unable to operate ... these actions and the others required as part of a true shut down of the federal government would impose significant health and safety risks on millions of Americans, some of which would undoubtedly result in the loss of human life, and they would immediately result in massive dislocations of and losses to the private economy, as well as disruptions of many aspects of society and of private activity generally, producing incalculable amounts of suffering and loss.

OLC Memorandum for the Director of the Office of Management and Budget, *Government Operations in the Event of a Lapse in Appropriations*, OLC Opinion, at 2-3 (Aug. 16, 1995).

Consistent with this, we have identified employees who are necessary to address an imminent risk to the safety of human life or the protection of property:

- Assuming the plan is implemented on October 1, 2013, the CFTC has approximately 680 employees on board.
- Of the 680 employees, 28 have been identified as excepted from the restrictions of the Antideficiency Act, because their work is necessary to address an imminent risk to the safety of human life or the protection of property. This represents 4.1% of the CFTC's staff. The justification for each employee's inclusion on the excepted list is set forth in the attached table.
- The 5 employees in the Whistleblower and Consumer Protection Offices are exempt from furlough because their operations are funded through a separate funding source unrelated to the CFTC's annual appropriation.
- The 4 Commissioners are PAS appointees (Presidential appointees with Senate confirmation) and are exempt from furlough. Their respective staffs, however, are subject to furlough under the requirements of the Antideficiency Act.
- With limited exceptions, all employees who are not identified as excepted would require no more than four hours to conduct an orderly shutdown of agency operations. However, five employees in the Office of Financial Management (OFM) would require no more than two work days to complete orderly shutdown activities. The 5 OFM employees will require additional time to conduct orderly shutdown activities in order to address the substantial number of agency contracts that are in force, so as to reasonably assure that the CFTC is compliant with the Antideficiency Act during a lapse of appropriations. To the extent feasible, OFM is taking steps in advance of a lapse of appropriations to address the agency's contracts and to communicate with the agency's contractors.
- The CFTC has no employees that are excepted because they are engaged in military, law enforcement, or direct provision of health care activities or because their compensation is financed by a resource other than annual appropriations.

The limited contingent of excepted employees has been identified to ensure, to the extent practicable, that a bare minimum level of oversight and surveillance of the futures markets, clearing operations, and intermediaries is maintained. However, the vast bulk of the CFTC's oversight and surveillance functions will cease during a lapse of appropriations. In the event that circumstances change such that an imminent risk to the safety of human life or the protection of property emerges, the excepted employees will be responsible for notifying appropriate agency officials, who then will make a determination as to whether additional employees must be recalled from furlough to address the imminent risk.

For your information, we are attaching three documents as appendices to this response:

1. A copy of the CFTC's Lapse Procedure, dated September 2013.
2. A chart containing a list of the 28 employees who have been determined to be excepted for purposes of the Antideficiency Act.
3. A one-page summary of which CFTC functions will continue in the event of a lapse of appropriations, and which functions will cease during such a lapse.

Please feel free to contact me at 202-418-5697 if you have any questions.

CFTC Procedure

Date: September 2013

Description: **Lapse in Appropriations** – This procedure describes the agency’s plan for operating in the event of an emergency shutdown due to a lapse in appropriations

Contact: Laurie Lindsay
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Purpose

This procedure outlines the process the Commodity Futures Trading Commission (CFTC) will follow to shut down operations in the event of a lapse in appropriations and until additional appropriations are enacted into law. Under the Antideficiency Act (31 U.S.C. §1341 *et seq.*), officers and employees of the federal government cannot, among other things, enter into obligations in advance of appropriations or employ federal personnel except in emergencies involving the safety of human life or protection of property, or to accomplish the orderly suspension of agency operations. If no funds are available, the agency must:

- Initiate the orderly shutdown of agency activities not considered essential to the safety of human life or protection of property; and
- Continue only those emergency functions, which if suspended, would imminently threaten the safety of human life or protection of property, as defined in this procedure.

Excepted Employees

- When shutdown appears imminent, the Human Resources Branch (HR), in consultation with the Office of General Counsel (OGC) and the agency offices and divisions, will recommend to the Chairman which employees should be excepted from furlough because they are needed to perform approved emergency functions that protect life or property.
- Once the Chairman approves the list of excepted employees, HR will notify excepted employees of their obligation to report to work in the event of shutdown. The agency offices and divisions will notify the excepted employees of the emergency functions they are to perform.
- As the shutdown continues, the Division/Office Directors will continually evaluate the list of excepted employees to determine whether adjustments need to be made in order to ensure that emergency functions can be performed.
- If circumstances shift, Division/Office Directors may request that adjustments be made to the excepted list, which may result in the recall of certain employees. Any such request must be made to the Executive Director, who will consult with the General Counsel and Office of the Chairman prior to approval.

Employees Exempt From Furlough During a Lapse in Appropriations

- HR will notify Presidential appointees that they may continue to work but their staff members will be subject to furlough unless they are needed to perform emergency functions.
- HR will notify employees of the Whistleblower Office and the Office of Consumer Outreach that they may continue to work.

Employees Subject to Furlough During a Lapse in Appropriations

- HR will provide supervisors with furlough notices to be sent to all employees (including student volunteers, unpaid consultants, and individuals on Intergovernmental Personnel Act agreements (as applicable)) other than those described above as not being subject to furlough during a lapse in appropriations.
- Within the first three (3) hours after employees report to work at his/her regularly scheduled tour of duty start time on the first business day following the lapse in appropriations, supervisors will send a furlough notice to all employees under their supervision other than those described above as not being subject to furlough during a lapse in appropriations.
- Employees (except those on preapproved leave or an alternative work schedule) must report to work on the first business day following the initiation of a shutdown. Within the first three (3) hours after employees report to work at his/her regularly scheduled tour of duty start time, employees will receive a furlough notice and must perform the duties necessary for the orderly shutdown of Commission operations.
- Supervisors must notify employees that travel is cancelled unless it is part of an emergency function that protects life or property. Any employee on travel that is not part of an emergency function protecting life or property must immediately return to his/her duty station
- Employees MAY NOT volunteer to work for the CFTC without pay. This is a violation of Antideficiency Act and carries strong personal sanctions against the individual. Pursuant to 31 U.S.C. §1350 any officer or employee who “knowingly and willfully violates the Antideficiency Act shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both.”
- In the event of a shutdown, all paid leave must be cancelled. Accordingly, any employee who has received preapproval for paid leave during the shutdown period will be furloughed, unless such employee is considered “excepted” as outlined above. Any employee who is informed that they are excepted must report to work.

Contractors

- The Financial Management Branch (FM) will issue “stop work” notices to CFTC contractors for contracts that are not necessary to address an imminent risk to the safety of human life or the protection of property, unless the contract: (1) is already funded; (2) will not impose any new obligations on the government during the lapse in appropriations; and (3) will not require oversight by CFTC personnel during the lapse in appropriations.
- To promote compliance with the Antideficiency Act, FM may issue “termination” notices to CFTC contractors if the lapse in appropriations lasts for thirty days or longer.

Notification to OMB

The Executive Director is responsible for notifying OMB of the shutdown in compliance with Section 124 of OMB Circular A-11

Shutdown Activities for Employees Subject to Furlough During a Lapse in Appropriations

- Employees who are not excepted must not check email or use voice capabilities or conduct any work. Employees who are not excepted will be instructed to power off and securely store all CFTC provided equipment prior to the lapse in appropriations, and will be informed that they cannot access any such devices while on furlough. This includes, but is not limited to, CFTC provided laptops, smartphones, or tablets.

- Employees who are not excepted must set an autoreply for his/her email address and for public email addresses. Employees who are not excepted must record out-of-office messages on all public phones and on his/her phone.
- All employees who are not excepted must cancel meetings, hearings, and other previously arranged business and notify appropriate parties of the cessation of normal agency business due to a lapse in appropriations.
- Employees who are not excepted should document the status of cases and projects so they can be resumed, transferred, or otherwise appropriately handled when the funding situation is resolved.
- Employees who are not excepted must take appropriate steps to safeguard and secure all records and property to ensure protection of any classified or sensitive information.
- Employees who are not excepted must complete shutdown activities within three (3) hours after the employee reports to work at his/her regularly scheduled tour of duty start time on the first business day following the lapse in appropriations.

Notification to Public and Staff

- The Office of Public Affairs will notify the public of closure and reopening of CFTC offices through the CFTC Website. The website will remain operational because it has already been fully funded prior to the lapse in appropriations. However, the website will not be updated or maintained during a lapse in appropriations, unless necessary to address an imminent risk to the safety of human life or the protection of property.
- The Logistics and Operations Branch will ensure that the main CFTC information line (1-866-406-8550) and the headquarters and regional main phone lines contain current status information.
- Employees are responsible for checking the CFTC information line for information about the reopening of the agency after Congress appropriates funds.
- Employees are expected to return to work on their next regularly scheduled work day, unless on preapproved leave, following enactment of appropriations legislation.

Summary of CFTC Operations in the Event of a Lapse of Appropriations

In the event that a lapse of appropriations occurs, the CFTC will severely curtail its operations until additional appropriations are enacted into law.

Operational During a Lapse of Appropriations:

The CFTC will maintain a limited staff of excepted employees: Division of Market Oversight (DMO), Division of Clearing and Risk (DCR), and Division of Swaps and Intermediary Oversight (DSIO) staff to perform oversight and surveillance of the futures markets, clearinghouses, and intermediaries; Enforcement staff to address open and active litigation cases; and certain other employees to perform work necessary and incidental to the execution of the aforementioned functions. The limited DMO/DCR/DSIO staff identified as excepted will only conduct a bare minimum level of oversight and surveillance, and the functions of the Division of Enforcement will largely cease.

Pursuant to 5 U.S.C. §7511(b)(1), the four Presidentially-appointed and Senate-confirmed Commissioners are exempt from furlough and will continue to serve during a lapse in appropriations. In addition, the Office of Consumer Outreach and the Whistleblower Office will continue to perform normal functions during a lapse of appropriations because their operations are not funded by the Commission's annual appropriations.

Non-Operational During a Lapse of Appropriations:

Notwithstanding the limited functions that the excepted employees will perform, the vast bulk of the CFTC's operations will cease during a lapse of appropriations. This includes, but is not limited to:

- Most functions of the Division of Enforcement, including but not limited to: the review and investigation of victim complaints, initiating actions against wrongdoers and protecting any victim assets that may be at risk in such situations, and assisting other law enforcement agencies with criminal and regulatory matters.
- Most functions of DMO, DCR, and DSIO. With the exception of the minimal level of excepted employees needed for the oversight and surveillance of the commodities and futures markets the operations of DMO, DCR, and DSIO will cease.
- Work relating to rulemakings and some other responsibilities mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203.

- Most functions of the Office of the Executive Director, Office of Data and Technology, and Office of the General Counsel, except to the limited extent that work is incidental to the functions performed by other excepted employees addressing imminent risks to the safety of human life or the protection of property.
- All functions of the Office of the Chief Economist, Office of Legislative Affairs, Office of Public Affairs, Office of Diversity and Inclusion, and Office of International Affairs.