

## **Federal Election Commission Plan for Agency Operations in the Absence of the Fiscal Year 2019 Appropriation**

This plan is pursuant to the requirements defined by the Office of Management and Budget (OMB), Circular A-11, Section 124, “Agency Operations in the Absence of an Appropriation.”

### **I. Introduction**

Legal opinions issued by the Attorney General and the Justice Department’s Office of Legal Counsel since 1980 have made clear that the Anti-Deficiency Act, 31 U.S.C. § 1341, unambiguously prohibits Federal officials from incurring obligations in the absence of appropriations except in extremely limited circumstances.

Based on these opinions, it is clear that in the absence of appropriations for the new fiscal year the Federal Election Commission (FEC) may neither expend any additional funds nor incur any additional obligations except for those that:

- \*Are implicitly authorized by some other law.
- \*Are necessary to the prevention of imminent threats to human life or property, including the government’s property. The government’s property includes electronically stored data.
- \*Are necessary to the orderly termination of agency operations in the absence of appropriations.
- \*Are necessary incident to execution of one of the President’s specified powers under Article II of the Constitution.
- \*Are funded by a multi-year, a “no-year” (i.e., remaining available until expended), or a permanent appropriation.

The Office of Personnel Management (OPM) defines a shutdown or “emergency furlough” as the placing of employees in a temporary non-duty, non-pay status due to the agency no longer having the necessary funds to operate.

This plan outlines the process and the guidance for actions to be taken by the FEC when Congress fails to enact regular appropriations, a continuing resolution, or a needed supplemental, resulting in an interruption of fund availability.

This section does not apply to specific appropriations action by the Congress to deny program funding.

In the absence of appropriations:

Federal officers may not incur any obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law.

Federal officers may incur obligations as necessary for orderly termination of an agency's functions, but funds may not be disbursed.

The FEC will be officially notified by the OMB in the event of a government shutdown.

## **II. Affected Employees**

All FEC employees are covered by the furlough action, including temporary employees, unless otherwise identified in Attachment A. As of December 14, 2018, the FEC has 300 employees on-board prior to any furlough actions. After all shutdown activities are completed, the FEC expects to have 269 employees furloughed.

## **III. Preliminary Activities**

1. Upon notification by OMB that the agency should review its shutdown plan, the Staff Director, in coordination with the CFO, GC and IG, will review this plan.

2. If any changes to this plan are deemed necessary, they will be shared with OMB pursuant to OMB Circular A-11.

3. If any changes to this plan are deemed necessary, and the changes would affect the working conditions of bargaining unit employees, the Staff Director or his/her designee will notify NTEU and, if necessary and if practical given the time involved, will conduct bargaining over the impact and implementation of the changes.

4. The Staff Director, the GC, and the CFO shall ensure that their subordinate employees holding positions on Attachment A are reminded or notified that they hold such positions, and that they should begin preparations to carry out the functions for which they would be retained at work during a shutdown.

5. The Press Office and Information Division, in consultation with the Office of General Counsel (OGC), the Office of Compliance, and the Commission, will prepare notifications for the public concerning Commission operating status and the effect of a shutdown on filing requirements for disclosure reports, Matters Under Review, administrative fines matters, and alternative dispute resolution matters. These notifications will be held ready for use in the event a shutdown actually occurs. Other divisions should make plans for directly contacting outside stakeholders to advise them of the shutdown.

6. The Administrative Services Manager will coordinate with the General Services Administration (GSA), the Federal Protective Service (FPS), and the building manager to determine all necessary arrangements for the physical security of the FEC headquarters building in the event of a funding lapse.

7. Not later than the third business day before funding is to lapse, the Staff Director will provide a notice to all employees via email that a funding lapse is possible. This message should, at a minimum:

- a. Provide information about the likelihood of a shutdown, to the extent information is known.
- b. Inform all employees that, except as noted below, they should carefully monitor news media accounts of the government's operating status and should not report to work or offsite training in the event of a shutdown.
- c. Inform all employees that if the funding lapse is not resolved, they will receive a furlough notice the morning of the first business day of the shutdown.

8. The Contracting Officer will be responsible for contacting all Contracting Officer's Representatives (CORs). Employees assigned as a COR must immediately provide by return email to the Contracting Officer and their own supervisors: the most current status of the contract(s) for which they are responsible; the last identifiable deliverables, including dates and any other pertinent information regarding the status of the contract; and any outstanding or expected invoices for work already performed.

9. All employees will be responsible for updating their contact information in the FEC Emergency Contact Information database or otherwise providing their supervisors with contact information sufficient to ensure that their supervisor is able to notify them once the furlough period is over. All supervisors will be responsible for accessing that information for their direct reports, or otherwise obtaining contact information for their direct reports, and securely maintaining that information in some format other than on FEC data systems so that they may use the information to notify their employees once the furlough period is over.

10. For additional instructions regarding travel, please refer to "Effect of Furlough on Travel" below.

#### **IV. Activities on the Business Day Before a Possible Funding Lapse**

A. All employees will be responsible for securing agency property for which they have custody, securing all files and records in their possession – both paper and electronic – in the same manner as if they were to be on leave for several days. This particularly includes the duty to secure personally identifiable information (PII) and other sensitive information. In order to avoid insect and rodent infestations during the shutdown, all employees will also be responsible for removing all food and beverages from their offices or work stations.

B. All employees must update their hours worked and leave taken in WebTA for a period through the last day prior to the potential furlough.

C. All employees will be responsible for taking the necessary steps, under supervisory direction, to cancel meetings, hearings, and other previously arranged business, and appropriately notifying parties such as other Federal agencies, State governments, and private entities involved in agency matters of the cessation of normal business.

D. The Press Office and the Information Division will release through the website and other appropriate means the previously prepared information about operating status and filing requirements in the event of a furlough.

E. The Office of Human Resources will send an email to all employees providing information regarding the eligibility of furloughed employees for unemployment compensation and procedures for applying. This message must also advise employees that in the event later legislation restores employee pay for the furlough period, any unemployment compensation received will have to be paid back.

## **V. Activities on the First Day of the Funding Lapse**

**A. Furlough Message.** At 7 a.m. on the first business day of the funding lapse, the Staff Director will issue a “Furlough Decision Notice Due to Lapse of Appropriations” (5 C.F.R. Part 752). Notice by agency-wide email, will be sufficient. Staff receiving their notice by email must respond to the email acknowledging that they have received and read it.

This notice must at a minimum:

1. Inform recipients that, unless they have been notified otherwise, they are in a furlough (non-pay, non-duty) status effective upon the completion of their duties related to the orderly shutdown of the agency, and at that time must depart the premises immediately and engage in no further work until recalled to duty.

2. Inform recipients that the furlough is not expected to last in excess of 30 days.

3. Inform recipients that the furlough action is being taken because of a sudden emergency requiring immediate curtailment of the agency’s activities, and that therefore, the customary 30-day advance notice period and opportunity to answer are suspended under the provisions of 5 C.F.R. 752.404(d)(2).

4. Inform recipients, pursuant to 5 C.F.R. 752.404(b)(2), that if any employees of their same grade and job title are not furloughed, the reason is that those employees are required to complete orderly suspension of agency operations, will be performing functions essential to the protection of life or property, or will be performing functions the continuation of which is otherwise authorized by law.

5. Inform recipients of their rights to appeal the furlough to the Merit Systems Protection Board or, if they are bargaining unit employees, their right to grieve the furlough pursuant to the FEC-NTEU Labor Management Agreement.

6. Inform recipients that they are prohibited from performing voluntary services for the federal government and therefore, until specifically recalled to work, they are prohibited from performing any work functions while on furlough status, even on a voluntary basis.

7. Inform recipients that while the agency will make its best efforts to formally notify them when they are recalled to work, they are instructed to monitor developments in the news media. Absent contrary guidance from OMB or OPM, employees will be expected to report to work on the first business day after the President has signed legislation resolving the funding lapse or after Congress has overridden a Presidential veto of funding legislation.

For employees not listed on the attached Schedule A, the completion of shutdown functions entails only completing any activities listed in Section IV above, and receiving and reading the furlough notice.

Employees who have completed the activities listed in Section IV above by the close of business on the day prior to the shutdown may, at their option, choose to receive their furlough notices remotely by logging into their FEC email accounts using VPN, an FEC-provided mobile device, or Outlook (Cloud), at the hour when their normal tour of duty begins. Employees with remaining shutdown functions, or those who cannot receive their furlough notices remotely, must report to work on the first day of the shutdown in order to complete shutdown functions and receive their furlough notice. Any such employees must depart the premises immediately after receiving their furlough notice and completing shutdown functions. There is no automatic entitlement to a half day's work, or pay, on the first day of the shutdown.

## **B. Effects of the Furlough**

**1. Effect of Furlough on Leave.** All paid leave during a furlough is cancelled, because the necessity to furlough supersedes leave rights. The Anti-Deficiency Act (31 U.S.C. 1341 et seq.) does not allow authorization of any expenditure or obligation before an appropriation is made, unless authorized by law. Paid leave creates a debt on the part of the Government that is not authorized by the Act. Therefore, the FEC must cancel all paid leave during a furlough and employees must be either (1) at work performing excepted activities or (2) furloughed. Any employee who was on or scheduled for leave (annual or sick) will be put on non-pay status. Any leave that was not used due to the furlough will be restored to the employee's leave balance once the furlough period has ended. No advanced sick or annual leave is authorized for use during a furlough.

**2. Effect of Furlough on Travel.** Unless the anticipated funding lapse is resolved, an employee cannot begin an official trip, even if it has been previously approved, at any time after the furlough is effective. Any authorization for such travel is automatically revoked.

If an employee is on travel for official business on the first day of the funding lapse, he/she must immediately stop any work and return to Washington as promptly as possible

in order to minimize any further funding obligation requirements. If the employee is subject to furlough, the employee's furlough is effective upon the employee's arrival in the Washington area, rather than at midnight of the day of the funding lapse.

If an employee must travel on official business outside of normal working hours for the purpose of returning immediately to Washington, the employee will be eligible for compensatory time per statute and regulation.

**3. Effect of Furlough on Local Training.** Employees absent from the worksite in connection with training at local facilities must be advised that they will be placed on furlough for the duration of the funding hiatus. Such employees must stop attendance, and notify the Contracting Officer to determine if the class can be rescheduled at a later date after the resolution of the furlough.

**4. Effect of Furlough on Details to Other Agencies.**

Employees on details to other agencies may continue to work if their function at the other agency will continue during the shutdown. Otherwise, they are on furlough and must check their **FEC email** on the first day of the shutdown for their furlough notice.

**5. Effect of Furlough on Employee Benefits**

**a. Federal Employees' Health Benefits Plan**

Pursuant to direction from OPM, the health coverage of all employees shall continue. The employer's portion of the premium will continue to be paid by the government. However, employees shall be personally liable for their share of premiums. Because an employee's share of premiums cannot be deducted from the employee's paycheck when the employee is in a non-pay status, each employee shall incur a debt to the Government equal to the amount of the employee's share of premiums for each pay period in which no deductions are made. Once returned to a pay status, the delinquent amount will be automatically deducted from the bi-weekly gross pay, in addition to other authorized deductions, until the debt is liquidated.

**b. Leave Accrual**

No leave will be earned or credited for any pay period during which an employee is in a non-pay status for the full pay period. If furloughed employees are returned to duty for a partial pay period following a pay period in which they were in a non-pay status for the entire pay period, leave accrual will be pro-rated based on the number of days in a pay status.

### **c. Retirement and Life Insurance**

For most employees, retirement and life insurance benefits remain unaffected by the furlough period. However, OHR will follow OPM guidance for employees who are on a leave without pay (LWOP) status before the furlough.

OHR is also responsible for notifying the National Finance Center of the furlough actions on employees receiving military retired or retainer pay.

**C.** The Staff Director will contact OPM and the National Finance Center and the CFO will contact OMB and the Department of the Treasury immediately upon initiation of shutdown operations.

**D.** The Administrative Services Manager or her designee will inform GSA, FPS and the building manager that the agency has initiated shutdown operations, and will coordinate the execution of any necessary actions determined according to III.B.6 above.

**E.** The Staff Director shall:

1. Remain on duty, as Furlough Manager, throughout the furlough.
2. Be authorized to recall to duty any employees necessary to meet unanticipated contingencies related to imminent threats to life or property, including electronic records or data.
3. Initiate resumption of operations (see below) immediately upon the signing by the President of legislation ending the funding lapse.
4. Receive and take appropriate action on all communications from OMB during the funding lapse.

**F.** The Litigation Division of OGC will ensure that notices are filed with appropriate courts in which the Commission has pending litigation matters informing the courts that Commission employees have been furloughed and that the agency is closed for the duration of the funding lapse. The amount of time necessary for this function may vary depending on the Commission's litigation docket at the time of the lapse but is not anticipated to take longer than the close of business on the first business day following the funding lapse. Employees carrying out this function will be furloughed upon its completion. The General Counsel is authorized to recall to work such Litigation Division personnel as may be necessary solely to file any additional notices that may become necessary during the furlough, to engage in the normal conduct of litigation in cases where the court so orders notwithstanding the furlough, or to provide assistance (if requested) to the Office of the Solicitor General in Supreme Court cases in which the Commission is a party. Upon the completion of these tasks, any recalled personnel shall be returned to a furlough status.

**G.** The Office of the Chief Financial Officer (OCFO) will perform the fiscal and accounting tasks required to maintain accountability and report obligations and expenditures of all

funds. It is anticipated that the amount of time necessary for this function may be up to a full business day. Employees carrying out this function will be furloughed once the excepted functions are completed.

**H.** The Contracting Officer (or designee) will notify all vendors, except those performing functions related to protection of life or property, functions necessary to orderly termination of Commission activities of a stop work status. Contractors working on projects for which funds have already been obligated may continue work until such time as it is necessary for them to communicate with a Commission employee who has been furloughed in order to fulfill the contract. They must then stop work. The amount of time necessary for the Contracting Officer to issue stop work notices may be more than one business day depending on when the funding lapse begins. The contracting officer will be furloughed upon completion of this function.

**I.** The Office of Human Resources (OHR) will ensure any HR actions necessary to shut down the agency are completed, including the delivery of hard copy furlough notices to employees who are unable or unwilling to receive their furlough notices by email. The amount of time necessary for this function is estimated to be no more than a full business day. The OHR personnel necessary to this function will be furloughed upon its completion. Currently, per guidance from the OPM, it is anticipated that all furlough actions to be processed through the National Finance Center will be retroactively conducted at the end of the furlough.

**J.** The Office of the Chief Information Officer (OCIO) will perform the tasks required to guard against imminent threats to Commission data, and will continue to perform this task throughout the shutdown. OCIO employees necessary for this function are listed on Appendix A and shall not be furloughed.

**K.** The Administrative Services Manager (or designee) will be responsible for notifying all appropriate Federal and non-Federal parties who have roles relating to the physical security of the FEC building that the agency is shut down. The Administrative Services Manager or their delegate shall also remain on site throughout the completion of all other activities on the first day of the shutdown in order to be available to resolve building issues that arise while those activities are being completed. Upon the completion of all other shutdown activities, the Administrative Services Director or their designee will be furloughed.

**L.** The General Counsel (or designee(s)) shall not be furloughed. The OGC personnel not furloughed shall provide advice and legal support to the Staff Director and Commission as necessary concerning shutdown-related legal questions during the funding lapse. The specific personnel who will not be furloughed are listed by name on Appendix A.

**M. Functions that may or may not occur during a lapse, depending on the specific situation:**

1. If, at the time of the lapse, the Ethics Office has under its review financial information provided by a potential nominee to the Commission, the Deputy Ethics Officer may remain on duty during the furlough solely for the purpose of carrying out functions related to that review. This is permissible as an

incident to the President's power of nomination under Article II of the Constitution.

2. If a lapse occurs during the calendar year in which a presidential election occurs or the calendar year immediately preceding the presidential election year, the Staff Director and the General Counsel shall jointly determine the number and identity of Audit Division and OGC employees necessary, if any, to carry out functions during the lapse related to the eligibility and entitlement of presidential candidates to public funding. This is permissible as implicitly authorized by the permanent, indefinite appropriation of funds to the Presidential Election Campaign Fund at 26 U.S.C. § 9006(a).

## **VI. Resumption of Operations**

Upon the end of the furlough, employees are expected to report to work the next business day, unless otherwise authorized by the Staff Director. Employees will be notified via the operation of the phone tree system contained in the Continuity of Operations Plan, beginning with calls by the Staff Director to Commissioners; the GC, CFO and Inspector General; and his or her own direct reports. Employees are also responsible for monitoring the media regarding updates to the government's funding status.

## **VII. Responsibilities of Component Offices to Complete Shutdown Activities**

### **Responsibilities of the OSD:**

Publishes pre-furlough and furlough notices.

Provides a furlough plan.

Notifies appropriate bargaining agents of any proposed shutdown due to a lack of funds as soon as feasible after the decision has been made and prior to delivery of furlough notices to employees.

Notifies employees of any rights and benefits they will have while they are in furlough status.

Negotiates, when and where practicable, the impact and implementation of the shutdown of operations in accordance with FEC policy and the Federal Labor Management Relations statute (5 U.S.C., Chapter 71). The decision to shut down operations due to a lack of funds is not negotiable; therefore, negotiations will not preempt that decision.

### **Responsibilities of the OCFO:**

Establishes special accounts to accumulate all obligations incurred in maintaining essential activities and terminating agency operations.

Suspends acquisition and assistance awards pending validation of program award decisions.

Facilitates the de-obligation of funds for unused appropriation through contract modifications to maximize funds availability for essential activities, if appropriate.

**Responsibilities of the OGC:**

Assists the Commission, the Staff Director, the CFO and the IG in identifying both the essential functions performed by the FEC and the emergency personnel required to perform these functions to ensure compliance with OMB guidance and opinions of the Attorney General.

**VIII. Relation to OMB Guidance**

To the extent any provision of this plan is inconsistent with written guidance from the OMB regarding the specific times of furlough or the scope of permissibly exempt activities, the OMB guidance shall govern.