



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

**Agency Response Plan  
In the Event of a Funding Lapse**

**As required by Section 124,  
OMB Circular A-11  
(2010)**

March 17, 2011

1550 Crystal Drive, 9<sup>th</sup> Floor, Arlington, VA 22202  
Mailing Address: 400 Army Navy Drive, Arlington, VA 22202  
Tel: (703) 602-3840 Fax: (703) 602-8753

## SIGAR Response Plan in the Event of a Funding Lapse

### 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 Enduring Freedom – Afghanistan, a critical component of the United States Government's Global War on Terror. SIGAR's investigators, auditors and other oversight personnel perform time-critical audits (such as 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.

B. SIGAR Employees.— As of today's date, SIGAR's employee workforce (exclusive of a small number of contractor personnel) consists of 116 excepted service, limited-term (generally, 13 month term<sup>1</sup>) federal government employees hired under 5 U.S.C. § 3161 and 3 military detailees.<sup>2</sup>

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<sup>1</sup> SIGAR's general employment of 13-month appointment terms has recently been changed, as a matter of SIGAR management policy, in favor of presumptive 2-year appointment terms prospectively, as authorized by SIGAR's enabling legislation. *See* Pub. L. No. 110-181, as amended, Section 1229(h)(1)(B)(ii).

<sup>2</sup> SIGAR also has from time to time a small number of employees of contractors – generally fewer than 5 (except during the weeks prior to the publication deadlines for SIGAR's statutorily mandated Quarterly Reports to Congress) and two Foreign Service National ("FSN") translators in Afghanistan – performing temporary or periodic services to SIGAR.

Under this Plan, SIGAR will suspend the performance of services by all contractors and contractor personnel performing services to SIGAR outside Afghanistan, but retain the services of its two contractor translators in Afghanistan as part of this Plan for the duration of any such lapse. SIGAR will implement this measure to avoid paying for, or incurring additional obligations to pay for, any unexcepted activities by contractors or contractor personnel during any such funding lapse.

In addition, as noted in the text above, the Department of the Army (DA) has detailed, from time to time (presently 3) Active Duty military detailees to SIGAR, the costs of whose details are not reimbursable by SIGAR to DA, USFOR-A or any other DOD component. SIGAR's Response Plan assumes the retention of its 3 military detailees (unless required otherwise under the DA's agency shutdown plan).

Of this total number (116), 34 are now deployed for duty in Afghanistan (29 on a permanent basis and 5 on a TDY basis). 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, DA 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.” Current SIGAR personnel recruitment and budgeting plans envision a total SIGAR employee workforce of 180 excepted service, limited term employees hired under 5 U.S.C. § 3161 at such time as SIGAR becomes fully funded.

C. Requirement for Agency Response Plan in the Event of a Lapse in Appropriations.— OMB Circular A-11 (2010), section 124.2, 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. Circular A-11 requires such agencies to submit their agency shutdown plans to OMB when first prepared or revised. This is SIGAR’s first shutdown plan, and has been submitted to OMB pursuant to Circular A-11.

## 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.”<sup>3</sup> The Treasury is further protected by the operation of the Antideficiency Act,<sup>4</sup> 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.”<sup>5</sup> 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 opine 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.

<sup>3</sup> U.S. Const. art. I, § 9, cl. 7.

<sup>4</sup> 31 U.S.C. § 1341 *et seq.*

<sup>5</sup> 31 U.S.C. § 1341(a)(1)(B).



At present, SIGAR has no unobligated multi-year appropriations available to it from Fiscal Years prior to FY 2011, and will therefore be implementing this Plan immediately upon the occurrence of an FY 2011 funding gap in accordance with OMB's guidance. Should these circumstances change in the future, however, then at the time OMB notifies SIGAR of a funding lapse for the purpose of initiating the implementation of this Plan, SIGAR will coordinate with OMB on whether and how the availability of any such unobligated funds should be employed to delay the timing of implementation of this Plan by SIGAR upon a funding lapse.

C. SIGAR's Excepted Personnel.— Consistent with the 1995 and earlier opinions of the Attorney General addressing funding lapses, the Antideficiency Act authorizes SIGAR to continue to employ 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 an 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 of SIGAR's criminal investigators in Afghanistan 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.<sup>6</sup>

ii. Functions as to which express statutory authority to incur obligations in advance of appropriations has been granted.— SIGAR does not enjoy such express statutory authority.<sup>7</sup>

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.— Under this Response Plan, all of SIGAR's forward

<sup>6</sup> In this connection, SIGAR's Afghanistan activities constitute an integral part of the national security objectives in that theatre, and operate as part and parcel of Operation Enduring Freedom – 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.

<sup>7</sup> See Pub. L. No. 110-181, Section 1229(h)(3).

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."<sup>8</sup>

The President's war powers and the conduct of foreign relations essential to the 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 Militia of the several States, when called into the actual Service of the United States."<sup>9</sup> He is further vested with all of "the executive Power" and the duty to execute the laws.<sup>10</sup> The fact that SIGAR's IG (currently acting IG) is presidentially appointed,<sup>11</sup> buttresses the position that SIGAR is uniquely, and exclusively, a war-zone IG engaged in national security functions.

Significantly, OPM's Director, in the context of premium pay cap waiver authority (under section 1101 of Public Law 110-417), has recently stated, in relevant part, that waiver of pay caps 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 any DOD operation in countries in which such a waiver is being considered meets the DOD definition. (Note: The State Department and DOD have determined all their employees serving in Iraq and Afghanistan are performing work in direct support of, or directly related to, a military operation. In other locations, they will make determinations on a case-by-case basis.)<sup>12</sup>

Under this recent DOD and State Department determination, all forward

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<sup>8</sup> *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).

<sup>9</sup> U.S. Const. art. II, § 2, cl. 1.

<sup>10</sup> U.S. Const. art. II, § 1.

<sup>11</sup> P.L. 110-181, Section 1229(c)(1).

<sup>12</sup> "Memorandum for Heads of Executive Departments and Agencies," John Berry, Director of OPM (March 3, 2011).



SIGAR personnel are performing work in direct support of, or directly related to, Operation Enduring Freedom, 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 Response Plan provides for the temporary retention of four administrative staff for the orderly termination of agency operations for approximately one-half day.

### 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.<sup>13</sup>

*SIGAR Headquarters.* In addition to its personnel deployed to Afghanistan, SIGAR will retain as “excepted” (as required) its agency head,<sup>14</sup> along with SIGAR’s Assistant Inspector General for Management and SIGAR’s Travel and Deployment Specialist, to support its mission in Afghanistan. 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.* Finally, three (3) additional 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 of 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-excepted” 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 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

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<sup>13</sup> At the present time, there are, as noted in the text above, 34 SIGAR investigators, auditors and support personnel deployed permanently or on TDY to Afghanistan. In addition, SIGAR has two FCN (foreign country national) personnel, who are contractors arranged through the Embassy, serving as translators.

<sup>14</sup> SIGAR’s current agency head, the Acting Inspector General, was also appointed by the President.

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. The furlough notification to employees that SIGAR intends to employ for this purpose is appended at Attachment 1.

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.<sup>15</sup> SIGAR will, however, incur an obligation to pay for the continued services of excepted personnel upon termination of the funding hiatus.<sup>16</sup>

3. **Data Specifically Requested by Section 124.2 of Circular A-11.**—

A. *Time to Completion of Implementation.*— Approximately one-half day from the time of notification by OMB to implement this Plan.

B. *Number of employees expected to be on-board before the earliest possible implementation of this agency response plan.*— 116.

C. *Number of employees to be retained under this Plan.*— The total number of employees to be retained as excepted personnel under this Plan is as follows:

- SIGAR's personnel deployed to Afghanistan (currently 34);
- SIGAR's Acting Inspector General in Arlington, Virginia (1);
- SIGAR's Assistant Inspector General for Management in Arlington, Virginia (1); and
- SIGAR's Travel and Deployment Specialist in Arlington, Virginia (1) (for a total number of 37 of SIGAR's 116 limited-term appointment government employees). (In addition, three (3) HR staff will be retained temporarily at headquarters for the orderly termination of agency operations.)

The remainder of SIGAR's government employees (79 at present) would be furloughed under this Plan .

Because all SIGAR's employees are designated as "excepted" on the grounds identified herein, there are no SIGAR employees who have been so designated solely to protect life and property, under the "emergencies" exception of 31 U.S.C. § 1342 .

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<sup>15</sup> 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).

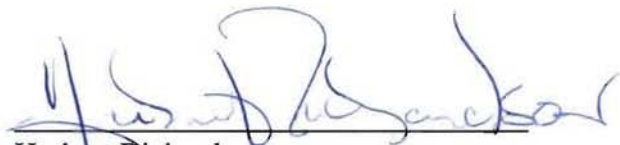
<sup>16</sup> *Id.*

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It is therefore so ordered, this 17day of March, 2011.



Herbert Richardson

Acting Special Inspector General for Afghanistan Reconstruction