Congressional Research Service

MEMORANDUM

July 29, 2013

To: Honorable Tom Coburn

Subject: **Potential Effects of a Government Shutdown on Implementation of the Patient Protection and Affordable Care Act (ACA)**

This memorandum responds to your request of July 25, 2013, regarding the potential effects of a funding lapse and related government shutdown on implementation of the Patient Protection and Affordable Care Act, commonly referred to as ACA.[1] Specifically, you asked CRS to address several questions that you posed. As discussed, this memorandum includes information that CRS was able to provide in the time available.

The memorandum begins with an overview of how failure to enact annual appropriations causes a government "shutdown." This process involves a cessation of affected federal government operations, albeit with several exceptions. After providing this overview of the shutdown process, the memorandum then presents the questions you posed. The questions are listed as bolded headings and are followed by answers from CRS.

Some caveats are necessary when addressing this subject. In the context of a prospective or actual lapse in appropriations and government shutdown, several presidential administrations have interpreted the nature and scope of restrictions on government activities during a shutdown and any related exceptions. These interpretations came by way of legal opinions and guidance documents issued by the Department of Justice's Office of Legal Counsel and the Office of Management and Budget (OMB). In these documents, the administrations identified specific exceptions that govern federal agency decisions regarding which operations may continue during a government shutdown under certain circumstances. These exceptions arguably have been read broadly, resulting in a situation where executive agencies may exercise some discretion. It is important to note that past views and practice in the executive branch do not necessarily constrain or guide what may happen in the event of a future funding lapse and shutdown. Consequently,

[1] ACA was signed into law on March 23, 2010 (P.L. 111-148, 124 Stat. 119). A week later, on March 30, 2010, the President signed the Health Care and Education Reconciliation Act (HCERA; P.L. 111-152, 124 Stat. 1029), which amended multiple health care and revenue provisions in ACA. Several other bills that were subsequently enacted made more targeted changes to specific ACA provisions. All references to ACA refer to the law as amended. While a detailed examination of ACA is beyond the scope of this memorandum, numerous CRS products that provide more in-depth information on the many new programs and activities authorized and funded by the law are available at http://www.crs.loc.gov (see under Issues Before Congress: Health).

CRS is not able to predict what will happen for specific programs, agencies, or activities, in the event of a shutdown. Nevertheless, analysis of the operative legal framework, past events, and current agency-specific circumstances may help illuminate the contours of what *might* happen in such a situation.

The information in this memorandum is drawn from publicly available sources and is of general interest to Congress. As such, all or part of this information may be provided in memoranda or reports for general distribution to Congress. Your confidentiality as a requester will be preserved in any case.

We trust this memorandum is responsive to your request. Please feel free to contact us if you have questions or would like to discuss these matters further.

Process for a Government Shutdown[2]

Potential for a Funding Gap in Annual Appropriations

The federal fiscal year begins on October 1. For agencies and programs that rely on discretionary funding through annual appropriations acts, Congress and the President must enact interim or full-year appropriations by this date if many governmental activities are to continue operating.[3] If interim or full-year appropriations are not enacted into law, the time interval in which agency appropriations are not enacted is referred to as a "funding gap."[4] A funding gap also may occur any time that interim funding in a continuing resolution (CR) expires and another CR or regular appropriations bill is not enacted immediately thereafter. When a funding gap occurs, the federal government begins a "shutdown" of the affected activities, including the furlough of certain personnel and curtailment of agency activities and services. There are some exceptions to this process, however, as explained further below. Programs that are funded by laws other than annual appropriations acts (e.g., entitlements like Social Security) also may be affected by a funding gap, if program execution relies on activities that receive annually appropriated funding.

Antideficiency Act: Restrictions and Exceptions

The Constitution, statutory provisions, court opinions, and Department of Justice (DOJ) opinions provide the legal framework for how funding gaps and shutdowns have occurred in recent decades.[5] Article I, Section 9 of the Constitution states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Federal employees and contractors cannot be paid, for example, if appropriations in the first place have not been enacted. Nevertheless, it would appear possible under the Constitution for the government to make contracts or other obligations if it lacked funds to pay for these

[2] This section draws from CRS Report RL34680, *Shutdown of the Federal Government: Causes, Processes, and Effects*, coordinated by Clinton T. Brass.

[3] Discretionary funding refers to budget authority (i.e., the authority to incur financial obligations that result in government expenditures) that is provided in and controlled by the annual appropriations acts.

[4] CRS Report RS20348, *Federal Funding Gaps: A Brief Overview*, by Jessica Tollestrup. Some observers use alternative terms "lapse in appropriations" and "appropriations hiatus" instead of "funding gap."

[5] For legal analysis of funding gaps, see U.S. Government Accountability Office (formerly the General Accounting Office; hereinafter GAO), *Principles of Federal Appropriations Law*, 3rd ed., vol. II, GAO-06-382SP, February 2006, chapter 6, pp. 6-146 - 6-159.

commitments.[6] The so-called Antideficiency Act generally prevents this, however. The act prohibits federal officials from obligating funds before an appropriations measure has been enacted, except as authorized by law.[7] The act also prohibits acceptance of voluntary services and employment of personal services exceeding what has been authorized by law.[8] Exceptions are made under the act to the latter prohibition for "emergencies involving the safety of human life or the protection of property." Therefore, the Antideficiency Act generally prohibits agencies from continued operation in the absence of appropriations. Failure to comply with the act may result in criminal sanctions, fines, and removal.

For years leading up to 1980, many federal agencies continued to operate during a funding gap, "minimizing all nonessential operations and obligations, believing that Congress did not intend that agencies close down," while waiting for the enactment of annual appropriations acts or continuing resolutions.[9] In 1980 and 1981, however, U.S. Attorney General Benjamin R. Civiletti issued two opinions that more strictly interpreted the Antideficiency Act in the context of a funding gap, along with the law's exceptions.[10]

The Attorney General's opinions stated that, with some exceptions, the head of an agency could avoid violating the Antideficiency Act only by suspending the agency's operations until the enactment of an appropriation. In the absence of appropriations, exceptions would be allowed only when there is "some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property." Apart from this broad category of "human life and property" exceptions to the Antideficiency Act, the Civiletti opinions identified another broad category of exceptions: those that are "authorized by law." GAO later summarized the 1981 Civiletti opinion as identifying four sub-types of "authorized by law" exceptions.[11]

- Activities funded with appropriations of budget authority that do not expire at the end of one fiscal year, such as multiple-year and no-year appropriations (that is, when these multiple-year and no-year appropriations still have budget authority that is available for obligation at the time of a funding gap).[12]

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[6] For discussion, see prepared statement of Walter Dellinger, Assistant Attorney General, in U.S. Congress, Senate Committee on the Budget and House Committee on the Budget, *Effects of Potential Government Shutdown*, hearing, 104th Cong., 1st sess., September 19, 1995, S.Hrg. 104-175 (Washington: GPO, 1995), p. 18. Some commentators, however, have expressed a contrary view. See Jim Schweiter and Herb Fenster, *Government Contract Funding under Continuing Resolutions*, 95 Fed. Cont. Rep. 180, note 17 (February 15, 2011).

[7] 31 U.S.C. § 1341. The Antideficiency Act (31 U.S.C. §§ 1341-1342, §§ 1511-1519) is discussed in CRS Report RL30795, *General Management Laws: A Compendium*, by Clinton T. Brass et al., pp. 93-97. GAO provides information on the act, at http://www.gao.gov/legal/lawresources/antideficiencybackground.html.

[8] 31 U.S.C. § 1342; see also §1515.

[9] U.S. GAO, *Funding Gaps Jeopardize Federal Government Operations*, PAD-81-31, March 3, 1981, pp. i, 2, at http://archive.gao.gov/f0102/114835.pdf.

[10] 43 Op. Att'y Gen. 224 (Apr. 25, 1980), 43 Op. Att'y Gen. 293 (January 16, 1981). The Civiletti opinions are included in a GAO report as Appendices IV and VIII. See U.S. GAO, *Funding Gaps Jeopardize Federal Government Operations*, PAD-81-31, March 3, 1981, at http://archive.gao.gov/f0102/114835.pdf. (Note that the pages within the PDF version of this GAO report and its appendices are out of order; for example, p. 77 appears before p. 76.) For a detailed discussion of exceptions to the Antideficiency Act, see U.S. GAO, *Principles of Federal Appropriations Law*, vol. II, pp. 6-146 - 6-159.

[11] The bulleted text here draws, in part, from ibid., pp. 6-149 – 6-150. GAO also noted that the courts have added to the list of exceptions to the Antideficiency Act in certain circumstances (ibid., p. 6-152).

[12] The term "multiple-year budget authority" refers to budget authority that remains available for obligation for a fixed period of time in excess of one fiscal year. The term "no-year budget authority" refers to budget authority that remains available for an indefinite period of time (e.g., "to remain available until expended"). See GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP, September 2005, p. 22. In addition, agencies that receive most or all of their budget authority for their day-to-day operations through means that are not dependent on appropriations acts, such as the U.S. Postal Service and the (continued...)

- Activities authorized by statutes that expressly permit obligations in advance of appropriations, such as contract authority.[13]
- Activities "authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency." The Civiletti opinion illustrated this abstract concept by citing the situation when benefit payments under an entitlement program are funded from other-than-one-year appropriations (i.e., where benefit payments are not subject to a funding gap, because they are authorized by permanent entitlement authority),[14] but the salaries of personnel who administer the program are funded by one-year appropriations (i.e., the salaries are subject to a funding gap). In this situation, the Attorney General offered the view that continued availability of money for benefit payments would necessarily imply that continued administration of the program is authorized by law at some level and therefore excepted from the Antideficiency Act.[15]
- Obligations "necessarily incident to presidential initiatives undertaken within his constitutional powers," such as the power to grant pardons and reprieves. GAO later expressed the view that this same rationale would apply to legislative branch agencies that incur obligations "necessary to assist the Congress in the performance of its constitutional duties."[16]

In 1990, in response to the 1981 Civiletti opinion, Congress amended 31 U.S.C. §1342 to clarify that "the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."[17] DOJ's Office of Legal Counsel (OLC) issued a memorandum in 1995 that interpreted the effect of the amendment (hereinafter, "1995 OLC opinion").[18] The 1995 OLC opinion said one aspect of the 1981 Civiletti opinion's description of emergency governmental functions should be modified in light of the amendment, but that the 1981 opinion otherwise "continues to be a sound analysis of the legal authorities respecting government operations" during a funding gap.[19]

(...continued)

Bureau of Consumer Financial Protection in the Federal Reserve System, would fall under this exception.

[13] For explanation of contract authority, see ibid., p. 21.

[14] In such a case, budget authority is available to make payments as a result of previously enacted legislation and is available without further legislative action. "Entitlement authority" refers to authority to make payments (including loans and grants) for which budget authority is not provided in advance by appropriations acts to any person or government if, under the provisions of the law containing such authority, the federal government is legally required to make the payments to persons or governments that meet the requirements established by law. See ibid., pp. 22-23 and 47.

[15] For an example of this exception in the context of two shutdowns during FY1996, see the section titled "Effects on Mandatory Spending Programs," in CRS Report RL34680, *Shutdown of the Federal Government: Causes, Processes, and Effects*, coordinated by Clinton T. Brass.

[16] U.S. GAO, *Principles of Federal Appropriations Law*, vol. II, p. 6-150.

[17] Ibid., p. 6-151, citing P.L. 101-508, 104 Stat. 1388, at 1388-621 (now codified at 31 U.S.C. §1342).

[18] U.S. Department of Justice, Office of Legal Counsel, *Government Operations in the Event of a Lapse in Appropriations*, memorandum from Walter Dellinger, Assistant Attorney General, for Alice Rivlin, Director, Office of Management and Budget, August 16, 1995, reprinted in U.S. Congress, Senate Committee on the Budget and House Committee on the Budget, *Effects of Potential Government Shutdown*, hearing, 104th Cong., 1st sess., September 19, 1995, S.Hrg. 104-175 (Washington: GPO, 1995), pp. 77-85.

[19] Ibid., p. 78. In light of the intervening amendments, the 1995 OLC opinion required the safety of human life or the protection of property to be compromised "in some significant degree" in order for a function to be considered excepted.

More recently, OMB summarized its interpretation of exceptions to the Antideficiency Act in memoranda that were issued to agencies in April and December 2011, in the context of near-impasses regarding enactment of FY2011 and FY2012 annual appropriations, respectively.[20] The near-impasses also resulted in executive branch agencies posting a substantial amount of information on the Internet about their plans for a potential shutdown, including information about excepted and non-excepted personnel and activities.[21] These plans might provide insight into questions of whether government activities at specific agencies and programs, and in specific situations, would continue or cease, at least according to interpretations of law at that time.

Questions and Answers

(1) What would happen to ACA implementation in the event of a lapse in appropriations funding, resulting in a government shutdown?

It appears that substantial ACA implementation might continue during a lapse in annual appropriations that resulted in a temporary government shutdown for two reasons. The first is that the federal government will be able to rely on sources of funding other than annual discretionary appropriations to support implementation activities, including multiple-year and no-year discretionary funds still available for obligation as well as mandatory funds.[22] The second reason, which is covered in more detail in the answers to several of the other questions, is that agencies may continue to perform certain types of activities that fall under exceptions to the Antideficiency Act, which generally prohibits continued operations in the absence of appropriations.

HCERA[23] created a Health Insurance Reform Implementation Fund (HIRIF), to which it appropriated $1 billion.[24] Both the Centers for Medicare & Medicaid Services (CMS, within the Department of Health and Human Services (HHS)), and the Internal Revenue Services (IRS, within the Department of the Treasury) have used these mandatory funds to cover the costs associated with ACA's implementation. The HIRIF appropriation was one of numerous appropriations included in ACA that collectively provide billions of dollars of mandatory funding to support new and existing grant programs and other activities.[25] The HHS shutdown contingency plan that was prepared in anticipation of a possible government shutdown in FY2012 indicated that ACA implementation activities at CMS would continue because of the mandatory funding provided in the law.[26]

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[20] U.S. Executive Office of the President, Office of Management and Budget (hereinafter OMB) Memorandum M-11-13, *Planning for Agency Operations During a Lapse in Government Funding*, April 7, 2011, pp. 4-6; and OMB Memorandum M-12-03, *Planning for Agency Operations During a Lapse in Government Funding*, December 15, 2011, Attachment 1 (first three pages of non-paginated attachment).

[21] OMB, "Agency Contingency Plans," at http://www.whitehouse.gov/omb/contingency-plans.

[22] Mandatory funding refers to budget authority that is provided in and controlled by laws other than the annual appropriations acts.

[23] See footnote 1.

[24] HCERA § 1005, 42 U.S.C. § 18121

[25] For more information on all the ACA mandatory appropriations and the obligation of these funds, see CRS Report R41301, *Appropriations and Fund Transfers in the Patient Protection and Affordable Care Act (ACA)*, by C. Stephen Redhead.

[26] U.S. Department of Health and Human Services, *Fiscal Year 2012 Contingency Staffing Plan for Operations in the Absence of Enacted Annual Appropriations* (Dec. 15, 2011), at http://www.whitehouse.gov/sites/default/files/omb/contingencyplans/hhs_12152011_1436.pdf.

The Obama Administration's FY2013 budget projected that all the HIRIF funds would be obligated by the end of FY2012 and requested more than $1 billion in new discretionary funding for CMS and the IRS to pay for ongoing implementation activities. Congress did not provide any new discretionary funding for ACA implementation in FY2013.

HHS officials expect to spend about $1.5 billion on ACA implementation in FY2013, primarily to establish the federally facilitated exchanges and related information technology (i.e., data services hub) and to conduct consumer outreach and education.[27] In the absence of any FY2013 discretionary funding for these activities, HHS reportedly is using funds from the following sources:[28]

- approximately $235 million in unobligated HIRIF funds carried over from FY2012;[29]
- $454 million in mandatory funds from the Prevention and Public Health Fund (PPHF), for which ACA provided a permanent annual appropriation;
- $450 million in no-year funds from the nonrecurring expenses fund (NEF);[30] and
- approximately $116 million from the Secretary's authority to transfer funds from other HHS accounts.[31]

The Administration's FY2014 budget requested $1.4 billion in new funds for CMS Program Management for ongoing ACA implementation activities, plus an additional $400 million for the IRS to administer ACA's tax-related provisions, including the premium tax credits.[32] In the event that congressional appropriators do not provide any of these funds, or in the event of a temporary lapse in discretionary appropriations that results in a government shutdown, it seems likely that the Administration will continue to rely on alternative sources of funding to support ACA implementation activities.

(2) How would the Departments of Health and Human Services (HHS) and the Treasury determine what would continue during a lapse?

This question might be addressed from two perspectives: (1) the structure of an agency's internal decision making process; and (2) the criteria that are evaluated in that process.

[27] John Reichard, "HHS Using Several Sources to Fund Federal Health Insurance Exchange," *CQ Roll Call*, April 10, 2013.

[28] Ibid.

[29] HHS did not, in fact, obligate all the HIRIF funds by the end of FY2012 as was originally projected.

[30] The nonrecurring expenses fund, within the Department of the Treasury, was established by Division G, Section 223 of the Consolidated Appropriations Act, 2008 (P.L. 110-161, 121 Stat. 1844). The HHS Secretary may transfer to the fund unobligated balances of expired annual discretionary funds up to five years after the fiscal year in which those funds were available for obligation. The amounts transferred to the fund are available until expended for use by HHS for "capital acquisition necessary for operation of the Department, including facilities infrastructure and information technology infrastructure..." Congressional appropriators must be notified at least 15 days in advance of any planned use of funds.

[31] Each year, the Labor-HHS-ED appropriations act gives the HHS Secretary authority to transfer funds between appropriation accounts. No more than 1% of the funds in any given account may be transferred, and recipient accounts may not be increased by more than 3%. Congressional appropriators must be notified at least 15 days in advance of any transfer.

[32] U.S. Department of Health and Human Services, *Budget in Brief, FY2014*, at http://www.hhs.gov/budget/fy2014/fy-2014-budget-in-brief.pdf; U.S. Department of the Treasury, Internal Revenue Service, *Budget in Brief, FY2014*, at http://www.irs.gov/PUP/newsroom/FY%202014%20Budget%20in%20Brief.pdf.

With regard to the first perspective, it is not clear in advance how HHS and Treasury would structure their internal decision making processes in a given scenario—in terms of participating officials and organizations—to determine which operations would cease or continue in the event of a shutdown.

With regard to the second perspective, it seems likely that the departments and their officials would evaluate the criteria that are outlined in the section of this memorandum titled "Antideficiency Act: Restrictions and Exceptions" (see above). Some perspectives on this matter also might be gleaned from the plans that the departments developed in 2011, which were posted on OMB's website at http://www.whitehouse.gov/omb/contingency-plans.

(3) Is there any precedent you could point to, for what activities would continue during a lapse?

The experience of the Social Security Administration (SSA) during the two FY1996 shutdowns illustrates what might happen over a period of time in these situations.[33] The lack of funds for some employees' salaries, for example, may eventually impinge on the processing and payment of new entitlement claims. SSA's administrative history describes how 4,780 employees were allowed to be retained during the initial stages of the first shutdown.[34] The majority of these employees were "in direct service positions to ensure the continuance of benefits to currently enrolled Social Security, SSI and Black Lung beneficiaries." Avoidance of furloughs was possible, because "appropriations were available to fund the program costs of paying benefits, [which] implied authority to incur obligations for the costs necessary to administer those benefits." SSA furloughed its remaining 61,415 employees. Before long, however, SSA and OMB reconsidered. SSA had not retained staff to, among other things, respond to "telephone calls from customers needing a Social Security card to work or who needed to change the address where their check should be mailed for the following month." SSA then advised OMB that the agency would need to retain 49,715 additional employees for direct service work, including the processing of new claims for Social Security benefits. Further adjustments were made during the considerably longer second shutdown, in response to increasing difficulties in administering the agency's entitlement programs.

The SSA workers described above were determined to be excepted based on the "necessary implication" standard enunciated in the Civiletti opinion. We were unable to identify any judicial precedents applying that standard. Additionally, few of the contingency plans submitted to OMB by the various executive agencies provided any further explication of that term. Of note, the Department of Labor determined that activities by the Employment and Training Administration with respect to unemployment insurance benefits fell within the activities authorized by "necessary implication" of the underlying benefits.[35] Similarly, the Department of Veterans Affairs determined that the processing of monthly recurring payments for education and vocational rehabilitation were excepted functions based on the "necessary implication" doctrine.[36] Consequently, it may be reasonable to infer that any similar benefit programs

[33] In FY1996, two funding gaps and corresponding shutdowns occurred. The first lasted five full days between November 13-19, 1995. The second FY1996 partial shutdown of the federal government lasted 21 full days between December 15, 1995, and January 6, 1996.

[34] See SSA's "History of SSA 1993 - 2000," chapter 5, at http://www.ssa.gov/history/ssa/ssa2000chapter5.html.

[35] Solicitor of Labor M. Patricia Smith, *Update to April 7, 2011 Plan for Continuation of Certain Limited Departmental and Solicitor Activities During a Lapse in Appropriations* 3 (December 14, 2011), at http://www.whitehouse.gov/sites/default/files/omb/contingencyplans/labor_12152011_1404.pdf.

[36] U.S. Department of Veterans Affairs, *VA Contingency Plan* 5 (April 8, 2011), at http://www.whitehouse.gov/files/omb/contingencyplans/VA_040811_1330.pdf.

under the ACA with a separate funding stream could also be considered excepted functions under the "necessary implication" doctrine in the event of a lapse in annual appropriations.

(4) Would the IRS continue to collect taxes and user fees enacted by the law during a lapse?

As discussed above, the Antideficiency Act has been interpreted to provide an exception in the case where there is "some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property."[37] In its government shutdown Contingency Plan from November 16, 2011, the IRS cited memoranda from OMB and the General Counsel of the Treasury for the proposition that incoming tax revenue constitutes property in the context of this exception to the Antideficiency Act.[38] As a result, that contingency plan indicated that "during a lapse in appropriations, the Service may continue processing tax returns to insure the protection of those returns that contain remittances." Further, the Contingency Plan also indicated that, based on the same exception, IRS intended to continue processing all electronic tax returns; take measures to protect cases involving statutes of expiration, bankruptcy, liens and seizure; and maintain criminal law enforcement and undercover operations.[39] However, all audit functions, examination of returns, and processing of non-electronic tax returns that did not include remittances were not considered excepted from the Antideficiency Act.[40]

Therefore, whether a particular tax will be collected during a government shutdown may depend upon the manner in which it is assessed. For example, many excise taxes, including the excise tax on indoor tanning services enacted by the ACA, require providers to self-assess the tax and submit quarterly returns to the IRS along with semimonthly deposits of the amounts collected from customers.[41] However, other excise taxes, such as the fee on branded prescription drugs added by § 9008 of the ACA, are not self-assessed by the taxpayer, but are first calculated by the IRS and communicated to the taxpayer in the form of a "notice of preliminary fee calculation."[42] It is not clear from the guidance issued by IRS in its Contingency Plan whether this calculation and notice would be considered an excepted activity during a lapse in funding. On one hand, these activities are intended to generate revenue for the government, suggesting that it may qualify for the same exception to protect government property. On the other hand, these activities might be distinguished from the processing of returns, remittances, and deposits, in which funds are actually in the process of being sent to the IRS. If the "notice of preliminary fee calculation" is considered an excepted activity, it raises the question why audits would not be excepted, when both arguably are related to revenue collection.

Importantly, it should be noted that a lapse in funding does not automatically result in the suspension of filing and payment deadlines imposed by the Internal Revenue Code (IRC). While some enforcement and collection activities may be unavailable during a government shutdown, those authorities would resume if

[37] 43 Op. Atty. Gen. 293.

[38] IRS, *FY2012 Shutdown Contingency Plan*, at 6 (November 16, 2011) (citing Memorandum for Heads of Executive Departments and Agencies, *Agency Operations in the Absence of Appropriations*, Office of Management and Budget (November 17, 1981) (excepting activities essential to the preservation of the essential elements of the money and banking system of the United States, including borrowing and tax collection activities of the Treasury); Memorandum for the Assistant Secretary (Administration), *Operating During a Hiatus in Appropriations*, General Counsel of the Treasury 4 (September 2, 1982)).

[39] Ibid.

[40] Ibid,. at 7.

[41] Treas. Reg. §§ 40.6011(a)-1(a), 40.6302(c)-1.

[42] Treas. Reg. § 51.6T.

funding is subsequently provided for the IRS, and any outstanding tax liabilities accrued during that time period may be subject to enforcement and collection at that time.

(5) Would the ACA changes to Medicare, such as the reduction in payments to health care providers and Medicare Advantage plans, continue during a shutdown?

A short-term government shutdown would likely have little impact on Medicare claims payments based on what happened during the shutdowns in 1995-1996, nor would it affect underlying program requirements. Medicare continued to pay physicians and hospitals during those shutdowns according to the prevailing payment rates because claims are paid out of the Medicare trust funds. These outlays represent mandatory spending, which is not controlled by the appropriations committees. However, CMS's contractual payments to the vendors that process the claims on its behalf come from the agency's operating budget, which is funded through annual discretionary appropriations. During the 1995-1996 shutdowns, the claims vendors continued to process and pay claims with the expectation that they would be paid for their services later. Prospectively, if a shutdown were to last for many weeks or months, Medicare claims payments might cease as vendors ran out of cash to cover their operating costs.[43]

(6) Would premium credits and cost-sharing subsidies continue during a shutdown?

Section 36B of the IRC provides a refundable tax credit to subsidize the health insurance premiums for certain low-income taxpayers who enroll in a health plan offered through a health insurance exchange established by a state.[44] Like many other tax credits, the monies used to fund such provisions are permanently appropriated outside of the annual appropriations process.[45] Therefore, the funds for such credits would continue to be available via this permanent appropriation during a government shutdown caused by a lapse in annual appropriations. CRS is not aware of any official position from the IRS with respect to this provision, but it may be likely that at least some of the eligibility and processing functions associated with payment of this credit might continue during a government shutdown, even if the salaries of the federal employees who would be making those determinations are paid from annual appropriations that have lapsed. This is because the IRS could rely upon that portion of the Civiletti opinion which indicates that continued availability of money for benefit payments would necessarily imply that continued administration of the program is authorized by law despite the lapse in discretionary funding.[46]

In addition to the premium tax credits discussed in the preceding paragraph, certain individuals and families receiving the credits are also eligible for coverage with lower cost-sharing (i.e., out-of-pocket costs such as deductibles and copays) than otherwise required under the applicable health plan. Under § 1402 of ACA, health plans must reduce the cost-sharing for these enrollees. The affected plans are then to be reimbursed by the Treasury in the same amount. However, unlike the refundable tax credits, these payments to the health plans do not appear to be funded through a permanent appropriation. Instead, it

[43] John Gorman, "What Happens to Medicare/Medicaid if There's a Government Shutdown?" Gorman Health Group blog, January 15, 2103, at http://blog.gormanhealthgroup.com/2013/01/15/what-happens-to-medicaremedicaid-if-theres-a-government-shutdown/.

[44] I.R.C. § 36B. Treasury regulations implementing this provision have stated that such credits will also be available in those exchanges established by HHS on behalf of a state. Treas. Reg. § 1.36b-1(k). Some have questioned whether the statute permits these credits with respect to coverage in federally facilitated exchanges. A full discussion of that issue is beyond the scope of this memorandum.

[45] 31 U.S.C. § 1324.

[46] See above in the section titled"Antideficiency Act: Restrictions and Exceptions." This argument would be similarly applicable to the advance payments of the refundable tax credit, contemplated under §1412 of the ACA. 42 U.S.C. § 18082.

appears from the President's FY2014 budget that funds for these payments are intended to be made available through annual appropriations.[47] Consequently, in the event of a government shutdown, it does not appear that such cost-sharing payments to health plans would be excepted from the Antideficiency Act, although the provisions of § 1402 requiring insurers to reduce cost-sharing payments could continue to remain in effect.

(7) Would state and federal exchanges be able to operate during a shutdown?

Yes, other sources of funding besides annual discretionary appropriations are available in FY2014 and beyond to support exchange operations. As discussed in the answer to question #1, the HHS Secretary currently is using funding from ACA and other sources to establish the federally facilitated exchanges and related information technology (i.e., data services hub) and to engage in consumer outreach and education. ACA also provided the Secretary with an indefinite annual appropriation to award exchange planning and establishment grants to states through 2014. Each year, the Secretary determines the amount of funding that will be made available to states through this grant program.[48]

Beginning in 2015, exchanges must be self-sustaining. To help meet that goal, ACA permits exchanges to assess fees on insurance carriers that offer plans through the exchanges, or to otherwise generate funding, to support exchange operations.[49] The HHS Secretary also is planning to assess fees on carriers that participate in federally facilitated exchanges. HHS projects that those fees will total $450 million in FY2014.[50] It plans to use the funds to support exchange operations and consumer outreach and education.

(8) Would a shutdown suspend the requirements of the individual mandate?

Section 5000A of the IRC imposes a penalty upon taxpayers who do not maintain "minimum essential coverage" during the tax year.[51] This provision, also known as the "individual mandate," applies to tax years beginning after December 31, 2013 (i.e., calendar years 2014 and on),[52] and is intended to be assessed as part of a taxpayer's annual income tax return required to be filed during April of the year following the applicable tax year.[53] Therefore, the IRS will likely begin assessing the individual mandate beginning in early 2015, for penalties incurred during 2014. The law specifies certain groups of individuals as exempt from the individual mandate and its associated penalties.[54] It also gives the HHS Secretary the authority to establish a hardship exemption for other individuals who do not qualify for one of the statutory exemptions.[55]

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[47] OMB, *The Budget for Fiscal Year 2014, Appendix*, at 448, at http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/hhs.pdf.

[48] For more information, see CRS Report R43066, *Status of Federal Funding for State Implementation of Health Insurance Exchanges*, by Annie L. Mach and C. Stephen Redhead.

[49] ACA § 1311(d)(5)

[50] U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services, *Fiscal Year 2014, Justification of Estimates for Appropriations Committees*, at 14, at http://www.cms.gov/About-CMS/Agency-Information/PerformanceBudget/Downloads/FY2014-CJ-Final.pdf.

[51] I.R.C. § 5000A.

[52] I.R.C. § 5000A(a) (applying to "each month beginning after 2013").

[53] I.R.C. § 5000A(b)(2).

[54] I.R.C. § 5000A(d)-(e).

[55] I.R.C. § 5000A(e)(5).

If a government shutdown were to occur during calendar year 2014, the lapse in funding would not automatically suspend the requirements of the individual mandate. In other words, during the time period that the government is shut down, taxpayers who fall within the coverage of the individual mandate would still be accruing penalties for any months in which they lacked minimum essential coverage. There is no general exception to the individual mandate that automatically applies during a lapse in government funding. Moreover, the HHS Secretary has not included a government shutdown among the various circumstances enumerated in regulation as constituting a hardship.[56]

If a government shutdown spanned the "tax filing season" during the first part of 2015, the IRS has indicated that it would still process all electronic returns and those paper returns that contained remittances.[57] To the extent that these returns reported penalties accrued during 2014 because of noncompliance with the individual mandate, it appears that the IRS would continue to process such returns, including the portion attributable to the individual mandate, during a government shutdown.

[56] 45 C.F.R. § 155.605(g).

[57] IRS, *FY2012 Shutdown Contingency Plan*, at 6 (November 16, 2011). As discussed above, this activity during a government shutdown is premised on the ability to perform tasks necessary "to protect federal property," including incoming tax revenues.