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Government Shutdown: Operations of the Department of Defense During a Lapse in Appropriations

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Summary

Because Congress did not provide any FY2014 funding for DOD by October 1, 2013, the beginning of the new fiscal year, DOD, like other agencies, is now subject to a lapse in appropriations during which agencies are generally required to shut down. The Office of Management and Budget (OMB), however, has identified a number of exceptions to the requirement that agencies cease operations, including a blanket exception for activities that “provide for the national security.”

On September 25, 2013, DOD issued guidance and its contingency plan identifying the types of activities that would continue in the event of a shutdown. As a result, during the lapse in appropriations, some DOD personnel would be “excepted” from furloughs, including all uniformed military personnel, while others would be furloughed and, thus, not be permitted to work. Those civilian personnel who supported DOD military operations or necessary to protect health and safety would be “excepted” from furloughs, roughly half of a total of about 750,000, while the remainder would be furloughed and not paid. Normally, such “excepted” military and civilian personnel would continue to work but would not be paid until after appropriations are subsequently provided.

With enactment of H.R. 3210, the Pay Our Military Act (POMA), on September 30, 2013, however, many defense personnel will be paid on time, including all active-duty personnel, and certain civilian and contractor personnel. DOD’s original guidance limited DOD’s excepted civilians to those designated as necessary for military operations and to protect the safety of persons and property. On October 5, 2013, Secretary of Defense Chuck Hagel announced that the language in H.R. 3210 would also allow DOD to recall most but not all of its civilian employees to work. In addition to those DOD civilians already designated as “excepted,” the Administration interpreted H.R. 3210 as permitting the Secretary to recall (and start to pay) those DOD civilians “whose responsibilities contribute to the morale, well-being, capabilities and readiness of service members.” This revision of DOD’s Contingency Plan would increase the number of DOD civilians returning to work from roughly 50% to about 90% according to DOD Comptroller Robert Hale. As the services and DOD components implement this decision, civilians will return to work starting this week, and will become eligible to be paid on time under H.R. 3210.

DOD is continuing to review whether the number of contractor personnel, also covered under H.R. 3210, will be increased. Those defense civilian or contractor personnel who were or remain furloughed would only receive pay for that period if Congress passes legislation to pay furloughed personnel. On October 5, 2013, the House unanimously passed H.R. 3223, which would provide retroactive pay for all federal employees, as occurred during the 1995 to 1996 shutdown. The President has announced his support of the bill. The Senate has not yet taken it up.

On October 2 and October 3, 2013, the House passed five “mini” Continuing Resolutions (CRs) providing funding for the District of Columbia, NIH, various museums, Veterans Administration disability programs, and pay for non-activated reservists, generally at FY2013 levels including the sequester now in effect. That package includes H.R. 3230, which would expand the number of reservists who would be paid on time from activated reservists (such as those deployed for the Afghan war) who are already covered by H.R. 3210, to non-activated duty reservists who are performing weekend drills. Based on press reports of reactions from the Senate leadership, however, the Senate is not likely to take up the bill.

The authority to continue some activities during a lapse in appropriations is governed by the Antideficiency Act, codified at 31 U.S.C. 1341 and 1342, as interpreted by Department of Justice (DOJ) legal opinions and reflected in Office of Management and Budget (OMB) guidance to executive agencies. Subject to review by OMB, each agency is responsible for making specific determinations on which activities may continue during a shutdown and which may not.

Legally, according to DOJ and OMB guidance, activities that may continue during a lapse in appropriations include (1) activities “necessary to bring about the orderly termination of an agency’s functions”; (2) administration of benefit payments provided through funds that remain available in the absence of new appropriations, including, in the case of DOD, military retirement benefits; (3) activities and purchases financed with prior year funds and ongoing activities for which funding has already been obligated; (4) activities undertaken on the basis of constitutional authorities of the President; and (5) activities related to “emergencies involving the safety of human life or the protection of property.” The Defense Department attributes its authority to carry on national security-related operations mainly to Section 1342 of the Antideficiency Act, which permits the continuation of activities to protect human life and property.

DOD’s September 25, 2013 guidance identifies activities that would continue in the event of a shutdown including the war in Afghanistan, certain unspecified military operations and related support activities deemed necessary for those operations. This guidance is almost identical to December 2011 guidance that was issued almost two years ago when a funding lapse was also widely viewed as a real possibility.

The 2013 guidance provides that both ongoing military operations and other unspecified national security activities would continue as well as those support activities considered necessary by DOD necessary—from training and communications to recruiting and intelligence. In addition, activities necessary for safety of persons and protection of property, including emergency response and some equipment repair and acquisition support would also continue. Other activities that would continue are operation of DOD Dependent Schools, child care centers, and DOD medical activities, including TRICARE services for dependents, but not non-essential services, such as elective surgery in military medical facilities.

H.R. 3210 reduces the number of DOD civilians furloughed, but those in that status would continue to face a pay gap, potentially imposing hardships on many families, unless legislation providing retroactive pay is enacted. Contracting activities that supported military activities and payments to vendors derived from prior multiyear appropriations could also continue. The status of many contractor personnel remains unclear. While some new contract obligations to support “excepted” activities could be signed, monies could not be disbursed while other new contracts would be delayed. This could create some confusion and, potentially, disruptions to supplies of some material and services, particularly if full funding for DOD is not restored soon.

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Introduction

Because Congress did not provide funding for FY2014, the new fiscal year beginning October 1, 2013, the Department of Defense (DOD), like other agencies, is now subject to a lapse in appropriations.¹ In that event, agencies are generally required to shut down, although the Office of Management and Budget (OMB) has identified a number of exceptions to that rule, including a blanket exception for activities that “provide for the national security.”² Other than continuing to perform such “excepted” activities, agencies are generally required to terminate operations and personnel who are not performing “excepted” activities are now furloughed after working only long enough to ensure an orderly shutdown.³

On September 25, 2013, Deputy Secretary of Defense Ashton B. Carter issued guidance and a contingency plan to continue essential activities in the event that appropriations lapsed. These activities included not only the war in Afghanistan (including preparing troops to deploy) but also other (unspecified in this guidance) military operations, and “many other operations necessary for safety of human life and protection of property, including operations essential for the security of our Nation.” Such activities would be considered “excepted” from furloughs. All other activities would shut down.⁴

Recent Developments

On September 30, 2013, President Obama signed H.R. 3210, the Pay Our Military Act (POMA), which was passed unanimously earlier in the House and Senate.⁵ This act provides appropriations to cover the *pay and allowances* of all members of the armed forces performing “active service” (“active service” includes both active duty and full-time National Guard duty),⁶ and those DOD

¹ Military operations of the Department of Defense (DOD) are normally funded through annual appropriations provided in the DOD appropriations act and in the military construction, veterans’ affairs, and related agencies appropriations act. DOD also administers a number of civil affairs activities that are funded in other appropriations bills, including civil construction projects managed by the Army Corps of Engineers. The non-military functions of the Department of Defense are not addressed in this report.

² The exception for national security was cited in OMB memos in 1980 and 1981 that are discussed below. Those memos, in turn, have been referenced by OMB guidance to agencies in years since then. OMB Circular A-11, which is periodically updated, also requires agencies to maintain plans for the orderly termination of operations in the event of a lapse in appropriations, with exceptions for personnel engaged in military, law enforcement, or direct provision of health care activities.

³ For a general discussion of government shutdowns because of funding lapses, see CRS Report RL34680, *Shutdown of the Federal Government: Causes, Processes, and Effects*, coordinated by Clinton T. Brass.

⁴ DOD, “Contingency plan memo,” September 25, 2013.

⁵ H.R. 3210 was passed by 423 to 0 in the House on September 29, and by Unanimous Consent in the Senate on September 30, 2013.

⁶ Active service is defined at 10 USC 101(d)(3). Active duty is defined at 10 USC 101(d)(1) to mean “full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.” Full-time National Guard duty is defined at 10 USC 101(d)(5) to mean “training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.”

civilians and contractor personnel whom the Secretary of Defense determines are providing support to these members of the armed forces. This act ensures that those personnel will be paid on time rather than being dependent on passage of a full continuing resolution (CR) or regular appropriations act.⁷

DOD Revises Its Guidance on Furloughing Certain Civilians

On October 5, 2013, Secretary of Defense Chuck Hagel announced that after consultation with the Department of Justice, it was decided that the new law, H.R. 3210, would permit DOD to recall most, but not all, DOD civilians from furlough rather than the fewer number “excepted” from furlough under DOD’s original September 25, 2013, Contingency Plan. Under the original plan, only those DOD civilians whose “support activities are felt directly by covered members of the armed forces” (i.e., those performing military operations or required for health and safety) were “excepted” (see **Appendix A**).⁸

The Administration interpreted H.R. 3210 as also permitting the recall of those DOD civilians “*whose responsibilities contribute to the morale, well-being, capabilities and readiness of service members [italics added]*.”⁹ This revision of DOD’s Contingency Plan would increase the number of DOD civilians returning to work from roughly 50% to about 90% according to DOD Comptroller Robert Hale.¹⁰ Under DOD’s revised Contingency Plan reflecting this interpretation of H.R. 3210, DOD civilians are being recalled from furlough if they:

- “contribute support to service members and their families *on an ongoing basis [italics added]*” (such as health care and family support programs, repair and maintenance of weapon systems on bases, training associated with readiness, installation support, commissary, payroll activities, and administrative support); and
- “contribute to capabilities and *sustaining force readiness* and that, if interrupted, would affect service members’ ability to *conduct assigned missions in the future [italics added]*”; (such as acquisition program management, depot maintenance,

⁷ There is some ambiguity about how long this funding and authority would be available under H.R. 3210. Sec. 2 (a) refers to appropriations for FY2014 being available for “*any period [italics added]* during which interim or full-year appropriations for fiscal year 2014 are not in effect.” At the same time, Sec. 3 provides that the appropriations and authority would be available “until *whichever of the following first* occurs”: when appropriations are enacted, including a CR, or January 1, 2015, the end of the first quarter of FY2015; this language suggests that the authority could only be used once. See CRS Report R41948, *Automatic Continuing Resolutions: Background and Overview of Recent Proposals*, by Jessica Tollestrup.

⁸ DOD, Deputy Secretary of Defense Ashton, B. Carter, “Guidance for Continuation of Operations in the Absence of Available Appropriations,” September 25, 2013, http://www.defense.gov/home/features/2013/0913_govtshutdown/Guidance-for-Continuation-of-Operations-in-the-Absence-of-Available-App.pdf; also Attachment, DOD, “Contingency Plan Guidance for Continuation of Essential Operations in the Absence of Available Appropriations,” September 2013, http://www.defense.gov/home/features/2013/0913_govtshutdown/Contingency-Plan-Guidance-Attachment.pdf; hereinafter, DOD, “Contingency plan memo,” September 25, 2013.

⁹ DOD, Secretary of Defense, Chuck Hagel, Memorandum for Subject: Components and defense agencies, “Guidance for Implementation of Pay Our Military Act,” October 5, 2013; http://www.defense.gov/pubs/Memorandum-Pay_Our_Military_Act_Guidance-FINAL.pdf.

¹⁰ DOD, Transcript, Robert Hale, OSD/C, “Press Briefing on the Secretary of Defense’s Interpretation of the Pay Our Military Act,” October 5, 2013; <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5320>.

intelligence, information technology and other administrative support) (see **Appendix B** for complete text).¹¹

The services and defense agencies are currently determining how to carry out the revised guidance. As the services and DOD components implement this decision, civilians will return to work starting this week and will become eligible to be paid on time under H.R. 3210.

Because H.R. 3210 only covers the pay and allowances of personnel, but not “critical parts and supplies” necessary to provide that support,” Secretary of Defense Chuck Hagel warned that at some point once current inventories run out, DOD civilians would not be able to do their jobs. At that point, he would be “forced once again to send them home.”¹²

DOD is continuing to review whether the number of contractor personnel, also covered under H.R. 3210, will be increased. Expanding the number of contractor personnel covered could be problematic because it could be difficult to determine the amount of monies providing pay, the funding covered in POMA. Contracts are typically written in terms of the goods or services to be provided rather than the amount for pay, one element of cost.

The Issue of Retroactive Pay for Civilians

Those defense civilian or contractor personnel who were or remain furloughed would only receive pay for that period if Congress passes legislation to pay furloughed personnel. On October 5, 2013, the House unanimously passed H.R. 3223, which would provide retroactive pay for all federal employees, as occurred during the 1995 to 1996 shutdown. The President has announced his support.¹³ The Senate has not yet taken up the bill at this time.

The Issue of Pay for Guard and Reserve Drill Training

On October 3, 2013, the House passed H.R. 3230, Pay Our Guard and Reserve Act, which would provide appropriations to cover the pay of inactive-duty weekend training reservists in FY2014 until a regular or continuing resolution appropriations act is passed.¹⁴ (Reservists performing two-week annual training are already covered under H.R. 3210.) Although reservists would be paid, it is not clear how much training would take place because H.R. 3230 does not provide appropriations to cover related training costs (e.g., fuel, spare parts, food services, and ammunition). Reservists might be confined to training that did not involve additional expenses beyond their pay, although DOD might be able to draw on existing stocks or existing contracts to address these issues at least in the short-term.

This bill is part of a package of five “mini” CRs that would provide funding, generally at the FY2013-enacted level including the effects of sequestration, for the District of Columbia, the

¹¹ DOD, Secretary of Defense, Chuck Hagel, Memorandum for Subject: Components and defense agencies,”Guidance for Implementation of Pay Our Military Act,” October 5, 2013; http://www.defense.gov/pubs/Memorandum-Pay_Our_Military_Act_Guidance-FINAL.pdf.

¹² *Ibid*, p. 4.

¹³ OMB, Office of Management and Budget, “Statement of Administration POLICY, “H.R. 3223—Federal Employee Retroactive Pay Fairness Act (House),” October 4, 2013; http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr3223h_20131004.pdf.

¹⁴ See H.R. 3230 as passed by the House.

National Institutes of Health, various museums, Veterans Administration funding, and pay for guard and reservists. According to press reports, the Senate leadership is not interested in considering partial funding appropriations of particular agencies, and the White House has issued a veto threat.¹⁵

DOD's Contingency Plan for a Shutdown

In a September 30, 2013 press conference, DOD Comptroller Robert Hale suggested that while all military personnel would continue to report for duty, only those reservists, DOD civilians, and contractor personnel providing support for the Afghanistan war and other unspecified military operations would continue to work. As an example, DOD Comptroller Hale suggested that civilians providing support for some military operations, such as ships deployed in the Mediterranean would be “excepted” but that civilian personnel supporting other military activities, such as peacetime training off of Norfolk, would be furloughed. Individual commanding officers are making these decisions. Comptroller Hale agreed that roughly half of DOD's civilian workforce of about 800,000 would be furloughed as was estimated in 2011 during previous shutdown planning.¹⁶

In DOD's September 23, 2013 memorandum to all its employees, Deputy Secretary of Defense Ashton B. Carter said that under the department's plan in the event of a funding lapse, while “all military personnel would continue in a normal duty status, a large number of our civilian employees would be temporarily furloughed.”¹⁷ Three days later, in a September 26, 2013 memo, the Deputy Secretary said that “commanders and supervisors will ... provide additional detail [and] your status under a potential lapse.”¹⁸ For those activities that are not excepted, personnel were expected to come in to carry out “orderly shutdown activities” that are expected to take no more than three or four hours.¹⁹

Debate over Interpretation of H.R. 3210, “Pay Our Military Act”

Although the President signed H.R. 3210 on September 30, 2013, the Department of Defense did not revise its contingency plan until October 5, 2013, after consulting the Department of Justice. This delay appears to reflect some debate about how to interpret the language in the new law, which provides appropriations to cover the pay and allowances of those DOD employees who are currently “excepted” from furlough, hence paying those personnel on time, and gives the

¹⁵CQ News, “Senate Democrats Rebuff ‘Mini CR’ Measures, by Sarah Chacko, CQ Roll Call, Oct. 3, 2013; <http://www.cq.com/doc/news-4356141?from=bluebox&pos=bb10>. OMB, “Statement of Administration Policy, H.J. Res. 70, 71, 72, 73 and H.R. 3230 – Limited Appropriations Resolutions, 2014 (Rep. Rogers, R-KY),” October 2, 2013; http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphrj70-71-72-73_hr3230hr_20131002.pdf.

¹⁶ Department of Defense, Under Secretary of Defense (Comptroller) Robert F. Hale, “News Briefing on the Department Of Defense's Plan for a Possible Government Shutdown,” September 27, 2013; <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5308>.

¹⁷ DOD, Memorandum for all Department of Defense Employees, “Guidance for Potential Government Shutdown,” September 23, 2013.

¹⁸ DOD, Memorandum for all Department of Defense Employees, “Potential Government Shutdown,” September 26, 2013.

¹⁹ OMB, Director Sylvia Burwell, M-13-22, Memorandum for the Heads of Executive Departments and Agencies, “Planning for Agency Operations during a Potential Lapse in Appropriations,” September 17, 2013, <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-22.pdf>.

Secretary of Defense authority to bring previously furloughed civilians and contractor personnel back to work, provided he determines that they are providing support to members of the armed forces performing active service. Some argued that this latter group could constitute all or nearly all DOD civilians and contractors.

Initially, Secretary of Defense Hagel indicated that this issue of designating additional groups of civilians or contractors for return from furlough was under review in the Administration. In an October 1, 2013, press conference, Secretary of Defense Chuck Hagel said:

Our lawyers are now looking through the law that the president signed, along with the Department of Justice lawyers and OMB, to see if there's any margin here or widening in the interpretation of the law regarding exempt versus non-exempt civilians. Our lawyers believe that maybe we can expand the exempt status. We don't know if that's the case, but we are exploring that, so that we could cut back from the furloughs some of the civilians that had to leave.²⁰

That same day, Representative Bud P. McKeon, the Chair of the House Armed Services Committee, sent a letter to Secretary Hagel arguing that H.R. 3210 provides the Secretary with "broad latitude" to end the furloughs for DOD civilians.

I believe the legislation provides you with broad latitude and I encourage you to use it. The text does not limit to provision of pay to civilians who were previously categorized by the Administration as "excepted" or "essential" for the purposes of Department of Defense operations in the event of a government shutdown. Therefore, I strongly encourage you to use the authority Congress has given you to keep national security running, rather than keeping defense civilians at home when they are authorized to work.²¹

The congressional intent of the legislation is not clear.²² In a recent statement, Congressman Mike Coffman, sponsor of H.R. 3210, suggested that H.R. 3210 would protect "the pay for Department of Defense civilian employees and contractors whose work is essential for military operations."²³ In the meantime, DOD is implementing its current plan based on the September 25, 2013 guidance according to Pentagon spokesman.²⁴

²⁰ Department of Defense, News transcript, "Media Availability with Secretary Hagel on the Government Shutdown" October 1, 2013; <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5314>.

²¹ Howard P. "Buck" McKeon, Chairman, House Armed Services Committee, "Letter to Chuck Hagel, Secretary of Defense, October 1, 2013, <http://armedservices.house.gov/index.cfm/2013/10/mckeon-letter-to-hagel-on-pay-our-military-act>.

²² H.R. 3210 was not considered in committee by either house so there are no reports indicating legislative intent.

²³ Congressman Mike Coffman, website, "House Passes Coffman Bill to Keep Military Paid," http://coffman.house.gov/index.php?option=com_content&view=article&id=875:house-passes-coffman-bill-to-keep-military-paid&catid=36:latest-news&Itemid=10.

²⁴ *Inside Defense*, "As DOD Executes Shutdown Plan, Confusion Erupts Over 'Pay Our Military Act' (updated), October 2, 2013.

Debate over Interpretation of H.R. 3210

The language in Section 2(a)(1) of H.R. 3210 provides appropriations to cover the pay and allowances of all members of the armed forces performing “active service” (“active service” includes both active duty and full-time National Guard duty) during any period in FY2014 in which interim or full-year appropriations are not available. The language in Sections 2(a)(2) and 2(a)(3) provides appropriations to cover the pay and allowances of those DOD civilians and contractor personnel whom the Secretary of Defense determines “are providing support to members of the Armed Forces described in paragraph (1).”

DOD’s September 25, 2013, contingency plan guidance—which is derived from the laws and policies governing operations in the absence of appropriations—makes distinctions between the types of activities for which civilian and contractor personnel would be “excepted” from furlough based on the types of activities being conducted by the military. For example, while all support for the Afghan war would be provided, support for day-to-day peacetime training for active-duty military would not necessarily be conducted.

The debate over H.R. 3210 appears to revolve around the extent to which the authority of the bill should be confined to those civilians and contractors who are already considered “excepted,” or whether the Secretary of Defense should apply it more broadly to include additional DOD civilian or contractor personnel.

On October 5, 2013, DOD announced that it was adopting the broader interpretation, and substantially modified its original guidance. The issue of whether to expand the number of contractor personnel remains under review.

Questions About DOD Operations During a Lapse in Funding

The 2013 DOD guidance, like 2011 guidance provides that many DOD activities would continue during the period of a funding lapse, though other activities would halt. Some personnel would be “excepted” from furloughs, including all uniformed military personnel on active duty, while others would be subject to furlough. “Excepted” military, reservists, and civilian personnel who would continue to work during a lapse in appropriations would be paid on time because of the passage of H.R. 3210. Other furloughed personnel would not be paid, and may be paid retroactively if Congress chooses to do so once annual appropriations are enacted. This report provides an overview of recent guidance and precedents over the past 30 years that have governed planning for DOD operations in the event of a funding lapse, and it discusses their implications for a possible, impending shutdown.

Among the questions the report address are the effects of a shutdown on

- pay for uniformed military personnel and DOD civilians;
- how reservists and military technicians may be affected;
- types of activities to protect persons and property that are “excepted;”
- potential effects on contracting;
- whether DOD Dependent Schools or childcare centers would continue to operate during a shutdown;
- how long operations of the Defense Finance and Accounting Service could continue; and
- whether the “Feed and Forage Act,” 41 U.S.C. 11, which allows the Defense Department to obligate funds in advance of appropriations for certain purposes, might be invoked to provide additional flexibility during a funding lapse.

Answers to some of these questions are quite simple, others complex, and others uncertain.

Assuming that past Attorney General, OMB guidance, recent DOD guidance, and current new law will be followed in the event of an impending shutdown, brief answers to these questions are as follows:

- **Pay of Uniformed Military Personnel and DOD Civilians:** The current DOD guidance provides that all active-duty military personnel would be “excepted” from furloughs during a lapse in funding, as they have been in the past.²⁵ H.R. 3210, the Pay Our Military Act, signed by President Obama on September 30, 2013, provides appropriations to allow the Defense Department to cover the pay and allowances of members of the armed forces performing active service, and the DOD civilians and contractors who provide support to them. H.R. 3210 provides this authority through January 1, 2015, or until other regular or continuing appropriations are enacted.²⁶ This bill means that today’s experience differs from the previous government shutdown in 1995 and 1996, when this authority was not provided and DOD was marginally affected by the first short shutdown and not by the second, longer shutdown because a defense appropriations bill had been enacted.
- **Potential effects on reservists:** DOD’s Contingency Plan specifies that activated reservists, like active-duty military, would continue to conduct their duties. The Contingency Plan also specifies that reservists will not perform inactive duty training (e.g., weekend drills) “except where such training directly supports an excepted activity” and may not be ordered to active duty (e.g. for annual training) “except in support of those military operations and activities necessary for national security, including fulfilling associated pre-deployment requirements.”²⁷ This would include those reservists currently “training up” for deployments. H.R. 3210 provides appropriations to cover the pay and allowances of activated reservists, but would not cover the compensation of any reservists performing inactive duty training. Under DOD’s Contingency Plan, military technicians—who are federal civilian employees required to hold membership in the reserves as a condition of their civilian employment—will continue to perform their civilian duties only if they are deemed necessary to carry out excepted activities.
- **National Security and Protection of Life and Property:** The 2013 DOD guidance includes not only military operations in Afghanistan but also some training and other support necessary for the Afghan war or other military operations. Excepted military activities are those considered necessary to “execute planned or contingency operations necessary for national security,” including “administrative, logistical, medical, and other activities in direct support of such activities.” Other military activities deemed necessary to carry out those operations are recruiting during contingency operations, command, control, communications, computer, intelligence, surveillance and reconnaissance. Not listed are depot maintenance repair of equipment or base

²⁵DOD, “Contingency plan memo,” September 25, 2013.

²⁶ H.R. 3210; see also, Roll Call, “President Signs Military Pay Bill,” by Connor O’Brien, September 30, 2013.

²⁷ DOD, “Contingency plan memo,” September 25, 2013.

support, activities which typically do not involve active-duty personnel.²⁸ Presumably, civilians performing activities *not* directly required to support military operations would be furloughed under DOD's original plan. This plan was modified with new guidance issued after enactment of H.R. 3210 (see "Recent Developments").

- **Contractor Activities:** Contracts that rely on previously appropriated funds, whether for weapon systems with deliveries over several years or support services where contracts may span fiscal years, would continue. The Defense Department, however, would only be able to sign new contracts for goods funded with FY2014 funds for activities deemed necessary to support military operations, and no monies could be disbursed (checks sent out) under those contracts. An exception could be any contractor personnel covered by H.R. 3210, whose support was necessary for military operations, such as contractor personnel in Afghanistan.²⁹
- **Operation of DOD Dependent Schools and Childcare:** The 2013 and 2001 DOD guidance provides that, the support that dependent schools provide to military personnel is directly enough related to national security that the schools may continue to operate during a shutdown.³⁰ The 2013 guidance also concludes that child care "essential to readiness" may continue as well as emergency family support³¹
- **Operation of the Defense Finance and Accounting Service (DFAS) and Other Working Capital Funds:** Some DFAS operations would be likely to continue through a funding lapse, initially using funds drawn from reimbursements from prior year funds, and then to issue paychecks for those covered under H.R. 3210 (see "Recent Developments"), and to control funds for contracts in support of excepted activities.³² DFAS personnel needed to administer military retired pay and other retiree benefits would be expected to work during a funding lapse because the authority to distribute benefits drawn from multi-year funds, including retirement funds, is implied by the responsibility agencies have to provide payments to which recipients are entitled.³³ Military pensions and other retirement benefits are entitlements financed through the military retirement and

²⁸ DOD, "Contingency plan memo," September 25, 2013.

²⁹ Department of Defense, Under Secretary of Defense (Comptroller) Robert F. Hale, "News Briefing on the Department Of Defense's Plan for a Possible Government Shutdown," September 27, 2013; DOD Contingency plan memo," September 25, 2013.

³⁰ *Ibid.*

³¹ *Ibid.*, p. 5 and p. 7.

³² DOD, "Contingency plan memo," September 25, 2013. DFAS activities financed through reimbursements from other appropriations would also continue as long as those funds lasted.

³³ DOD, Transcript, Robert Hale, OSD/C, "Press Briefing on the Secretary of Defense's Interpretation of the Pay Our Military Act," October 5, 2013; <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5320>.

In reviewing the applicable law in 1980 and 1981, the Attorney General concluded that agencies are "authorized by law" to incur obligations in advance of appropriations "for the administration of benefit payments under entitlement programs when the funds for the benefit payments themselves are not subject to a one-year appropriation." This reasoning is the basis on which Social Security Administration personnel are authorized to continue to process Social Security checks even when appropriated funds for the agency lapse. See Opinion by Attorney General Benjamin Civiletti, January 16, 1981.

health care fund, which is available independently of annual defense appropriations.

Though new appropriations are not available during a funding lapse, a substantial amount of money provided to the Defense Department is available for obligation for more than one year, including funding for R&D, procurement, military construction, and purchases of material for inventories of stock funds. The 2013 shutdown guidance provides that DFAS can make adjustments for prior year unobligated balances, suggesting that some administration, contract oversight, and auditing functions, some of which are carried out by DFAS, may also continue.

Many DFAS personnel are paid through reimbursements from other appropriated accounts for services that DFAS provides to organizations within DOD, and those funds could be available to support DFAS services to continue national security-related operations.³⁴ DOD's 2013 guidance provides that other activities funded through reimbursements would also continue operations as long as cash was available, recently estimated as about two weeks according to DOD Comptroller Robert Hale.³⁵

- **Authority to Obligate Funds Under the “Feed and Forage Act”:** The Feed and Forage Act, 41 U.S.C. 11, says, in part,

No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and ... the Coast Guard when it is not operating as a service in the Navy for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies.

During the Vietnam War, the law was used to provide funds when supplemental appropriations were delayed. In more recent years, it has been used mainly to provide short-term funding for unplanned military operations. If invoked during a funding lapse, the act would give DOD authority to obligate funds in advance of appropriations for the limited number of purposes specified. While the DOD 2013 guidance mentions the Feed and Forage Act, use of the Feed and Forage Act during a funding lapse appears unnecessary during earlier shutdowns, Attorney General and OMB guidance has allowed national security-related operations to continue. The authority for DOD to continue national security-related activities appears to be considerably broader than that provided by the Feed and Forage Act, which is limited in purpose and which does not directly provide authority to obligate funds for pay of military personnel.³⁶ Moreover, like

³⁴ According to Army guidance cited later in this report, during a lapse in appropriations, “Funded and automatic reimbursable orders may be accepted consistent with receipt of current year funded reimbursable authority”—i.e., reimbursable activities may continue to the extent funds are available to provide the reimbursements.

³⁵ DOD, “Contingency plan memo,” September 25, 2013, attachment, p. 8. DOD, Transcript, Robert Hale, OSD/C, “Press Briefing on the Secretary of Defense’s Interpretation of the Pay Our Military Act,” October 5, 2013; <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5320>.

³⁶ The Feed and Forage Act does not itself permit pay of personnel, but a different statute provides one exception. Section 2201(c) of Title 10 U.S. Code allows funding for an increase in the number of active duty troops to be incorporated into the list of activities that may be funded under 41 U.S.C. 11—i.e., it indirectly expands the purposes for which funding under the Feed and Forage Act may be available. The provision applies only to funding for an increase in the number of active duty personnel, however, not to funding of current personnel levels.

the authority provided by the Antideficiency Act, the Feed and Forage Act permits only the obligation of funds and not disbursements until funds are subsequently appropriated—neither law allows the Defense Department to issue pay checks or to make other payments.³⁷ While invocation of the Feed and Forage Act during a shutdown is conceivable, it is not clear what purpose it would serve.³⁸

- **Activities to Protect Health and Safety:** The 2013 DOD guidance includes a broad range of activities under the “safety of persons and protection of property” category. These activities range from emergency response and intelligence support to terrorist threat warnings to emergency repair of utilities and associated equipment, and some counterdrug activities.³⁹

Implications of DOD Guidance

The legal authority for critical military operations to continue is reasonably clear. The 2013 guidance also provides that all other activities needed, in the view of DOD to support these “excepted” activities, may carry on, including logistics, intelligence, communications, and contracting functions. Guidance also defines quite broadly the range of activities that are permitted to continue in support of operational forces, including personnel support activities such as defense dependent schools and child care, temporary duty travel in support of exempted activities, and new contracts for exempted activities. The Administration is free to change these guidelines, based on its own interpretation of relevant laws and regulations.

Nonetheless, though authority to sustain ongoing military operations is clear in principle, a lapse in appropriations, if it were to extend for more than a very limited period of time, could disrupt operations to some degree. As the DOD guidance illustrates, efforts to distinguish between, on the one hand, those activities that are sufficiently important for national security to warrant continuation during a lapse in appropriations and, on the other hand, activities that do not directly support national security involve difficult, and to some degree, arbitrary judgments.

Unit training would continue for some combat units, but not for others, depending on their place in deployment or force generation plans. For example, military personnel preparing to deploy to Afghanistan would continue. Medical personnel would continue to provide services to active duty personnel, but not to dependents or retirees who might normally receive non-emergency services in the same facilities. Issuance of some contracts would continue during a shutdown, but other contracting activity, perhaps done by the same people, would not. Local commanders would have the authority to make final judgments on which activities and missions are essential and must be

³⁷ See U.S. Department of Defense, Office of the Under Secretary of Defense (Comptroller), “Budget Execution: Processes and Flexibility,” March 2009, p. 17, http://comptroller.defense.gov/execution/Budget_Execution_Tutorial.pdf, which says, with regard to the Feed and Forage Act: “These authorities require congressional notification and do not permit actual expenditures until Congress provides an appropriation of the requested funds.” The tutorial also notes that the authority to fund an increase in personnel under 10 U.S.C. 2210 “is of limited value since it provides only for obligations and not for expenditures (payments to members).”

³⁸ The 2011 DOD guidance and 1998 Army shutdown guidance discussed in this mention the Feed and Forage Act as a potential source of authority, but neither discusses the circumstances under which it might be invoked.

³⁹ DOD, “Contingency plan memo,” September 25, 2013.

supported; this could result in inconsistent decisions on what activities may continue and what must be shut down across the whole force.

Effects on Military, Civilian, and Contractor Personnel

Virtually all military personnel and most civilians are normally paid out of annual appropriations. With passage of H.R. 3210, funds for all active-duty military, activated reservists, and those DOD civilian and contractor personnel whose support is necessary for military operations, for other DOD “excepted” activities, and to support active service personnel will be paid on time despite the lapse in other appropriations. Other DOD civilian and contractor personnel would not be paid. DOD is continuing to review the status of many contractor personnel under H.R. 3210.

Reservists performing weekend drills would not report for duty or be paid under DOD guidance unless Congress decides otherwise at a later time. Furloughed personnel could be subject to financial hardships if a lapse in appropriations extends past a normal pay date, since no disbursements may be made. The hardships that a sudden stop in pay would impose on civilian or contractor personnel, would, of course, vary depending on individual circumstances. Families with a second income and with substantial savings might be able to manage with few problems. Others, particularly those with young families and limited savings, might be affected very badly.

Effects of Limits on Expenditures on Contracting

In the event of a lapse in funding, the Defense Department would have the authority to obligate funds for goods and services needed to sustain its continuing operations—that is, it can sign contracts with a binding commitment to pay providers—for activities deemed essential to support military operations, but the Antideficiency Act prohibits expenditures or issuing checks for amounts obligated in advance of appropriations. While contracts for activities necessary to support military operations could be signed, reimbursements could not be provided and it is not clear that all vendors would be willing to provide goods or services under these circumstances, particularly if a shutdown appears likely to continue for an extended period.

Other new contracts, for example, for new weapon system programs or for higher production rates could be delayed until FY2014 appropriations are enacted if the connection to ongoing military operations is indirect. There is also likely to be some confusion among contractors because funds remaining available from prior years can continue to be distributed, but not new funds. In DOD appropriations acts, funding for R&D is typically available for obligation for two years, for most procurement for three years, and for shipbuilding for five years. Contract authority to purchase stocks of material for inventories is not limited by fiscal year. Unobligated balances of funds for those purposes would remain available even in the absence of new funding.

Money for operation and maintenance, however, is generally available for obligation for only one year, so most funding for day-to-day operations of the department would lapse and operations could continue only under the Antideficiency Act exceptions that allow the obligation of funds, but not disbursements. Whether vendors could be paid, therefore, depends on which pot of money obligations are made from, and money for more immediate, readiness-related activities would generally not be used to make prompt payments.

Under the circumstances, the Defense Department can be expected to sustain its most important operations, but not without some difficulties in managing the acquisition of material and services from vendors.

Authorities and Conditions Affecting DOD Operations in the Absence of Appropriations

Based on the 2013 guidance, as well as earlier precedents, followed over the past 30 years, the Department of Defense may continue, in the absence of appropriations, to carry on a quite broad range of activities. The most far-reaching authority that affects DOD is authority to continue activities that “provide for the national security.”⁴⁰

Even DOD’s authority to provide for national security, however, may be constrained by legal limits on the financial procedures that are permitted when appropriations lapse. Among other things, in order to carry on activities that are permitted to continue, but for which appropriations have lapsed, funds may be obligated in advance of appropriations (i.e., legally binding contractual commitments may be made), but expenditures of funds that derive from such obligations (i.e., the payment of bills with checks or electronic remittances) are prohibited. As a result, though uniformed military personnel and many DOD civilian employees may be expected to continue in their duties during a funding lapse, those normally paid with current-year appropriated funds, including virtually all uniformed personnel and most civilians, will not receive pay until after appropriations become available. Nor will payments to vendors for goods and services be permitted if the payments derive from contracts entered into in advance of appropriations.

The legal authority under which the Department of Defense may continue operations in the event of a funding lapse is established by the Antideficiency Act, now codified at 31 U.S.C. 1341 and 1342. The legal interpretation of the conditions under which operations may continue has been established, in turn, by Department of Justice legal opinions and Office of Management and Budget directives issued initially in 1980 and 1981, and that OMB has referred to in providing guidance on shutdowns since then. Agencies, including DOD, have also been required to prepare detailed plans for implementing a shutdown when lapses in appropriations were anticipated.

Ultimately, federal agency plans, based on OMB guidance, determine which activities will continue in the event of a shutdown and which will not. Current agency plans are now posted on OMB’s website or by individual agencies. DOD operations in the event of a shutdown would also be governed by financial management procedures that would, in turn, affect how a shutdown is managed.

⁴⁰ Office of Management, Director, “Memorandum for Heads of Executive Departments and Agencies,” Agency Operations in the Absence of Appropriations,” November 17, 1981, http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-4.pdf.

Key Department of Justice and OMB Guidance on Operations During a Lapse in Appropriations⁴¹

- An opinion by Attorney General Benjamin Civiletti on April 25, 1980, that found few exceptions to Antideficiency Act limits on funding in the absence of appropriations;
- A memorandum by OMB Director James McIntyre on August 28, 1980, that required agencies to submit plans for operations in the event of a lapse in appropriations;
- A memorandum by OMB Director James McIntyre on September 30, 1980, that provided guidance to agencies on operations permitted to continue during a lapse in appropriations;
- An extensive opinion by Attorney General Civiletti on January 16, 1981, reviewing in detail the legal basis for the guidance that OMB provided on September 30, 1980;
- A memorandum by OMB Director Richard Darman on November 17, 1981, that repeated the guidance provided by the September 30, 1980, OMB memorandum and that added some further guidance, including the point that obligations of funds may be permitted in advance of appropriations, but not expenditures;
- A memorandum by Assistant Attorney General Walter Dellinger on August 16, 1995, addressed to OMB Director Alice Rivlin, that found that a 1990 amendment to the Antideficiency Act provided no basis for altering earlier guidance on agency operations in the event of a lapse in appropriations;
- A memorandum to the heads of executive departments and agencies by OMB Director Rivlin on August 22, 1995, that conveyed the Dellinger memorandum and that required agencies to maintain contingency plans for a lapse in appropriations based on the September 30, 1980, and November 17, 1981, OMB memoranda;
- A memorandum for the heads of executive departments and agencies by OMB Director Lew on April 7, 2011 providing further guidance on contracting, grant administration, and payments processing during a lapse in appropriations;
- A memorandum for the heads of executive departments and agencies by OMB Director Burwell on September 17, 2013, providing further guidance on contracting, grant administration, and payments processing during a lapse in appropriations.

The following discussion (1) briefly reviews the legal basis for the Department of Defense to continue operations during a funding lapse and the attendant legal constraints on the scope of activities and the financial mechanisms that are permitted; (2) provides a brief overview of the possible impact of a lapse in funding on military and civilian personnel, on current military operations including operations in Afghanistan, and on day-to-day business operations of the Department of Defense; and (3) provides selected excerpts from DOD guidance on activities that may continue during a funding lapse and those that may not.

⁴¹ The April 25, 1980 and January 16, 1981 Civiletti opinions and the September 30, 1980 OMB memorandum are available as appendices in U.S. General Accounting Office, *Funding Gaps Jeopardize Federal Government Operations*, GAO Report PAD-81-31, March 3, 1981, online at <http://archive.gao.gov/f0102/114835.pdf>. The other memoranda cited, except for the 2011 and 2013 OMB memos, are available online as appendices to Office of Personnel Management, "Guidance and Information on Furloughs," online at <http://www.opm.gov/furlough/furlough.asp>. The 2011 OMB memo is available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-13.pdf>, while the 2013 OMB memo is available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-22.pdf>. Hereafter in this report, these opinions and memoranda are cited by author or agency and date. Other Department of Justice opinions related to operations in advance of appropriations have been issued as well.

The Antideficiency Act

The Antideficiency Act, now codified at 31 U.S.C. 1341 and 1342,⁴² generally prohibits the obligation or expenditure of funds exceeding amounts appropriated. It provides two quite broad exceptions, however:

- Section 1341 says that an employee of the United States Government may not “involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.” Subsequent Attorney General Opinions on operations permitted during a lapse in appropriations have been intended, in part, to identify what obligations in advance of appropriations should be considered to be “authorized by law.”
- Section 1342 says, in part, that “An officer or employee of the United States Government may not accept voluntary services... or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.” One basis for Department of Defense operations to continue during a funding lapse is this authority to employ personnel to protect human life and property. Department of Justice opinions have found that the authority to employ personal services implies the authority to procure material that personnel may need to carry out their emergency responsibilities (see below for a discussion). OMB guidance to agencies on preparations for a shutdown has identified a quite extensive range of activities that are permitted to continue in the absence of appropriations in order to protect human life and property.

While the Antideficiency Act permits certain exceptions to the requirement that agency operations cease when appropriations are not provided, the exceptions permit only the obligation of funds in advance of appropriations for the excepted activities, not the expenditure of funds. Contracts for material and services may be signed, and personnel may continue to be employed, but the Antideficiency Act does not permit agencies to make payments to vendors or issue pay checks to personnel if the payments would have to be drawn from amounts obligated in advance of

⁴² These provisions were formerly Sections 655(a) and 655(b) of Title 31, and were renumbered without substantive change in a recodification of Title 31 by P.L. 97-258, enacted on September 13, 1982. Attorney General opinions in 1980 and 1981 discussed in this memo refer to the earlier numbering. Section 1342 was also amended by P.L. 101-508, November 5, 1990. The current version of the Antideficiency Act reads, in part, as follows:

§ 1341. Limitations on expending and obligating amounts

(a)

(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund ...

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

§ 1342. Limitation on voluntary services

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.

appropriations. To be absolutely clear, no money is actually available, but only the promise to provide funds at some time in the future.

OMB and Justice Department Guidance on DOD Activities Permitted During a Lapse in Appropriations

Attorney General opinions released in April 1980 and January 1981 and OMB memoranda issued in September 1980 and November 1981—and referred to repeatedly in later years—provide the basic guidance on activities that DOD and other executive branch agencies may be allowed to continue when appropriations are not provided. In general, these activities are understood to be “authorized by law” under Section 1341 of the Antideficiency Act or to permit the employment of personal services for emergencies involving the safety of human life or the protection of property under Section 1342. The principal activities that the Justice Department and OMB have determined may continue include the following.

- **Activities “necessary to bring about the orderly termination of an agency’s functions”:** The Attorney General found that agencies may obligate funds to shut down operations after a funding lapse under the terms of the Antideficiency Act itself, since “it would be impossible in fact for agency heads to terminate all agency functions without incurring any obligations whatsoever in advance of appropriations.” In general, such activities are expected to be very limited—OMB guidance in 2013 said that “orderly shutdown activities should take no more than three or four hours following the expiration of funding.”⁴³
- **Administration of benefit payments provided through funds that remain available in the absence of new appropriations:** The Attorney General found that departments are “authorized to incur obligations in advance of appropriations for the administration of benefit payments under entitlement programs when the funds for the payments themselves are not subject to a one-year appropriation.” This follows, he said, from the premise that funding is “authorized by necessary implication from the specific terms of duties that have been imposed on, or authorities that have been invested in, the agency.” The Social Security Administration, by this reasoning, may continue to pay personnel and to fund operations needed to manage pensions during a lapse in funding because of its responsibility to distribute benefits that are provided through a permanent trust fund that is not affected by a lapse in appropriations. Presumably, DOD administration of military retired pay and medical benefits may continue as well.
- **Activities and purchases financed with prior year funds and ongoing activities for which funding has already been obligated:** Substantial amounts of DOD funding are provided in accounts that are available for obligation for more than a year—R&D funding is typically available for two years, most

⁴³ OMB, Director Sylvia Burwell, M-13-22, Memorandum for the Heads of Executive Departments and Agencies, “Planning for Agency Operations during a Potential Lapse in Appropriations,” September 17, 2013, <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-22.pdf>.

procurement for three years, and shipbuilding funds for five years. Contract authority to procure material for stockpiles is also available as “no year” money. Contract authority provided understanding law and unobligated balances in the acquisition accounts remain available during a lapse in funding because they have previously been provided—only current-year funding is affected by a lapse in appropriations. Similarly, contracts which have already been signed, and which may require delivery of services or material as ordered, remain valid.⁴⁴ Most significantly, obligations already made or new obligations made from funds appropriated in prior years may lead to expenditures of funds, in contrast to obligations made in advance of appropriations. Whether vendors may be paid during the period of a funding lapse, therefore, depends on which pot of money the funds are drawn from—some contractors may be paid as usual while others may not be. At the very least, a degree of confusion is likely. A further complicating factor is whether administrative personnel needed to manage contracts are permitted to continue working. To the extent that acquisition personnel are paid with annual appropriations—which is generally the case—personnel may be available to manage contracts only if they are excepted from a shutdown. It is not necessarily to be assumed that agencies have authority under the Antideficiency Act to except from furloughs personnel needed to administer the use of funds available from prior year appropriations or other sources. Both the 2011 and 2013 DOD guidance, however, say that personnel may continue to administer activities financed with prior year or other available funds that are necessary to support excepted activities.

- **Activities undertaken on the basis of constitutional authorities of the President:** The Attorney General found that the President has an inherent constitutional authority to obligate funds in advance of appropriations to carry out “not only functions that are authorized by statute, but functions authorized by the Constitution as well.” When the Constitution grants a specific power to the President, the Attorney General reasoned, “Manifestly, Congress could not deprive the President of this power by purporting to deny him the minimum obligational authority sufficient to carry this power into effect.” This does not mean that the President can “legislate his own obligational authorities.” But in the opinion of the Attorney General, “the policy objective of the Antideficiency Act ... should not alone be regarded as dispositive of the question of authority.” The Attorney General did not specifically address whether this provides a basis for the President to direct that funds be obligated in advance of appropriations for reasons of national security. OMB memoranda since 1980 repeat the conclusion that funding may be continued to “Provide for the national security, including the conduct of foreign relations essential to the national security or the safety of life or property.”⁴⁵ This wording might be read to imply that the authority of agencies

⁴⁴ There has been some discussion of the possibility that the military services could obligate funds for civilian pay for at least a month or so in advance, which would allow personnel to continue working and for pay checks to be issued for some time after a funding lapse. Such a prospect is at odds with longstanding procedures which require agencies to halt operations in the event of a funding lapse and for non-excepted personnel to be furloughed. Continuing resolution language stipulates that “only the most limited funding action of that permitted ... shall be taken in order to provide for continuation of projects and activities” (P.L. 111-242, Section 110), which would appear to limit such advance obligations.

⁴⁵Office of Management, Director, Memorandum for Heads of Executive Departments and Agencies,” Agency Operations in the Absence of Appropriations,” November 17, 1981, [http://www.opm.gov/policy-data-oversight/pay-\(continued...\)](http://www.opm.gov/policy-data-oversight/pay-(continued...))

to continue operations related to national security is independent of the authority to continue activities related to the safety of life or the protection of property. National security-related activities may, then, be among those for which obligations in advance of appropriations are considered to be “authorized by law” under Section 1341 of the Antideficiency Act and are permitted independently of Section 1342 and whether or not they protect life or property. For its part, however, the Defense Department has generally not cited any authority beyond that provided in Section 1342.

- **Activities that protect life and property:** OMB guidance periodically issued in preparation for a shutdown concludes that agencies have the authority to “Conduct essential activities to the extent that they protect life and property.”⁴⁶ The guidance reflects Section 1342 of the Antideficiency Act. Section 1342, however, directly permits the obligation of funds only for employment of “personal services” and not for other purposes. Rather than accept such a limited view of what is permitted, the January 16, 1981, Attorney General opinion provided a basis for expanding the scope of activities permitted under Section 1342 to include the acquisition of material needed to respond to emergencies to those:

in which a government agency may employ personal services ... it may also ... incur obligations in advance of appropriations for material to enable the employees involved to meet the emergency successfully. In order to effectuate the legislative intent that underlies a statute, it is ordinarily inferred that a statute “carries with it all means necessary and proper to carry out properly the purposes of the law.”

OMB memoranda provide a fairly long list of examples of activities permitted to continue on the grounds they protect life and property, including inpatient and emergency outpatient medical care; public health and safety activities; air traffic control; border protection; care of prisoners; law enforcement; disaster assistance; preservation of the banking system; borrowing and tax collection; power production and distribution; and protection of research property. The “protection of property” exception in itself appears to provide the basis for a quite wide range of government activities to continue.

(...continued)

leave/furlough-guidance/attachment_a-4.pdf.

⁴⁶ This phrasing was initially used in a memorandum issued by OMB Director James McIntyre on September 30, 1980, and repeated in a November 17, 1981, memorandum by OMB Director David Stockman. Subsequent OMB memoranda in advance of anticipated shutdowns refer to the 1980 and 1981 memoranda as guidance in preparing shutdown plans. See, for example, OMB Director Alice M. Rivlin, “Memorandum for Heads of Executive Departments and Agencies: Agency Plans for Operations during Funding Hiatus,” OMB Memorandum M-95-18, August 22, 1995, available on line as Appendix A-1 at <http://www.opm.gov/furlough/furlough.asp>.

Appendix A. 2013 DOD Guidance on Operations During a Lapse of Appropriations

Below are excerpts (in italics) from the September 25, 2013 guidance issued by Deputy Secretary of Defense, Ashton B. Carter, “Guidance for Continuation of Operations in the Absence of Available Appropriations” General guidance is followed by a specific list of excepted activities in an attachment.⁴⁷

Excerpts from Memorandum

The Department will, of course, continue to prosecute the war in Afghanistan, including preparation of forces for deployment into that conflict. . The Department must, as well, continue many other operations necessary for the safety of human life and protection of property, including operations essential for the security of our nation. These activities will be “excepted” from cessation; all other activities would need to be shut down in an orderly and deliberate fashion, including -with few exceptions -the cessation of temporary duty travel.

All military personnel will continue in a normal duty status regardless of their affiliation with excepted or non-excepted activities. Military personnel will serve without pay until such time as Congress makes appropriated funds available to compensate them for this period of service. Civilian personnel who are engaged in excepted activities will also continue in normal duty status and also will not be paid until Congress makes appropriated funds available. Civilian employees not engaged in excepted activities will be furloughed, i.e., placed in a non-work, non-pay status.

The responsibility for determining which functions would be excepted from shut down resides with the Military Department Secretaries and Heads of DOD Components, who may delegate this authority as they deem appropriate. The attached guidance should be used to assist in making this excepted determination. The guidance does not identify every excepted activity, but rather provides overarching direction and general principles for making these determinations. It should be applied prudently in the context of a Department at war, with decisions guaranteeing our continued robust support for those engaged in that war, and with assurance that the lives and property of our Nation’s citizens will be protected.

⁴⁷ DOD, Deputy Secretary of Defense Ashton, B. Carter, “Guidance for Continuation of Operations in the Absence of Available Appropriations,” September 25, 2013, http://www.defense.gov/home/features/2013/0913_govtshutdown/Guidance-for-Continuation-of-Operations-in-the-Absence-of-Available-App.pdf; also Attachment, DOD, “Contingency Plan Guidance for Continuation of Essential Operations in the Absence of Available Appropriations,” September 2013, http://www.defense.gov/home/features/2013/0913_govtshutdown/Contingency-Plan-Guidance-Attachment.pdf; hereinafter, DOD, “Contingency plan memo,” September 25, 2013. For general background, see *Shutdown of the Federal Government: Causes, Processes, and Effects*, coordinated by Clinton T. Brass. *Shutdown of the Federal Government: Causes, Processes, and Effects*, coordinated by Clinton T. Brass.

Excerpts from Attachment: examples of “Excepted” Activities

Following are excerpts (in italics) from the 2013 DOD shutdown planning guidance which, although not comprehensive, provides in more detail illustrative examples of the types of DOD activities that would and would not be excepted, in case of a lapse of appropriation.

The information provided in this document is not exhaustive, but rather illustrative, and is intended primarily to assist in the identification of those activities that may be continued notwithstanding the absence of available funding authority in the applicable appropriations (excepted activities). Activities that are determined not to be excepted, and which cannot be performed by utilizing military personnel in place of furloughed civilian personnel, will be suspended when appropriated funds expire. The Secretary of Defense may, at any time, determine that additional activities shall be treated as excepted.

Military Personnel

Military personnel are not subject to furlough. Accordingly, military personnel on active duty, including reserve component personnel on Federal active duty, will continue to report for duty and carry out assigned duties. In addition to carrying out excepted activities, military personnel on active duty may be assigned to carry out non-excepted activities, in place of furloughed civilian personnel, to the extent that the non-excepted activity is capable of performance without incurring new obligations.

Reserve component personnel performing Active Guard Reserve (AGR) duty will continue to report for duty to carry out AGR authorized duties. Reserve component personnel will not perform inactive duty training resulting in the obligation of funds, except where such training directly supports an excepted activity, and may not be ordered to active duty, except in support of those military operations and activities necessary for national security listed in Attachment 2, including fulfilling associated pre-deployment requirements. Orders for members of the National Guard currently performing duties under 32 U.S.C. 502(f) will be terminated unless such duties are in support of excepted activities approved by the Secretary of Defense.

Civilian Personnel

Civilian personnel, including military technicians, who are not necessary to carry out or support excepted activities, are to be furloughed. Only the minimum number of civilian employees necessary to carry out excepted activities will be exempt from furlough. Positions that provide direct support to excepted positions may also be deemed excepted if they are critical to performing the excepted activity. Determinations regarding the status of civilian positions will be made on a position by position basis, using the guidance in this document. Determinations shall be made for all positions, including those in the Senior Executive Service or equivalent, as well as those located overseas.

Following the expiration of appropriations, a minimum number of civilian employees may be retained as needed to execute an orderly suspension of non-excepted activities within a reasonable timeframe.

Civilian personnel whose salaries are paid with expired appropriations and later reimbursed from a non-DOD source (e.g., the Foreign Military Sales Trust Fund) are not exempt from

furlough solely on that basis. Personnel whose salaries are paid from a DOD appropriation or fund that has sufficient funding authority (e.g., multiyear appropriations with available balances from prior years) will not be subject to furlough. Heads of activities may, on their authority, require the return to work of civilian personnel in the event of developments (natural disasters, accidents, etc.) that pose an imminent danger to life or property.

Contracts

Contractors performing under a contract that was fully obligated upon contract execution (or renewal) prior to the expiration of appropriations may continue to provide contract services, whether in support of excepted activities or not. However, new contracts (including contract renewals or extensions, issuance of task orders, exercise of options) may not be executed unless the contractor is supporting an excepted activity. No funds will be available to pay such new contractors until Congress appropriates additional funds. The expiration of an appropriation does not require the termination of contracts (or issuance of stop work orders) funded by that appropriation unless a new obligation of funds is required under the contract and the contract is not required to support an excepted activity. In cases where new obligation is required and the contract is not required to support an excepted activity, the issuance of a stop work order or the termination of the contract will be required.

The Department may continue to enter into new contracts, or place task orders under existing contracts, to obtain supplies and services necessary to carry out or support excepted activities even though there are no available appropriations. It is emphasized that this authority is to be exercised only when determined to be necessary -where delay in contracting would endanger national security or create a risk to human life or property.

Additionally, when authorized by the Secretary of Defense, contracts for covered items may be entered into under the authority of the Feed and Forage Act.

Protection of Life and Property/National Security⁴⁸

- *Military operations and activities authorized by deployment or execute orders, or otherwise approved by the Secretary of Defense, and determined to be necessary for national security, including administrative, logistical, medical, and other activities in direct support of such operations and activities; training and exercises required to prepare for and carry out such operations.*
- *Activities of forces assigned or apportioned to combatant commands to execute planned or contingent operations necessary for national security, including necessary administrative, logistical, medical, and other activities in direct support of such operations; training and exercises required to prepare for and carry out such operations.*

⁴⁸ Activities involving technical intelligence information collection, analysis and dissemination functions not in direct support of excepted activities (e.g., general political and economic intelligence unrelated to ongoing or contingency military operations, support of acquisition programs, support to operational test and evaluation, intelligence policy security promulgation and development, systems development and standards, policy and architecture) are not excepted activities.

- *Activities necessary to continue recruiting for entry into the Armed Forces during contingency operations (as such term is defined in 10 U.S.C 101(13)), including activities necessary to operate Military Entrance Processing Stations (MEPS) and to conduct basic and other training necessary to qualify such recruited personnel to perform their assigned duties.*
- *Command, control, communications, computer, intelligence, surveillance, and reconnaissance activities required to support national or military requirements necessary for national security or to support other excepted activities, including telecommunications centers and phone switches on installations, and secure conference capability at military command centers.*
- *Activities required to operate, maintain, assess, and disseminate the collection of intelligence data necessary to support tactical and strategic indications and warning systems, and military operational requirements. Activities necessary to carry out or enforce treaties and other international obligations.*

Safety of Persons and Protection of Property

- *Response to emergencies, including fire protection, physical and personnel security, law enforcement/counter terrorism, intelligence support to terrorist threat warnings, Explosive Ordnance Disposal operations, emergency salvage, sub-safe program, nuclear reactor safety and security, nuclear weapons, air traffic control and harbor control, search and rescue, utilities, housing and food services for military personnel, and trash removal.*
- *Emergency repair & non-deferrable maintenance to utilities, power distribution system buildings or other real property, including bachelor enlisted quarters (BEQ), bachelor officers' quarters (BOQ), and housing for military personnel.*
- *Repair of equipment needed to support services for excepted activities, including fire trucks, medical emergency vehicles, police vehicles, or material handling vehicles.*
- *Monitoring and maintaining alarms and control systems, utilities, and emergency services.*
- *Receipt/safekeeping of material delivered during shutdown.*
- *Control of hazardous material and monitoring of existing environmental remediation.*
- *Oil spill/hazardous waste cleanup, environmental remediation, and pest control, only to the extent necessary to prevent imminent danger to life or property.⁴⁹*
- *Safe storage or transportation of hazardous materials, including ammunition, chemical munitions, photo processing operations.*
- *Emergency reporting response and input to the National Response Team and coordinating with Environmental Protection Agency (EPA) and other agencies on*

⁴⁹Activities in support of environmental requirements which are not necessary to prevent imminent threat to life or property are not excepted activities.

fire, safety, occupational health, environmental, explosive safety for vector borne disease management.

- *Activities, both in the Continental United States (CONUS) and overseas, required for the safety of DOD or other U.S. Government employees or for the protection of DOD or other U.S. Government property.*
- *Defense support to civil authorities in response to disasters or other imminent threats to life and property, including activities of the U.S. Army Corps of Engineers with respect to responsibilities to state and local governments that involve imminent threats to life or property.*
- *Foreign humanitarian assistance in response to disaster or other crises posing an imminent threat to life.*
- *Emergency counseling and crisis intervention intake screening and referral services. Suicide and substance abuse counseling.*
- *Counterdrug activities determined to be necessary for the protection of life or property.*
- *Operation of mortuary affairs activities and attendant other services necessary to properly care for the fallen and their families.*
- *Other activities authorized by the Secretary of Defense to provide for the safety of life or protection of property.*

Medical and Dental Care⁵⁰

- *Inpatient care in DOD Medical Treatment Facilities and attendant maintenance of patient medical records.^{51 52}*
- *Acute and emergency outpatient care in DOD medical and dental facilities.*
- *Private Sector Care under TRICARE.*
- *Certification of eligibility for health care benefits.*
- *Veterinary Services that support excepted activities (i.e., food supply and service inspections).*

Acquisition and Logistic Support

- *Contracting, contract administration, and logistics operations in support of excepted activities.*
- *Activities required to contract for and to distribute items as authorized by the Feed and Forage Act (e.g., clothing, subsistence, forage, fuel, quarters, transportation, and medical and hospital supplies).*

⁵⁰ Contingency planning in medical command headquarters not immediately necessary to support excepted activities is not an excepted activity.

⁵¹ Elective surgery and other elective procedures in DOD medical and dental facilities are not excepted activities.

⁵² Surgery to continue recovery of function/appearance of Wounded Warriors is an excepted activity.

- *Central receiving points for storage of supplies and materials purchased prior to the shutdown.*

Education and Training⁵³

- *Education and training necessary to participate in or support excepted activities.*
- *DOD Education Activity (DODEA) educational activities.*⁵⁴

Legal Activities

- *Litigation activities associated with imminent or ongoing legal action, in forums inside or outside of 000, to the extent required by law or necessary to support excepted activities.*
- *Legal support for excepted activities, including legal assistance for military and civilian employees deployed, or preparing to deploy, in support of military or stability operations.*
- *Legal activities needed to address external (non-judicial) deadlines imposed by non-DOD enforcement agencies, to the extent necessary to continue excepted activities.*

Audit and Investigation Community

- *Criminal investigations related to the protection of life or property, including national security, as determined by the head of the investigating unit, and investigations involving undercover activities.*
- *Counterterrorism and counterintelligence investigations.*

Morale, Welfare and Recreation/Non-appropriated Funds

- *Morale, Welfare, and Recreation (MWR) and Non-Appropriated Fund (NAF) activities necessary to support excepted activities, e.g., operation of mess halls; physical training; child care activities required for readiness.*⁵⁵

Financial Management

- *Activities necessary to control funds, record new obligations incurred in the performance of excepted activities, and manage working capital funds.*⁵⁶

⁵³ Installation education centers may continue to operate utilizing military personnel, so that private agencies such as colleges and universities may provide courses for which payment has already been made. Civilian employees on TDY for training or education associated with non-excepted activities should be returned to their home stations as part of the orderly closedown of operations. Civilian personnel on PCS orders attending training or educational activities should remain in place.

⁵⁴ DODEA summer school activities are non-excepted activities.

⁵⁵ Activities funded entirely through NAF sources will not be affected. Military personnel may be assigned to carry out or support non-excepted MWR activities, where deemed necessary or appropriate, to replace furloughed employees.

⁵⁶ Preparation of financial reports, research and correction of problem disbursements, adjustments to prior-year funds (excepted as noted above) including those related to programs and contracts that do not support excepted activities, and (continued...)

- *Activities necessary to effect upward adjustment of obligations and the reallocation of prior-year unobligated funds in support of excepted activities.*

Working Capital Fund/Revolving Fund⁵⁷

- *Defense Working Capital Fund (DWCF)/ Revolving Fund (RF) activities with positive cash balances may continue to operate until cash reserves are exhausted.*
- *When cash reserves are exhausted, DWCF/RF activities must continue operations in direct support of excepted activities.*

DWCF/RF activities may continue to accept orders financed with appropriations enacted prior to the current fiscal year or unfunded orders from excepted organizations. Unfunded orders will be posted to accounts receivable and not actually billed until appropriations are enacted.

(...continued)

approval of the use of currently available funds to pay obligations against closed accounts are not excepted activities.

⁵⁷ *DWCFs/RFs* are not directly impacted by a lapse in annual appropriations. Management actions should be taken to sustain operations and minimize operational impact resulting from late approval of annual appropriations. Management actions which could be taken to conserve cash reserves include delay of training, minimal travel, reduction in supplies, and other actions consistent with management objectives. Inter-DWCF/RF billings will continue unless a suspension request is approved by the Office of the Under Secretary of Defense (Comptroller). Approval may be requested for advance billing of funded customer orders. Plan guidance for excepted activities is applicable to DWCF/RF internal operations.

Appendix B. DOD, “Guidance for Implementation of Pay Our Military Act,” October 5, 2013.

See below for complete text of DOD guidance to reflect the Administration’s interpretation of the effects of H.R. 3210, Pay Our Military Act,” identifying the number and categories of DOD civilians to be recalled from furlough.⁵⁸

SUBJECT: Guidance for Implementation of Pay Our Military Act

Appropriations provided under the Consolidated and Further Continuing Appropriations Act, 2013 (P.L. 113-6) expired at midnight on Monday, September 30, 2013. Hours before that occurred, the Congress passed and the President signed the Pay Our Military Act. That Act provides appropriations for specified purposes while interim or full-year appropriations for fiscal year 2014 are not in effect, as is currently the case.

First, the Act appropriated such sums as are necessary to provide pay and allowances to members of the Armed Forces, “including reserve components thereof, who perform active service during such period[.]” This provision provides the Department with the funds necessary to pay our military members (including Reserve Component members) on active duty or full-time National Guard duty under Title 32, U.S. Code.

Second, the Act appropriated such sums as are necessary to provide pay and allowances to contractors of DoD who the Secretary determines are providing support to members of the Armed Forces in active service. The Department’s lawyers are analyzing what authority is provided by this provision.

Third, the Act appropriated such sums as are necessary to provide pay and allowances to the civilian personnel of the Department of Defense “whom the Secretary ... determines are providing support to members of the Armed Forces” performing active service during such period. The term “pay and allowances” includes annual leave and sick leave.

This Memorandum provides instructions for identifying those civilian personnel within the Department who “are providing support to members of the Armed Forces” within the meaning of the Act. The responsibility for determining which employees fall within the scope of this statute resides with the Military Department Secretaries and Heads of other DoD Components, who may delegate this authority in writing. This guidance must be used in identifying these employees. The guidance does not identify every activity performed by DoD’s large civilian workforce, but rather it provides overarching direction and general principles for making these determinations. It should be applied prudently, and in a manner that promotes consistency across the Department.

The Department of Defense consulted closely with the Department of Justice, which expressed its view that the law does not permit a blanket recall of all civilians. Under our current reading of the law, the standard of “support to members of the Armed Forces” requires

⁵⁸ DOD, Secretary of Defense, Chuck Hagel, Memorandum for Subject: Components and defense agencies,”Guidance for Implementation of Pay Our Military Act,” October 5, 2013; http://www.defense.gov/pubs/Memorandum-Pay_Our_Military_Act_Guidance-FINAL.pdf.

a focus on those employees whose responsibilities contribute to the morale, well-being, capabilities, and readiness of covered military members during the lapse of appropriations. I have determined that this standard includes all those who are performing activities deemed “excepted” pursuant to the “CONTINGENCY PLAN GUIDANCE FOR CONTINUATION OF ESSENTIAL OPERATIONS IN THE ABSENCE OF AVAILABLE APPROPRIATIONS, SEPTEMBER 2013” because these support activities are felt directly by covered members of the Armed Forces. I want to make it clear that every DoD employee makes an essential contribution to the Department’s ability to carry out its mission of defending the Nation. However, under this Act, we must determine who provides support to the members of the Armed Forces in active service, in a way that respects Congress’s specific appropriation.

There are two distinct categories of civilian employees who fall within the scope of this statutory provision, in addition to those performing excepted activities. The first category includes those employees whose responsibilities provide support to service members performing active service and their families on an ongoing basis. The second category consists of those employees whose responsibilities contribute to sustaining capabilities and Force Readiness and which, if interrupted by the lapse in appropriations, will impact service members’ ability to conduct assigned missions in the future. To fall within this second category, there must be a causal connection between the failure to perform the activity during the duration of an appropriations lapse and a negative impact on military members in the future. In other words, if the activity is not performed over the duration of an appropriations lapse, would it be possible to identify a negative impact that will be felt by military members at some time in the future? In undertaking this analysis, it should be assumed that regular appropriations will be restored within the near term.

Examples of activities that provide support to service members on an ongoing basis are:

- i) Health Care Activities and Providers;*
- ii) SAPRO, Behavioral Health, and Suicide Prevention Programs;*
- iii) Transition Assistance Programs for Military Members in active service;*
- iv) Family Support Programs and Activities;*
- v) Activities related to the repair and maintenance of weapons systems and platforms at the Operational and Intermediate level;*
- vi) Training Activities associated with military readiness;*
- vii) Supply Chain Management activities in support of near term Force Readiness;*
- viii) Human Resource Activities associated with organizing, equipping, manning and training functions;*
- ix) Installation Support and Facilities maintenance;*
- x) Commissary operations;*
- xi) Payroll activities;*
- xii) The provision of guidance or advice to military members when such guidance or advice is necessary for the military members to execute their functions (e.g., legal advice);*
- and*
- xiii) Necessary support for all activities listed above, including legal, human resources, engineering, and administrative support.*

Examples of activities that contribute to capabilities and sustaining force readiness and that, if interrupted, would affect service members’ ability to conduct assigned missions in the future include:

- i) Acquisition Program oversight and management (including inspections and acceptance), financial management, contract, logistics, and engineering activities, which support long term readiness;*
- ii) Activities related to the repair and maintenance of weapons systems and platforms at the Depot level;*
- iii) Supply chain management activities in support of long-term force readiness;*
- iv) Intelligence functions;*
- v) Information Technology functions; and*
- vi) Necessary support for all activities listed above determined to be within the scope of the Act, including legal, human resources, engineering, and administrative support.*

Employees performing these activities are within the scope of the Act only if a delay in the performance of these activities over the duration of a lapse in appropriations would have a negative impact on members of the Armed Forces in the future. Delays in the availability of new or repaired equipment would be one such impact.

Those employees of the Department who do not fall within the scope of the Act (unless they have been determined to be “excepted” and unless engaged in activities that support service members) include:

- i) CIO functions;*
- ii) DCMO functions, at the OSD and Component level;*
- iii) Legislative Affairs and Public Affairs functions not previously excepted or required in support of internal communications to members of the Armed Forces in active service;*
- iv) Auditor and related functions, not previously excepted, and DF AS functions that otherwise would not be determined to be “excepted” upon exhaustion of its working capital fund budgetary resources, and not required to process payrolls;*
- v) Work done in support of non-DoD activities and Agencies (except the U.S. Coast Guard); and*
- vi) Civil works functions of the Department of Army.*

As I stated above, all DoD employees perform work that is critical to the long-term strength of our Armed Forces, and our Nation. I fervently hope that the time will be short until I can recall all employees of the Department of Defense back to the vital work that they do helping to defend this Nation and secure our future. I will continue to explore all possibilities to this end. Those falling outside the scope of the Act include men and women who have devoted their lives to service of this country, and whose work on our behalf and on behalf of the Nation is enormously valuable and critical to the maintenance of our military superiority over the long term.

The Act provides appropriations for personnel; it does not provide appropriations for equipment, supplies, materiel, and all the other things that the Department needs to keep operating efficiently. While the Act permits the Department to bring many of its civilian employees back to work, and to pay them, if the lapse of appropriations continues, many of these workers will cease to be able to do their jobs. Critical parts, or supplies, will run out, and there will be limited authority for the Department to purchase more. If there comes a time that workers are unable to do their work, I will be forced once again to send them home.

Within the Office of the Secretary of Defense, the Under Secretary of Defense (Comptroller) will take the lead in overseeing the implementation of this guidance, assisted by other offices as necessary. Thank you all for your strong leadership at a very difficult time. The President, the country and I are all grateful for and depend on your leadership, courage, and commitment to our troops, their families and our country.

cc:

Director of National Intelligence

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