



## U.S. TRADE & DEVELOPMENT AGENCY

### Plan for USTDA Operations in the Event of a Lapse in Appropriation

*As of December 15, 2011*

#### 1. **OBJECTIVE**

To provide guidance for actions to be taken by the U.S. Trade and Development Agency (USTDA or the “Agency”) in the event that a regular appropriation or continuing resolution is not enacted and signed into law, resulting in an interruption of fund availability.

#### 2. **POLICY**

When an appropriation act or a continuing resolution has not been enacted and signed into law, thereby causing a lapse of appropriations, all USTDA employees will be placed on emergency furlough, except for Presidential appointees<sup>1</sup> 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 re-call 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 blackberries and must not log into USTDA via the VPN Client.

#### 3. **APPLICABILITY**

This guidance applies to all USTDA employees.

#### 4. **DEFINITIONS**

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<sup>1</sup> The Director of the Agency is presidentially appointed and senate confirmed, and does not accrue leave. Accordingly, the Director of the Agency is exempt from emergency furlough.

**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:

- 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 in the discretion of the Director. As of the date hereof, Excepted Employees are the Administrative Officer; the Director of Policy and Program; and the Contracts Manager.

The Administrative Officer will be required to secure the protection of Federal property and equipment in the Administrative control of the Agency. The Director of Policy and Program will monitor those USTDA mission-related activities that are essential to the national security or safety of human life or the protection of property; and the Contracts Manager will monitor any emergency situations related to the safety of human life and the protection of property that may arise in the course of the performance of contracts that that is ongoing due to funding from other sources. It is anticipated that the Administrative Officer, the Director of Policy and Program and the Contracts Manager will fulfill their duties on a part time basis as needed.

**Lapse in Appropriation:** The time period during which 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**

- A. USTDA employees will be advised by the Director or designee of a possible Lapse in Appropriation as soon as the Agency is informed by the Office of Management and Budget that such event is deemed likely.
- B. If an appropriation act is passed by the Congress and signed into law by the President before the beginning of a workday, USTDA employees should report to work as usual.
- C. On the first workday on which an appropriation act is not passed by the Congress and signed into law by the President before the beginning of such workday, 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 and should return to USTDA headquarters in Arlington, Virginia immediately. 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.
- D. Following the completion of Shutdown activities as described in Section 5(C)(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.
- E. Actions with respect to USTDA Contractors
  - 1. Except as set forth below, contract personnel are not affected by a Lapse in Appropriations 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;
  - c. Advisory and Assistance Contractors; and
  - d. Personal Service Contractors (located in Bangkok, Thailand and Johannesburg, South Africa).
2. 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. Beijing, China;
  - c. Johannesburg, South Africa;
  - d. New Delhi, India; and
  - e. Sao Paulo, Brazil.
3. Due to the fact that the services provided by the Information Resource Center (IRC) contractors can only be performed on-site during normal business hours, upon the closure of the Agency during a Lapse in Appropriation and the furlough of its employees, the Contracts Manager will notify the contract service provider for the IRC, that the Agency is closed, and accordingly, services shall not be provided until funds are restored and the agency reopened.
4. 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.

## **6. RESPONSIBILITIES**

### **A. 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. Administrative Officer

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

C. Contracts Manager

- i. Suspends ongoing acquisition activities and awards.
- ii. Notifies contractors of Lapse in Appropriation in accordance with Section 5(E) above.

D. Employees

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 employees are advised that the United States will not contest its legal obligation to pay for their services, even in the absence of appropriations. Employees are expected to report to work as scheduled on the first workday after the enactment of an appropriation or continuing resolution that makes funds available to the Agency.

## 7. 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](http://www.opm.gov)). Furloughed employees are prohibited from performing agency work from outside the office. Accordingly, furloughed employees must not check their blackberries and must not log into USTDA remotely via the VPN Client.

## 8. 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* (July 21, 2010)
- E. OMB Memorandum, *Agency Operations in the Absence of Appropriations* (October 5, 1990)
- F. OMB Bulletin No. 80-14, Supplement No. 1, *Agency Operations in the Absence of Appropriations* (August 20, 1982)
- G. OMB Memorandum, *Agency Operations in the Absence of Appropriations* (November 17, 1981)
- H. OMB Bulletin No. 80-14, *Shutdown of Agency Operations Upon Failure by the Congress to Enact Appropriations* (August 28, 1980)
- I. Opinion of the Assistant Attorney General, Walter Dellinger, in a letter to Alice M. Rivlin, Director, OMB (August 16, 1995)
- J. 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)
- K. 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)
- L. Opinion of the Attorney General, in a letter from Benjamin R. Civiletti to the President, 43 Op. Atty Gen. 293 (January 16, 1981)
- M. Opinion of the Attorney General, in a letter from Benjamin R. Civiletti to the President, 43 Op. Atty Gen. 224 (April 25, 1980)
- N. *Shutdown of the Federal Government: Causes, Processes, and Effects*, Clinton T. Brass, Congressional Research Service, February 18, 2011
- O. *Funding Gaps Jeopardize Federal Government Operations*, The Comptroller General of the United States, Report to the Congress, March 3, 1981

- P. *Government Shutdowns*, Briefing Paper No. 10, Harvard Law School, Federal Budget Policy Seminar, May 4, 2005
- Q. Guidance and Information on Furloughs, Office of Personal Management, at [www.opm.gov/furlough/furlough.htm](http://www.opm.gov/furlough/furlough.htm).