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## Shutdown and Debt Ceiling Crisis Would Pose Distinct Challenges for Government Operations

Absent intervening legislation, the U.S. federal government's appropriations will lapse on October 1, 2013, prompting a government shutdown. Separately, the secretary of the Treasury has informed Congress that, no later than October 17, 2013, the federal government will exhaust its borrowing capacity under the statutory debt ceiling.<sup>1</sup> Absent intervening legislation, insufficient cash may then remain on hand to meet all of the government's obligations, causing what has been referred to as the "debt ceiling crisis."

Although the government shutdown and the debt ceiling crisis are occasionally conflated, they have distinct effects on government operations and on parties interacting and transacting with the government. A government shutdown occurs when federal agencies experience a lapse in their legal authority to incur financial obligations. For that reason, many federal employees cannot continue working during a shutdown and many contracts and grants are not awarded. By contrast, in a debt ceiling crisis, the government generally retains the authority to incur obligations, but may lack the cash to liquidate all of its obligations on time.

Government operations during a shutdown are controlled by rules that, albeit complex, are well-established and elaborated by past practice. The debt ceiling crisis, however, is unprecedented and little is known about the way the federal government would operate in it.

### Government Operations During a Shutdown

The Antideficiency Act, 31 U.S.C. § 1341, prohibits officers and employees of the federal government from entering into obligations in excess of appropriations.<sup>2</sup> Appropriations that fund much of the federal government's current operations will expire at 11:59 p.m. on Monday, September 30, 2013.<sup>3</sup> If no further appropriations legislation is enacted, the Antideficiency Act will generally deprive federal agencies of their authority to enter contracts, make grants, employ personnel and incur other financial obligations.

Yet some governmental functions continue even during a shutdown. Guidance promulgated during past shutdowns (or near-shutdowns) by the White House Office of Management and Budget (OMB) and the Department of Justice's Office of Legal Counsel has authorized agencies to obligate funds during a shutdown for, among other things:

- activities funded by multi-year or indefinite appropriations;
- activities necessary to the discharge of the president's constitutional duties and powers (likely including the conduct of foreign diplomacy and the exercise of the commander-in-chief powers);

<sup>1</sup> Letter from Jacob J. Lew to John A. Boehner, Sept. 25, 2013, *available at* <http://www.treasury.gov/Documents/Debt%20Limit%2020130925%20Boehner.pdf>.

<sup>2</sup> 31 U.S.C. § 1341(1)(A)-(B) ("An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or] involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law . . .").

<sup>3</sup> See Consolidated and Further Continuing Appropriations Act, 2013 (P.L. 113-6).

- activities that, if suspended, would adversely affect the execution of certain funded functions (e.g., the unfunded disbursement activities for funded social security benefits); and
- activities that, if suspended, would imminently threaten the safety of human life or the protection of property (e.g., air traffic control).<sup>4</sup>

In addition, consistent with guidance from the OMB,<sup>5</sup> federal agencies are updating their contingency plans for operations during a shutdown. The plans are collected on the OMB website.<sup>6</sup>

With respect to the federal government's litigation responsibilities, the Department of Justice's plan indicates that criminal matters would continue without interruption.<sup>7</sup> Civil litigation, however, would be curtailed or postponed to the extent that this can be done without compromising to a significant degree the safety of human life or the protection of property. This plan assumes the courts would continue operating during the shutdown.

### Government Operations During a Debt Ceiling Crisis

In contrast to the well-documented government shutdown procedures, no formal guidance is available about the operational effects of a debt ceiling crisis. Past practice likewise does not offer a reliable roadmap for a debt ceiling crisis, because the statutory debt ceiling had always been raised before the crisis occurred. Nor do shutdown procedures generally offer an accurate analogy for a debt ceiling crisis, because the problem they address (lack of authority to obligate funds under the Antideficiency Act) is not the principal problem during the crisis (inability to borrow when cash is insufficient to meet obligations).

Some information has been made public about operational options the Treasury considered during the (ultimately averted) brush with the debt ceiling in the summer of 2011. For example, according to a letter to Senator Orrin G. Hatch from the Treasury's inspector general, the "range of options" included "asset sales; imposing across-the-board payment reductions; various ways of attempting to prioritize payments; and various ways of delaying payments."<sup>8</sup> While the Treasury concluded that none of the options "could reasonably protect the full faith and credit of the U.S., the American economy, or individual citizens from very serious harm," Treasury officials told the inspector general "that organizationally they viewed the option of delaying payments as the least harmful among the options under review." The inspector general's letter does not indicate that a final decision among the various options had been reached.

Efforts have also been made to establish by legislation the priority of payments during a debt ceiling crisis, and the House of Representatives passed such bills this year.<sup>9</sup> The Obama administration has consistently opposed such legislation on the ground that prioritization of payments is "default by another name."<sup>10</sup>

4 See OMB Memorandum 13-22, Sept. 17, 2013, available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-22.pdf>; Office of Legal Counsel, Memorandum for the Director of the Office of Management and Budget, *Government Operations in the Event of a Lapse in Appropriations* (Aug. 16, 1995), available at <http://www.justice.gov/olc/appropriations2.htm>.

5 See OMB Circular A-11, section 124.2, available at [http://www.whitehouse.gov/sites/default/files/omb/assets/a11\\_current\\_year/s124.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s124.pdf).

6 See <http://www.whitehouse.gov/omb/contingency-plans>.

7 See <http://www.justice.gov/jmd/publications/doj-contingency-plan.pdf>.

8 Letter from Eric M. Thorson to Orrin G. Hatch, Aug. 24, 2012, available at [http://www.treasury.gov/about/organizational-structure/ig/Audit%20Reports%20and%20Testimonies/Debt%20Limit%20Response%20\(Final%20with%20Signature\).pdf](http://www.treasury.gov/about/organizational-structure/ig/Audit%20Reports%20and%20Testimonies/Debt%20Limit%20Response%20(Final%20with%20Signature).pdf).

9 Full Faith and Credit Act, H.R. 807 (113th Cong. 1st Sess.); Continuing Appropriations Resolution, 2014, H. J. Res. 59 § 138 (113th Cong. 1st Sess.).

10 Office of Management and Budget, Statement of Administration Policy on H.R. 807, May 7, 2013, available at [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr807r\\_20130507.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr807r_20130507.pdf).