FEDERAL MEDIATION AND CONCILIATION SERVICE

OFFICE OF THE DIRECTOR

MEMORANDUM

TO: Office of Management and Budget

FROM: Gregory T. Goldstein, Acting Director

DATE: July 31, 2023

RE: Lapse Plan for Agency Operations in the Absence of Appropriations

This memorandum establishes a contingency plan that will become operational in the event of a lapse in appropriations to fund current activities of the Federal Mediation and Conciliation Service (FMCS). The plan provides for an orderly suspension of most agency operations and continuation of limited essential functions.

Summary of Agency Functions

FMCS is an independent executive branch agency whose primary mission is to assist parties in labor disputes in industries affecting commerce, to settle such disputes through conciliation and mediation, and thus to avoid or minimize the disruptive effects of strikes and/or lockouts. FMCS also provides alternative dispute resolution services and establishes collaborative labor-management programs. FMCS provides its services variously to the private and public sectors, including federal agencies and state and local governments.

FMCS's international work in collaboration with the U.S. Department of State and the U.S. Department of Labor includes assisting other nations and foreign organizations with issues relating to effective labor relations systems. The agency also maintains and provides aggrieved parties with rosters of arbitrators.

FMCS conducts its core program operations at its Washington, DC, headquarters and in six regions across the country.

Except as described in this plan, all agency offices will close, and core operations will cease upon a lapse in appropriations. The following offices support FMCS's core program areas and services:

- Office of the Director
- Headquarters
- Field Operations
- Policy and Strategy

Lapse Plan Summary Overview	
Estimated time (to nearest half day) required to complete shutdown activities:	*0.5*
Total number employees expected to be on board before implementation of the plan:	*200*
Total number of employees to be retained under the plan for each of the following categories:	
Compensation is financed by a resource other than annual appropriations:	0
Necessary to perform activities expressly authorized by law:	*8*
Necessary to perform activities necessarily implied by law:	*5*
Necessary to the discharge of the President's constitutional duties and powers:	*1*
Necessary to protect life and property:	*0*
Brief summary of significant agency activities that will continue during a lapse:	
FMCS will continue to provide its services–most commonly collective bargaining mediations–only if all three of the following conditions are met: 1) the parties are in certain critical industries, including most particularly the defense, health care, and power generation industries; 2) the agency Director determines that FMCS services are necessary to protect life or property; and 3) such threat to life or property is imminent and an immediate response is necessary to avoid or minimize the disruptive effects of a work stoppage, strike, lockout, or similar event. The Director will determine the need for its services on a case-by-case basis, pursuant to applicable legal standards and this plan, from among a limited number of cases.	
Brief summary of significant agency activities that will cease during a lapse:	
Upon a lapse in appropriations FMCS will suspend all core operations and services and all activities of supporting internal offices, with the exception noted above.	

Brief summary of significant agency activities that will continue during a lapse:

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Legal Standards Applicable to Determinations Under the Contingency Plan

The United States Constitution provides, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" U.S. Const. art 1, § 9, cl. 7. The Antideficiency Act (the

Act) prohibits officers and employees of the Federal government from incurring obligations in advance of appropriations except where such obligations are authorized by law. 31 U.S.C. § 1341 (a)(1)(B). The Act further prohibits officers and employees of the Federal government from employing personal services exceeding those authorized by law except for emergencies involving the safety of human life or the protection of property. Such emergencies do 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. 31 U.S.C. § 1342.

The Attorney General has determined that the exception for emergencies under the Antideficiency Act is narrow and must be applied only where there is: 1) a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property; and 2) some reasonable likelihood that the safety of human life or the protection of property would be compromised in some significant degree by delay in the performance of the function in question. Accordingly, "the emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to the [sic] near at hand and demanding of immediate response." Memorandum for Alice Rivlin, Director, Office of Management and Budget, August 16, 1995.

The Attorney General has also opined that agencies are by necessary implication authorized to incur those minimal obligations necessary for the orderly termination of functions that may not continue during a period of lapsed appropriations. See "Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriations," 4A Op. O.L.C. 16 (1980); "Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations," 5 Op. (1981). The Attorney General has further noted that, with respect to any short lapse in appropriations, it is appropriate for an agency to assume in its analysis of emergencies that the private economy will continue operating during the lapse. Memorandum for Alice Rivlin, *ibid*.

Agency Functions that Will Continue During a Lapse in Funding as Excepted Activities

FMCS will continue to provide its services—most commonly collective bargaining mediations—if all three of the following conditions are met: 1) the parties are in certain critical industries, including most particularly the defense, health care, and power generation industries; 2) the agency Director determines that FMCS services are necessary to protect life or property; and 3) such threat to life or property is imminent and an immediate response is necessary to avoid or minimize the disruptive effects of a work stoppage, strike, lockout, or similar event. The Director will determine the need for its services on a case-by-case basis, pursuant to applicable legal standards and this plan, from among a limited number of cases.

The number of cases the Director will consider is presently limited to fewer than two percent of cases that, absent a lapse in funding, are otherwise eligible for mediation. From among these cases, the Director will provide mediation services only where it is determined that failure to offer mediation services poses an imminent threat to life or property.

The Director estimates that, to provide these excepted services, the agency will need to retain employees in the job categories and full-time equivalents as follows as determined by a specific requirement (aside from the Director, who will continue working): up to two (2) employees in the Office of the Director; up to one (1) Deputy/Associate Deputy Director; up to three (3) headquarters personnel; and up to eight (8) Mediators.

Orderly Shutdown Activities

In the event of a funding hiatus, the agency will proceed with the orderly shutdown of non-excepted activities beginning on the first day of the hiatus. The Director will authorize only actions that will

contribute to an orderly shutdown, with primary consideration given to protecting life and safeguarding government property and records.

The Director estimates that the orderly shutdown of non-excepted operations will require not more than one-half workday. The Director's intention is to accomplish shutdown in a way that will facilitate prompt reactivation when funds are made available:

1. The Director will notify the Office of Management and Budget (OMB) immediately when shutdown activities are being initiated, by notice to the OMB Labor Branch Chief.

2. The Director will limit obligations incurred to those needed to maintain the minimum level of essential activities necessary to protect life and property; to process necessary personnel actions; and to process the personnel payroll for all periods prior to fund interruption.

3. The Director will notify agency senior managers (including the Chief Operations Officer, General Counsel, headquarters managers, Deputy/Associate Deputy Directors, and Field Operations Managers) of the hiatus and will direct them to begin shutdown activities.

4. The Director will determine what specific services and personnel are essential and therefore excepted from suspension and, where applicable, the duration of each exception. The Director will notify affected senior managers of the final determination.

5. The Director will instruct the Director of Human Resources to take necessary personnel actions to notify employees of the suspension of agency operations and to release employees in accordance with law and OPM regulations, including the preparation of notices of furlough and processing of personnel and pay records in connection with furlough.

6. The Director of Human Resources will notify all employees that they should report for work as scheduled on the first workday of the hiatus. Managers or supervisors will inform employees of the status of funding and instruct them to limit their work activities to those functions necessary for the orderly cessation of operations. The Director of Human Resources will notify all employees that no work can be performed on a voluntary basis. The Director of Human Resources will also provide employees with electronic links to OPM guidance.

7. The Director of Human Resources will notify all employees of the impact of the furlough on all employee benefits, including unemployment compensation, health insurance, leave accrual, retirement, and life insurance, and will advise all employees to follow public news broadcasts and the OPM and/or OMB websites for notice of the end of the hiatus.

8. The manager of each office or division will notify absent employees of the furlough as soon as possible. Managers should contact employees in travel status, and advise them to return to their duty station immediately.

Termination of Hiatus in Funding

OMB will notify the FMCS Director when the hiatus of appropriations has ended, and when the Director in turn can advise all senior managers. Each manager will contact employees that they supervise by phone or e-mail to inform them that the hiatus has ended and to advise them that employees are required to return to work on their next regular duty day.