



U.S. TRADE & DEVELOPMENT AGENCY

Plan for USTDA Operations in the Event of a Lapse in

Appropriation As of December 18, 2020

1. **OVERVIEW**

The Office of Management and Budget (OMB) requires all agencies to have a shutdown plan in the case of a lapse in appropriations¹. This plan for the U.S. Trade and Development Agency (USTDA or the "Agency") provides the legal background, overarching principles, and specific list of excepted personnel pertaining to an orderly shutdown while continuing select operations in conformance with applicable laws and regulations. The plan provides guidance for actions to be taken by USTDA in the event that a regular appropriation or continuing resolution is not enacted and signed into law, resulting in an interruption of fund availability. (This supersedes all previous guidance.)

USTDA intends to continue operations for a limited time using available carryover fund balances; however, dependent upon the length of the lapse in appropriations, available balances may be exhausted and a determination made to implement this plan. Once Agency management has determined that available carryover fund balances are insufficient to continue operations, the Director shall advise all USTDA employees that a Lapse in Appropriation (as defined in Section 4 below) has occurred. Pursuant to this plan, USTDA employees will be instructed to limit their work activities to those functions necessary for the orderly cessation of Agency operations. It is estimated that these activities will be completed within one-half day.

Of the approximately 64 employees expected to be on-board before implementation of this plan, the Agency's plan includes retaining:

- The Director as a Senate-confirmed Presidential appointee; or any employee performing the functions and duties of the Director.
- The General Counsel, the Director of Management Operations, the Director of Program Management, the Acting Chief Information Officer, the Chief of the Office of Acquisition Management, and the Administrative Officer to conduct the orderly shutdown of operations and Excepted Activities (as defined in Section 4).

Section 7 below provides detailed description of the responsibilities for each of these retained employees.

2. **POLICY**

¹ See OMB Circular A-11, Section 124, Agency Operations in the Absence of Appropriations.

If a regular appropriation or continuing resolution has not been enacted and signed into law, the Agency will continue operations for a limited time using available carryover fund balances; however, dependent on when a regular appropriation or continuing resolution is enacted, available balances may become insufficient and a determination made to implement this plan in accordance with the procedures set forth in Section 6 below. The Agency may utilize such available balances because the Agency receives multi-year appropriations. Accordingly, in such circumstances, the Agency will continue as many normal operations as possible; operating status and available funding will be monitored closely and continuously, and planning for a Lapse in Appropriation (as defined in Section 4 below) will continue. Please see Section 5 below for further guidance.

Once the remaining available balance becomes insufficient to continue operations, all USTDA employees will be placed on emergency furlough, except for Presidential appointees² and any employees designated as Excepted Employees (as such term is defined in Section 4 below). Excepted Employees are designated as such in accordance with applicable legal opinions issued by the Department of Justice, guidance from the Office of Management and Budget, and USTDA's Office of General Counsel, for and during the time, if any, that they are engaged in Excepted Activities (as such term is defined in Section 4 below). The Director of the Agency has the discretion to recall employees from furlough status in order to assist with matters related to the safety of human life and the protection of Federal property and equipment. Voluntary services of USTDA employees cannot be accepted. Further, furloughed employees cannot perform work for USTDA from outside the office, including via mobile devices or remote computer connections. Accordingly, furloughed employees must power down their government issued mobile devices (and/or any other electronic device that is issued by USTDA) and must not log into USTDA via the VPN Client or other remote access. All Agency activities that are not Excepted Activities (as such term is defined in Section 4 below) will cease. Excepted Activities and activities performed by certain contract personnel under fully funded contracts will continue. Please see Section 6 below for further guidance.

3. APPLICABILITY

This guidance applies to all USTDA employees.

4. DEFINITIONS

Emergency Furlough: A furlough taken under unforeseeable circumstances, such as sudden emergencies requiring immediate curtailment of activities.

Excepted Activities: Activities performed by Excepted Employees that are otherwise authorized by law, those that protect human life and property, or those necessary to begin the phase down of other activities. Excepted Activities do not include ongoing, regular functions of government, and should include only those tasks that, if not carried out, would pose a threat to the safety of human life and protection of property. USTDA's Excepted Activities are as follows:

²The position of Director of the Agency is presidentially appointed and senate confirmed, and does not accrue leave. Accordingly, if serving at the time of a lapse in appropriations, the Director of the Agency is exempt from emergency furlough.

- A. Protection of Federal property and equipment in the administrative control of the Agency;
- B. Under the foreign policy guidance of the Secretary of State, USTDA mission-related activities that are essential to the national security or safety of human life or the protection of property; and
- C. Personnel activities necessary to support Excepted Employees engaged in tasks related to the safety of human life and the protection of property.

Excepted Activities will be performed off-site to the greatest extent practicable.

Excepted Employees: Any employee deemed necessary to perform an Excepted Activity at the discretion of the Director or the position performing the functions and duties of the Director. As of the date hereof, Excepted Employees are: the Chief Operating Officer, performing the functions and duties of the Office of Director; the Director of Program Management; the General Counsel; the Director of Management Operations; the Acting Chief Information Officer; the Chief of the Office of Acquisition Management; and the Administrative Officer.

It is anticipated that the Excepted Employees named above, will fulfill their duties on either a full-time or a part-time basis, whichever is needed for continued Agency function.

Lapse in Appropriation: The time period during which (a) available carryover fund balances are insufficient to continue operations and (b) USTDA has no new funding authority because an appropriation act or a continuing resolution has not been enacted and signed into law.

Shutdown: Discontinuation of all Agency activities that are not Excepted Activities.

5. PROCEDURES AND ACTIONS DURING PERIOD OF OPERATIONS USING RESIDUAL BALANCES

If there is no new appropriation or continuing resolution, the Agency will continue operating using available carryover fund balances until these funds are insufficient to continue. During this time, the Agency will continue as many normal operations as possible and operating status and available funding will be monitored closely and continuously.

If funds later become insufficient to continue operations, then the procedures and actions detailed in Section 6 become effective.

6. PROCEDURES AND ACTIONS DURING A LAPSE IN APPROPRIATION

- A. USTDA employees will be advised by the Director or designee of a possible Lapse in Appropriation as soon as it is determined by Agency management that available carryover fund balances are insufficient to continue operations.
- B. On the first workday after the Director has advised all USTDA employees that a Lapse in Appropriation has occurred, the following actions are required:

- i. USTDA employees will report to work as scheduled, will be informed of the status of funding and instructed to limit their work activities to those functions necessary for the orderly cessation of Agency operations. The Administrative Officer will provide notices to all employees containing information and instructions in the event of an Emergency Furlough. It is estimated that these activities will be completed during the first four hours of the workday. When employees have completed their Shutdown activities, they will be placed in furlough status. Employees must acknowledge receipt of the furlough notice in writing. The final list of all employees to whom notices have been issued will be maintained by the Administrative Officer so that the appropriate personnel actions may be effected.
 - ii. USTDA employees on travel status, including those on travel in connection with training or details funded by USTDA, should be contacted by their supervisors and told that they will be furloughed as of the completion of Shutdown activities. Employees in transit to a travel site will continue to their destination and contact USTDA immediately upon arrival. Travelers should return in accordance with the Federal Travel Regulations.
- C. Following the completion of Shutdown activities as described in Section 6(B)(i), and on subsequent days of a Lapse in Appropriation, the Agency will remain closed and all employees furloughed, with the exception of the Director of the Agency and the Excepted Employees.
- D. The total number of Agency employees expected to be on-board before implementation of this plan is approximately 62. The total number of employees to be retained under the plan as Excepted Employees is four.
- E. Actions with respect to USTDA Contractors
 - i. Except as set forth below, contract personnel are not affected by a Lapse in Appropriation as long as the contract remains fully funded, under no-year, multi-year or other funds remaining available for those purposes. Such contractors may continue to work off-site if they are permitted to do so by the terms of their contracts, but they should be notified that no Agency action, including payment of invoices, can be taken with respect to their contract during the pendency of an Emergency Furlough, and USTDA employees will not be available to administer such contracts or interact with contractors except in situations of emergency involving the safety of human life or the protection of property. This guidance applies to the following categories of contractors providing services to USTDA:
 - a. Definitional Mission, Desk Study, Feasibility Study and Technical Assistance Contractors;
 - b. Indefinite Quantity Contractors; and
 - c. Personal Service Contractors (located in: New Delhi, India; Bangkok, Thailand; Manila, Philippines; Accra, Ghana; and Johannesburg, South Africa.)
 - ii. Locally employed contractors in the following locations providing services to USTDA have entered into contracts with either the Department of State, or the Department of Commerce. The Foreign Service nationals in these locations will be subject to guidelines issued by either the Department of State or the

Department of Commerce, as applicable, in the event of an interruption in funding:

- a. Bangkok, Thailand;
 - b. Johannesburg, South Africa;
 - c. New Delhi India;
 - d. Sao Paulo, Brazil;
 - e. Lagos, Nigeria;
 - f. Hanoi, Vietnam;
 - g. Jakarta, Indonesia;
 - h. Kuala Lumpur, Malaysia; and
 - i. Nairobi, Kenya.
- iii. During a Lapse in Appropriation and the furlough of its employees, the Chief of the Office of Acquisition Management will notify the applicable contract service providers that the Agency is closed. In the case where contracts are fully funded, contractors will continue to perform services remotely and independently in accordance with their statements of work, and all other terms and conditions of their contract. Contractors may not log into USTDA remotely via the VPN Client or other remote access. No Agency action, including payment of invoices, will be taken with respect to contracts until the Agency reopens. In the case of an emergency relating to the services being provided and involving the safety of human life or the protection of property contractors should contact the Chief of Office of Acquisition Management.
 - iv. Upon the closure of the Agency during a Lapse in Appropriation, the IT services provided to the Agency will not occur on-site, however, one or more IT contractors may work from a remote location or be re-called to the Agency in order to secure and protect Federal computer equipment and systems consistent with the IT service provider's contract with USTDA.

7. RESPONSIBILITIES

A. Director (Chief Operating Officer performing the duties and functions of the Director)

- i. Has overall responsibility for the implementation of USTDA's Shutdown plan.
- ii. Notifies OMB immediately upon initiation of Shutdown activities.
- iii. Designates Administrative Officer to notify all personnel of possible Lapse in Appropriation and furlough actions.
- iv. Determines, in consultation with the Excepted Employees, whether situations that may arise during the Lapse in Appropriation are Excepted Activities.
- v. Directs Excepted Employees to deal with Excepted Activities.

B. The General Counsel

- i. Interprets lapse and shutdown guidance from OMB.
- ii. Advises Agency leadership in all functional legal areas.

C. Director of Management Operations

- i. Monitors USTDA operational-related activities that are essential to the national security or safety of human life or the protection of property.
- ii. Advises Agency leadership in all operational-related areas.

D. Director of Program Management

- i. Monitors USTDA mission-related activities that are essential to the national security or safety of human life or the protection of property.
- ii. Advises Agency leadership in all programmatic and mission-related areas.

E. Administrative Officer

- i. Prepares communications to employees, including furlough notices, consistent with the regulations, policies and guidance of the Office of Personnel Management.
- ii. Processes necessary personnel actions and payments of compensation owed to employees for periods prior to the interruption of funding.
- iii. Notifies all personnel of possible Lapse in Appropriation and furlough actions, including their rights and benefits while they are in furlough status.
- iv. Notifies all appropriate Federal and non-Federal parties providing security services of the Agency Shutdown in order to ensure continuity of such security services.
- v. Ensures that necessary postings are made on USTDA's intranet and USTDA's website.

F. Acting Chief Information Officer

- i. Monitors the IT network status to ensure safety and function of USTDA's network.
- ii. Works closely with the Director of Management Operations and the Administrative Officer to assist all personnel in an orderly shutdown. Restarts the Agency's full IT systems to avoid any data loss or interruption pursuant to Section 10, below.

G. Chief of the Office of Acquisition Management

- i. Suspends ongoing acquisition activities and awards.
- ii. Notifies contractors of Lapse in Appropriation in accordance with Section 6(E) above.

H. Employees

- i. Stay informed as to the status of Agency funding during the Lapse in Appropriation. Excepted Employees must track and record time spent on Excepted Activities as directed by the Director, and provide such information to the Administrative Officer. Such Excepted Employees are advised that the United States will not contest its legal obligation to pay for their services, even in the absence of appropriations.
- ii. As soon as the Agency has re-opened due to the enactment of an appropriation or continuing resolution that makes funds available to the Agency, all employees are expected to report to work as scheduled.

8. COMMUNICATIONS WITH EMPLOYEES

Employees are encouraged to monitor the public news media for updates on the situation. In addition, information updates regarding the status of Federal Government operations should be obtained from the Office of Personnel Management website (www.opm.gov). Furloughed employees are prohibited from performing Agency work from outside the office. Accordingly, furloughed employees must not check their government issued mobile device (and/or any other electronic device that is issued by USTDA) and must not log into USTDA remotely via the VPN Client or remote access.

Once an appropriation or continuing resolution that makes funds available to the Agency has been enacted, employees will be notified of the re-opening of the Agency through Send Word Now. The Agency will notify employees when funds are available to resume Agency operations and the date, time, and manner employees are expected to return to work. Employees who are unable to return to work at the designated date and time must contact their supervisors immediately to discuss alternative work options such as unscheduled leave or unscheduled telework.

9. ANTICIPATED CHANGES

Currently, there are no anticipated changes to the Agency's procedures and actions specified in this plan if the appropriations hiatus extends beyond a short time period (approximately 1-5 days). The Chief Operating Officer, along with the designated Excepted Employees, shall be responsible for implementing and adjusting the plan to respond to the length of the appropriations hiatus and changes in external circumstances, if any.

10. RESUMPTION OF ORDERLY OPERATIONS

Once the Agency receives notification that an appropriation or continuing resolution has been approved or is imminent, USTDA will begin contacting start-up personnel necessary to resume orderly operations. The Agency shall consider plans for restarting Information Technology (IT) systems and avoiding any data loss or interruption and may require that critical IT employees and/or contracted personnel report to work earlier than their normal work schedule to ensure that IT systems are up and running as soon as possible. Such work shall only occur once funding is actually available.

11. AUTHORITIES AND REFERENCES

- A. Title 31 U.S.C. § 1341, “Anti-Deficiency Act,” which states that no Federal officer or employee may involve the government in a contract or obligation for the payment of money in advance of an appropriation, unless otherwise authorized by law.
- B. Title 31 U.S.C. § 1342, which states that no Federal officer or employee may accept voluntary services exceeding that authorized by law, except for emergencies involving the safety of human life or the protection of property.
- C. Title 5 C.F.R., Part 752, Subpart D, which sets forth the regulatory requirements for removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less.
- D. OMB Circular No. A-11, Section 124, *Agency Operations in the Absence of Appropriations* (2016)
- E. OMB Memorandum for the Heads of Executive Departments and Agencies, M-13-22 (September 17, 2013)
- F. OMB Memorandum for the Heads of Executive Departments and Agencies, M-95-18, *Agency Plans for Operations During Funding Hiatus* (August 22, 1995)
- G. OMB Memorandum, *Agency Operations in the Absence of Appropriations* (October 5, 1990)
- H. OMB Bulletin No. 80-14, Supplement No. 1, *Agency Operations in the Absence of Appropriations* (August 20, 1982)
- I. OMB Memorandum, *Agency Operations in the Absence of Appropriations* (November 17, 1981)
- J. OMB Bulletin No. 80-14, *Shutdown of Agency Operations Upon Failure by the Congress to Enact Appropriations* (August 28, 1980)
- K. Opinion of the Assistant Attorney General, Walter Dellinger, in a letter to Alice M. Rivlin, Director, OMB (August 16, 1995)
- L. Opinion of the Office of Legal Counsel on the *Authority to Employ the Services of White House Employees during an Appropriations Lapse*, 19 Op. O.L.C. September 13, 1995)
- M. Opinion of the Office of Legal Counsel on the *Continuation of Agency Activities during a Lapse in both Authorization and Appropriation*, 6 Op. O.L.C. 555 (September 17, 1982)
- N. Opinion of the Attorney General, in a letter from Benjamin R. Civiletti to the President, 43 Op. Atty Gen. 293 (January 16, 1981)
- O. Opinion of the Attorney General, in a letter from Benjamin R. Civiletti to the President, 43 Op. Atty Gen. 224 (April 25, 1980)
- P. *Shutdown of the Federal Government: Causes, Processes, and Effects*, Clinton T. Brass, Congressional Research Service, February 18, 2011
- Q. *Funding Gaps Jeopardize Federal Government Operations*, The Comptroller General of the United States, Report to the Congress, March 3, 1981
- R. *Government Shutdowns*, Briefing Paper No. 10, Harvard Law School, Federal Budget Policy Seminar, May 4, 2005
- S. Guidance and Information on Furloughs, Office of Personal Management, at www.opm.gov/furlough/furlough.htm
- T. Guidance for Shutdown Furloughs at <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf>
- U. Frequently Asked Questions During a Lapse in Appropriations, Office of Management and Budget, June 20, 2019, at <https://www.whitehouse.gov/wp-content/uploads/2019/06/FINAL-Agency-Lapse-FAQs-6.27.19.pdf>