

The Shutdown's Rulemaking Ramifications

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On January 22, 2019, the longest federal shutdown on record came to an end, and approximately 800,000 furloughed employees returned to work. The length and partial nature of this shutdown set the stage for novel legal and practical issues for the regulatory process. Although some of these issues were rendered moot when the government re-opened, there is a lot to learn from this experience, which could very well repeat itself.

Shutdowns happen when appropriated funds run out. This is because the Antideficiency Act prohibits federal employees from spending money that Congress has not appropriated. 31 U.S.C. § 1341 *et seq.* The consequences for violating the Act include criminal fines and imprisonment.

The rulemaking process is labor-intensive. So, when federal employees cannot lawfully work because of a shutdown, progress on writing new or modified rules largely comes to a halt. Exceptions exist, *inter alia*, for “emergencies involving the safety of human life or the protection of property,” 31 U.S.C. § 1342, the president’s constitutional authorities, and instances where Congress authorized activities to continue. Guidance from the Office of Management and Budget sets out these standards in more detail (available at <https://www.whitehouse.gov>). But most regulatory drafting work at unfunded agencies does not meet these exceptions.



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Even funded agencies were affected by the partial shutdown. For example, the draft rules of many funded agencies must be reviewed by the Office of Information and Regulatory Affairs (OIRA) before they are released to the public. But OIRA’s staff was largely furloughed due to the shutdown. OIRA posted on its website (www.reginfo.gov) that it was “conducting review of regulatory actions that are deemed excepted activity.”

Based on tracking data available on that website, however, the flow of rules in and out of OIRA dropped precipitously during the shutdown. Although OIRA worked on some draft rules, its overall output did not reflect business as usual.

Moreover, rules must be published in the Federal Register to start the clock for the public comment period. The Office of the Federal Register (OFR), which was unfunded, directed agencies seeking publication during the shutdown to provide certification that “publication in the Federal Register is necessary to safeguard human life, protect property, or provide other emergency services consistent with the performance of functions and services excepted under the Antideficiency Act.” 83 Fed. Reg 63,540 (Dec. 10, 2018). As a result, very little was published in the Federal Register in the beginning of the shutdown.

In mid-January, OFR signaled a less stringent standard for funded agencies. To publish, funded agencies had to certify that “delaying publication until the end of the appropriations lapse would prevent or significantly damage the execution of funded functions at the agency.” Federal Register Bulletin Newsletter (Jan. 2019). That meant

the daily output at the Federal Register increased for funded agency documents such as proposed and final rules.

OFR’s lower standard for excepted work for a funded agency may draw support from a December 13, 1995 opinion by the U.S. Department of Justice (DOJ) Office of Legal Counsel (OLC) (available at <https://www.justice.gov/file/20141/download>). That opinion considers a hypothetical situation in which non-DOJ agencies are funded but DOJ is not. In that case, OLC opined that DOJ could act without appropriated funds if “necessary to the effective execution of functions by an agency that has current fiscal year appropriations, such that a suspension of [DOJ]’s functions during the period of anticipated funding lapse would prevent or significantly damage the execution of those funded functions.” According to OLC’s reasoning, when Congress funds one agency’s work, it also impliedly supports the continuation of associated and necessary work at unfunded agencies.

The longer the shutdown continued, pressure increasingly mounted for more funded agency regulatory actions to flow through unfunded offices like OIRA and OFR. OIRA’s activity level during the shutdown has been criticized for being too high. One unknown is whether unfunded agencies that would ordinarily be consulted in the interagency review process were called in to work on funded agency rules.

Another tricky issue is that FederalRegister.gov was not updating during the shutdown. The public could still obtain an electronic version of the Federal Register at its official online source at the Government Printing Office (<https://www.govinfo.gov/app/collection/fr>). However, this website

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has a less user-friendly interface. Of course, the Federal Register does still print on paper. But these days most people rely on web-based versions of the publication. At some point, did the shutdown interfere with the government's ability to provide the public meaningful notice of their opportunity to comment? Or is the fact that a rule published enough, even if it's not readily available online in the usual way?

Similar questions and concerns apply to Regulations.gov, which is the main portal for the public to comment on most agencies' proposed rules. The back-end feed between the Federal Register and Regulations.gov, which normally helps to ensure a steady flow of data, was severed during the shutdown. Regulations.gov was not updating its site to include new proposed rules for a couple of weeks. However, some entries contained errors such as incorrect comment due dates. Adding to the technical difficulties, on January 17, 2019, the site went down for much of the day.

Public comment periods on proposed rules usually run for a set period, often 30 or 60 days.

Therefore, lost days present a risk. Agencies can extend these comment periods, but it is not required. The longer the shutdown persisted, the more these disconnects and glitches might have interfered with the public's ability to comment

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on proposed actions and the agencies' ability to review submitted comments. As of this writing, there is no public guidance to agencies about how to handle these issues.

Of course, issuing a final rule is not the last step for an agency in practical terms. Final rules are subject to challenge in court. The

shutdown affected rulemaking litigation in at least two ways.

First, federal courts felt the shutdown, cobbling together court fees and other funding sources to remain open. This could have delayed new civil cases or stalled forward motion on existing ones if funding did run out.

Second, the attorneys in DOJ's Federal Programs Branch were furloughed. Many requested delays to ongoing proceedings, some of which were granted. As a result, the shutdown delayed at least some ongoing litigation on regulations, which, if nothing else, reduced the Trump Administration's time to get cases resolved in its favor.

This administration has made deregulation a signature issue. But removing old regulations from the books requires the same process used to create new regulations. A long shutdown slows progress and imposes novel risks on many steps of the regulatory process. Whether your impulse is to cheer or jeer how the shutdown hampered the president's deregulatory agenda, it exposed aspects of the regulatory process that usually proceed unseen. 

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