



**Office of the Special Inspector General
for Afghanistan Reconstruction**

**Agency Operations
In the Event of a Funding Lapse
FY 2019**

**As required by Section 124,
OMB Circular A-11
(2018)**

January 18, 2019

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SIGAR Response Plan In the Event of Funding Lapse FY 2019

1. Background.

A. SIGAR. – The Office of the Special Inspector General for Afghanistan Reconstruction (SIGAR) was established by Section 1229 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 (January 28, 2008), as a wartime (or overseas contingency operation) oversight agency of the United States Government’s Executive Branch. The Special Inspector General for Afghanistan Reconstruction is appointed by the President of the United States. *See* Pub. L. No. 110-181, Section 1229(c). SIGAR performs oversight of Afghanistan reconstruction and security programs, operations and contracts, funded directly or indirectly by U.S. appropriations, conducted as part and parcel of Operation Freedom’s Sentinel in Afghanistan, a critical component of the United States Government’s Global War of Terror. SIGAR’s investigators, auditors and oversight personnel perform time-critical audits (such as audits of Commander’s Emergency Response Program (CERP) projects), assessments and investigations of waste, fraud and abuse occurring in the conduct of such programs, operations and contracts, which are relied on by the United States Government’s national security community including U.S. military commanders in Afghanistan. *See, e.g.,* White House Press Release dated January 10, 2011 (“SIGAR plays a fundamental role in protecting the vital interests of the United States...[W]e will continue to work through SIGAR...to ensure that U.S. programs in Afghanistan effectively and efficiently achieve their [national security] objectives.”). SIGAR’s mission in the war zone is critical to national security.

In FY 2018, SIGAR was funded by multi-year appropriations which expire September 30, 2019. In accordance with section (2)(B) *Continuing Availability of Multi-Year Funds*, SIGAR will continue to fund agency operations during a lapse in funding through the use of carryover funds. If the period of funding lapse exceeds the carryover funds available, SIGAR will initiate implementation of this plan.

B. SIGAR Employees. – As of today’s date, SIGAR’s employee workforce (exclusive of a small number of contractor personnel) consists of 184 excepted service, limited-term (generally, 13 month term) federal government employees hired under 5 U.S.C. § 3161.¹ Of this total number of employees (184), 26 are now deployed for duty in Afghanistan. SIGAR employees deployed to Afghanistan are by virtue of their deployment to a war zone “emergency essential” pursuant to 10 U.S.C. § 1580, and are therefore required to remain on duty in Afghanistan in the event of a general evacuation of non “emergency essential” (EE) personnel by the Chief of Mission. *See* Dept. of the Army Civilian Employee Deployment Guide, ¶ 1-3, A Pamph. # 690-47 (1 Nov. 1995): “All civilian employees deploying to combat operations/crisis situations are considered EE regardless of volunteer status or the signing of an EE position agreement. The employee will be in an EE status for the duration of the assignment.”

C. Requirement for Agency Response Plan in the Event of a Lapse in Appropriations. – OMB Circular A-11 Section 124 requires SIGAR and other Executive Branch agencies to develop and maintain plans for an orderly shutdown of unexcepted activities in the event of a lapse in appropriations. Whenever there is a change in the source of funding for an agency program or any significant modification,

¹ SIGAR also has five Foreign Service National (FSN) personnel in Afghanistan – performing temporary or periodic services to SIGAR.

expansion, or reduction in agency program activities, the agency must submit an updated plan to OMB for review that reflects this change. At a minimum, agencies should submit updated plans to OMB for review every two years, starting August 1, 2015.

2. Operating in the Absence of Appropriations.

A. **General.** – The Constitution of the United States mandates that “no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”² The Treasury is further protected by the operation of the Antideficiency Act,³ which among other things prohibits all officers and employees of the federal government from entering into obligations in advance of appropriations, and prohibits employing federal personnel in the event of a lapse in appropriations (except in emergencies), “unless authorized by law.”⁴ The Attorney General of the United States has issued legal opinions addressing the permissible scope of government operations “authorized by law” during a lapse in appropriations. Such opinions have also construed the circumstances under which the “emergencies” exception of 31 U.S.C. § 1342 applies to authorize a continuation of government activities where there are “emergencies involving the safety of human life or the protection of property” (generally limited to circumstances where the failure to do so would result in an imminent threat to the safety of human life or the protection of property, including government property and records).

B. **Continued Availability of Multi-year Funds.** – The opinions of the Attorney General on the subject of funding lapses opined that, to the extent unobligated amounts from unexpired multi-year appropriations continue to remain available to a federal government agency, such moneys may, and therefore should, continue to be obligated (in furtherance of the purposes and operations for which they were initially appropriated) and employed to defer – or avoid altogether – an agency shutdown and employee furloughs during lapses in funding.

The Consolidated Appropriations Act for Fiscal Year 2018, Pub. L. No. 115-141, provided SIGAR \$54.9 million in multi-year funds, which remain available through September 30, 2019. Unobligated funding from FY2018 is considered carryover funding, and remains available for obligation in FY2019, until September 30, 2019. SIGAR will use this funding to mitigate the significant disruption a lapse in funding would cause to SIGAR’s employees and operations. SIGAR’s FY2018-2019 carryover amount of \$11.26M, will allow SIGAR to sustain current operations through March 2, 2019.

Although a lapse of appropriations occurred on December 22, 2018, SIGAR has not and will not immediately implement any shutdown plans. In the event that SIGAR’s carryover funding is exhausted and a new appropriations bill has not been signed, SIGAR has devised the following plan, in accordance with OMB Circular No. A-11 Section 124.

C. **SIGAR’s Excepted Personnel.** – Consistent with the 1995 and earlier opinions of the Attorney General addressing funding lapses, the Antideficiency Act permits SIGAR to continue to employ

² U.S. Const. art. I, § 9, cl. 7.

³ 31 U.S.C. § 1341 *et seq.*

⁴ 31 U.S.C. § 1341(a)(1)(B)

personnel during an appropriations lapse only for functions excepted from the Antideficiency Act's general prohibition. Such excepted functions include:

i. Activities relating to emergencies involving imminent threat to the safety of human life or the protection of property – the “emergencies” exception of 31 U.S.C. § 1342. – This function is generally considered to include the continued performance of law enforcement and criminal investigations activities, which if not continued would pose an imminent threat or risk to the safety of persons or property. For SIGAR's employees deployed to the war zone of Afghanistan, the requisite “imminence” of the threat or risk to the safety of persons or property, including government property and records, may be presumed met if otherwise engaged in national security related law enforcement activities and functions. Thus, all SIGAR's criminal investigators may be considered “excepted” under the emergencies exception in 31 U.S.C § 1342; however, all SIGAR's personnel deployed to the Afghanistan war zone – investigators included – are already separately excepted under the exception in (iv) below.⁵

ii. Functions as to which express statutory authority to incur obligations in advance of appropriations has been granted. – SIGAR does not have such express statutory authority.⁶

iii. Activities for which the authority to continue during a funding lapse arises by necessary implication, because of the direct dependence of Government activities authorized during a funding gap on the continuation of the activity in question. – This exception provides collateral support for excepting SIGAR's forward employees deployed to Afghanistan, operating in conjunction with exception in (iv) below.

iv. Functions necessary to the President's discharge of his constitutional duties and powers as Commander in Chief. – All of SIGAR's forward personnel deployed in Afghanistan are “excepted” under the constitutional exception to the Antideficiency Act. As Attorney General Benjamin R. Civiletti articulated in his 1981 opinion, referenced in OMB Circular No. A-11:

“In sum, I construe the ‘authorized by law’ exception contained within 31 U.S.C § 665(a) [now 31 U.S.C § 1341(a)(1)(B), the Antideficiency Act] as exempting from the prohibition enacted by the second clause of that section not only those obligations in advance of appropriations for which express or implied authority may be found in the enactments of Congress, but also those obligations necessarily incident to presidential initiatives undertaken within his constitutional powers.”⁷

The President's war powers and the conduct of foreign relations essential to national security therefore fall within the “authorized by law” exception of the Antideficiency Act. “The President shall be Commander in Chief of the Army and Navy of the United States, and of the

⁵ SIGAR's Afghanistan activities constitute an integral part of the national security objectives in that theatre, and operate as part and parcel of Operations Freedom's Sentinel – Afghanistan. Further, SIGAR's forward personnel have been designated by the military authorities as “emergency essential” – i.e., exempt from general civilian government employee evacuations from Afghanistan that may be ordered by the Chief of Mission.

⁶ See Pub. L. No. 110-181, Section 1229(h)(3).

⁷ Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Atty Gen. 293; 5 Op. O.L.C. 1 (1981).

Militia of the several States, when called into the actual Service of the United States.”⁸ He is further vested with all of “the executive power” and the duty to execute the laws.⁹ The fact that SIGAR’s IG is presidentially appointed,¹⁰ buttresses the position that SIGAR is a wartime IG engaged in national security functions.

Significantly, OPM’s Director, in the context of premium pay cap waiver authority (under section 1101 of Pub. L. No. 110-417), has stated, in relevant part, that the waiver of pay cap is authorized under the following conditions:

The employee performs work in direct support of, or directly related to, (1) a military operation (including a contingency operation, as defined in 10 U.S.C. 101(a)(13)) or (2) an operation in response to an emergency declared by the President. (“Military operation is a Department of Defense (DOD) term of art, defined in the DOD Dictionary of Military and Associated Terms.) Prior to authorizing any premium pay cap waiver under section 1106 on the basis of a military operation, an agency must confirm it meets the DOD definition.

All forward SIGAR personnel are performing work in direct support of, or directly related to, Operation Freedom’s Sentinel, and on this further basis are excepted from the Antideficiency Act.

v. Orderly termination of agency operations. – In a 1980 opinion, the Attorney General opined that agencies are by necessary implication authorized “to incur those minimal obligations necessary to closing [the] agency.” This exception falls within the ‘authorized by law’ exception under 31 U.S.C § 1341(a)(1)(B). The Attorney General’s 1981 opinion reiterated his conclusion, and consistent practice since that time has provided for the orderly termination of those agency functions that may not continue during a period of lapsed appropriations. SIGAR’s plan provides for approximately one-half day to allow for the orderly termination of agency non-excepted operations.

3. SIGAR’s Response Plan in the Event of a Funding Lapse.

SIGAR Personnel Deployed to Afghanistan. Pursuant to these constitutional and other legal exceptions to the Antideficiency Act, SIGAR has designated as “excepted” from the Act all forward personnel deployed to Afghanistan (whether on TDY or more permanently assigned) at the time a funding lapse occurs for retention – and activity continuation – purposes.¹¹

SIGAR Headquarters. In addition to its personnel deployed to Afghanistan, SIGAR will retain as “excepted” (as required) its agency head, along with SIGAR’s Deputy Inspector General, Assistant Inspector General for Investigations, Assistant Inspector General for Audits and Inspections, Assistant Inspector General for Management and three (3) Mission Support Specialists ((1) Travel and Deployment

⁸ U.S. Const. art. II, § 2, cl. 1.

⁹ U.S. Const. art. II, § 1.

¹⁰ Pub. L. No. 110-181, § 1229(c)(1).

¹¹ At the present time, there are, as noted in the text above, 26 SIGAR investigators, auditors, and support personnel deployed permanently or on TDY to Afghanistan. In addition, SIGAR has five FSN (foreign service national) personnel, who are contractors arranged through the Embassy.

Specialist, (1) Budget Analyst, and (1) Information Technology (IT) Specialist) to support the mission in Afghanistan's continuing operations as well as travel, funding, and IT. SIGAR may also retain additional "excepted" personnel, such as certain criminal investigators depending on the status of their criminal investigations at the time this plan is implemented. Furloughed employees may nevertheless be recalled temporarily or otherwise from furlough status in the event their services become required for SIGAR to continue to perform its excepted activities.

Orderly termination of Agency operations. Three (3) additional Human Resources (HR) related SIGAR administrative staff will be retained, temporarily at SIGAR's Arlington, Virginia office upon implementation of this Plan, for the orderly termination of agency operations. The orderly termination is estimated at this time to require approximately one-half day or one workday following notification by OMB of a funding lapse (and of the need to commence implementation of this plan).

Furloughed employees. All SIGAR personnel not deployed to Afghanistan, or otherwise excepted as noted above, are "non-exempted" under this plan, and are to be furloughed in non-pay, non-duty status in the event of a funding lapse (including the three (3) additional HR related SIGAR administrative staff retained temporarily for the orderly termination of agency operations.) SIGAR's employees who are to be furloughed pursuant to this plan will be notified by SIGAR's administrative (HR-related) staff of their furloughed status by email, to their work and personal email addresses, and will be required to report temporarily for duty on their next duty day following the commencement of this plan's implementation, to secure their files, official records and work spaces.

SIGAR "excepted" personnel (whether in Afghanistan or at SIGAR's Headquarters in Arlington, Virginia, whether on a continuing basis during any funding lapse or only temporarily for the orderly shutdown) will not be paid until appropriations are made available by Congress, consistent with the principles set forth in OMB Circular No. A-11 and the Attorney General's opinions addressing a funding hiatus.¹² SIGAR will, however, incur an obligation to pay for the continued services of excepted personnel upon termination of the funding hiatus.¹³

- A. Time to Complete Implementation. – Approximately one-half day from the time of notification by OMB.
- B. Number of employees expected to be on-board before the earliest possible implementation of this agency response plan. – Approximately 184.
- C. Number of employees to be retained under this plan. – The total number of employees to be retained as excepted personnel under this plan are 34 employees, below is the employee breakdown:
 - SIGAR's personnel deployed to Afghanistan - (26)
 - SIGAR's Inspector General in Arlington, Virginia - (1)
 - SIGAR's Deputy Inspector General in Arlington, Virginia – (1)
 - SIGAR's Assistant Inspector General for Investigations in Arlington, Virginia - (1)

¹² See, e.g., "Memorandum Opinion for the Director, Office of Management and Budget," August 16, 1995, transmitted by OMB Bulletin entitled "Agency Plans for Operations During Funding Hiatus," OMB Bull. M-95-18; 1995 OLC LEXIS 57 (August 22, 1995); *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 43 Op. Atty Gen. 293; 5 Op. O.L.C. 1 (1981); *Applicability of the Antideficiency Act Upon A Lapse in an Agency's Appropriations*, 43 Op. Atty Gen. 224; 4A Op. O.L.C. 16 (1980); "Payment of Travel Costs to Witnesses During a Period of Lapsed Appropriations," 1981 OLC Lexis 68, 5 Op. O.L.C. 429 (Dec. 23, 1981).

¹³ *Id.*

- SIGAR's Assistant Inspector General for Audits and Inspections in Arlington, Virginia - (1)
- SIGAR's Assistant Inspector General for Management & Support in Arlington, Virginia - (1)
- SIGAR's Mission Support Specialists in Arlington, Virginia - (3)

*Additionally, three (3) HR staff will be retained temporarily at headquarters for the orderly termination of agency operations.

The approximately 150 additional employees will be furloughed.

It is therefore so ordered, this 18th day of January, 2019.

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to read 'John F. Sopko'.

John F. Sopko
Special Inspector General for Afghanistan Reconstruction