

## **CRS: “Government Shutdown” Does Not Shut Down Obamacare**

On July 29, 2013 the Congressional Research Service (CRS) issued a memo to Dr. Coburn at his request for information on “the potential effects of a funding lapse and related government shutdown on implementation of the Patient Protection and Affordable Care Act.” The memo specifically addressed several questions he posed. The memo reveals that if government were shut down, *funding for Obamacare would still continue*. In other words, shutting down the federal government does not shut down Obamacare. This document is a summary of direct quotes from that memo.

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### **The Administration Can “Exercise Some Discretion” Implementing Obamacare**

“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...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.”

### **The Obama Administration Already Had Obamacare Funding Plans Online**

“The near-impasses [in FY2011 and FY2012] 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. These plans might provide insight into questions of whether government activities at specific agencies and programs, and in specific situations, would continue or cease....”

### **A “Government Shutdown” Does Not Cause All Government Functions To Cease**

“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.....In 1980 and 1981, [sic], 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.”

### **There Are Four Types of Funding That Do Not Cease During A Shutdown**

The GAO has summarized the 1981 Civiletti opinion as identifying four sub-types of “authorized by law” exceptions. Those include:

1. “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”
2. “Activities authorized by statutes that expressly permit obligations in advance of appropriations, such as contract authority.”
3. “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...but the salaries of personnel who administer the program are funded by one-year appropriations ... 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.”
4. Obligations “necessarily incident to presidential initiatives undertaken within his constitutional powers,” such as the power to grant pardons and reprieves.

### **“Substantial” Obamacare Implementation Would Continue In a 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.....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.”

### **What About Obamacare Implementation Funding From Other Sources?**

“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. 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.”

### **Obamacare’s Subsidies for Health Coverage Would Continue During a Shutdown**

“Like many other tax credits, the monies used to fund such provisions are permanently appropriated outside of the annual appropriations process. 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....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.”

### **Even Past Shutdown Experience Suggests Subsidies Would Still Be Operational**

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.....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..... The SSA workers described above were determined to be excepted based on the “necessary implication” standard enunciated in the Civiletti opinion. Consequently, it may be reasonable to infer that any similar benefit programs 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.”

### **The IRS Could Still Continue To Collect Obamacare’s Taxes During a Shutdown**

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. 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.’..... 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 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.”

### **A Shutdown Would Not Halt Obamacare’s Medicare Cuts**

“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.”

### **Obamacare's Exchanges Would Not Be Dismantled in a Government Shutdown**

“Yes, other sources of funding besides annual discretionary appropriations are available in FY2014 and beyond to support exchange operations.....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. Beginning in 2015, exchanges must be self-sustaining.”

### **The Individual Mandate Would Continue Under a Shutdown**

The individual mandate “applies to tax years beginning after December 31, 2013 (i.e., calendar years 2014 and on), 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..... 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.”