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# **FY2014 Appropriations Lapse and the Department of Homeland Security: Impact and Legislation**

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## Summary

Absent legislation providing appropriations for the Department of Homeland Security (DHS) for FY2014, the Department implemented a shutdown furlough on October 1, 2013. Operations of different components were affected to varying degrees by the shutdown. While an estimated 31,295 employees were furloughed, roughly 85% of the department's workforce continued with their duties that day, due to exceptions identified in current interpretations of law. Some DHS employees were recalled to work after the furloughs began on the basis of unanticipated needs (such as disaster preparedness activities) or the enactment of appropriations legislation that temporarily covered personnel costs.

While the DHS shutdown contingency plan's data on staffing and exemptions from furloughs is not a perfect metric for the broad impacts of the lapse in annual appropriations, some of the data provided by DHS lend a perspective on some of the effects on the department's staffing and operations during the funding gap until fuller post-shutdown reviews are completed.

Even though most of DHS continued to work through the shutdown, most of the department's civilian employees were not being paid until the lapse was resolved. A handful of activities were paid for through multi-year appropriations or other revenues, however, and employees working in those programs continued to be paid on schedule.

During the funding lapse, several pieces of legislation were introduced that would have impacted the funding status of the department, allowing it to either pay employees or restore operations to varying degrees. Two of these were enacted.

The Pay Our Military Act (P.L. 113-39) returned almost 5,800 furloughed Coast Guard civilian employees to work and restored pay for active military personnel and the civilian federal employees and the contractors that support them.

On October 17, 2013, the President signed into law a Senate-amended version of H.R. 2775 which carried a short term continuing resolution (CR) which funds government operations at a rate generally equivalent to FY2013 post-sequestration levels through January 15, 2014. This act resolves the lapse in funding, returns federal employees to work, and retroactively authorizes pay for both furloughed and exempt (or "excepted") employees for the duration of the funding lapse.

This report examines the DHS contingency plan for the funding lapse that began October 1, 2013, and the potential impacts of a lapse in annual appropriations on DHS operations, focusing primarily on the emergency furlough of personnel, and then discusses the legislative vehicles that had the potential to mitigate those same impacts.

CRS is continuing to gather information on the actual impact of the shutdown on DHS operations now that the October 1, 2013, lapse has been resolved, and will update this report as warranted.

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## Overview

Late on September 30, 2013, the Office of Management and Budget (OMB) gave notice to federal agencies that an emergency shutdown furlough would be put in place as a result of the impending lapse in annual appropriations for FY2014. Federal agencies had been directed to develop contingency plans in preparation for this eventuality. On the previous Friday, the Department of Homeland Security (DHS) released its “Procedures Relating to a Federal Funding Hiatus.”<sup>1</sup> This document included details on how DHS planned to determine who was required to report to work, cease unexempted<sup>2</sup> government operations, recall certain workers in the event of an emergency, and restart operations once an accord was reached on funding issues.

On October 17, 2013, the President signed into law legislation which carries a short-term continuing resolution (CR) funding government operations at a rate generally equivalent to FY2013 post-sequestration levels through January 15, 2014. This act resolves the lapse in funding that began October 1, 2013, returns federal employees to work, and retroactively authorizes pay for both furloughed and exempted employees for the duration of the funding lapse.

This report discusses the DHS contingency plan and the potential impacts of a lapse in annual appropriations on DHS operations, and then it discusses several legislative vehicles that mitigated or had the potential to mitigate those impacts.

For a broader discussion of a federal government shutdown, please see CRS Report RL34680, *Shutdown of the Federal Government: Causes, Processes, and Effects*, coordinated by Clinton T. Brass.

## Estimated Impact of the October 1, 2013, Funding Lapse on DHS Operations

Lapses in annual appropriations result in a partial shutdown of government operations and emergency furlough<sup>3</sup> of employees—however, they do not result in the complete shutdown of operations.

DHS personnel who continue to work without passage of annual appropriations or a continuing resolution generally fall into two categories: those whose activities are not funded through one-year appropriations and those whose work is necessary for the preservation of the safety of human life or the protection of property.<sup>4</sup> The former generally continue to be paid as scheduled,

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<sup>1</sup> Available at <http://www.dhs.gov/sites/default/files/publications/dhs-lapse-contingency-plan-09-27-2013.pdf>, and hereafter cited as “FY2014 Procedures” in footnotes. The Office of Management and Budget has assembled a complete list of such plans at <http://www.whitehouse.gov/omb/contingency-plans>.

<sup>2</sup> Some agencies use the term “excepted” rather than “exempted” to describe activities that would continue—the terms are interchangeable. This report generally uses “exempted” as DHS uses that term in its plan. The terms “essential” and “exempted” or “excepted” are *not* interchangeable—see “Exempt v. Essential” later in this report for details.

<sup>3</sup> OPM defines “emergency furlough” as a furlough that occurs due to a lapse in annual appropriations.

<sup>4</sup> FY2014 Procedures, pp. 3-4.

contingent on the availability of funds, whereas the latter are not paid while the lapse in annual appropriations continues.

Of DHS's estimated 231,117 civilian and military employees, nearly 200,000 were projected to be exempted from the emergency furlough, according to the department.<sup>5</sup> Most of these employees relied on annual appropriations for their salaries, and therefore were not paid during the funding lapse.

Further information about exemptions from operational shutdown and emergency furlough due to a lapse in annual appropriations is outlined below.

## **Exemptions and Exceptions**

### **Work That Is Not Funded Through One-Year Appropriations**

DHS has a number of functions that are paid for by fee revenues and multi-year appropriations. According to DHS, in the event of a funding lapse, these activities would continue and employees of these programs would continue to work and be paid as long as those revenues and multi-year appropriations were available, because emergency furlough and shutdown of these activities would occur only if resources were depleted.

DHS noted several specific activities that would continue to be funded through fee revenues and multi-year appropriations.

#### **Under the National Protection and Programs Directorate (NPPD)**

- Office of Biometric Identity Management
- Federal Protective Service

#### **Under the Federal Emergency Management Agency (FEMA)**

- Radiological Emergency Preparedness Program
- Chemical Stockpile Emergency Preparedness Program
- Disaster Relief Operations
- National Flood Insurance Program

#### **Under U.S. Citizenship and Immigration Services (USCIS)**

- All programs except for E-Verify<sup>6</sup>

In addition to these programs, a survey of the procedures document reveals that some exempt employees at U.S. Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), the Transportation Security Administration (TSA), and the Federal Law Enforcement

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<sup>5</sup> "DHS Lapse Contingency Plan Summary," September 27, 2013. Provided to CRS by DHS Legislative Affairs.

<sup>6</sup> "DHS Lapse Contingency Plan Summary," September 27, 2013. Provided to CRS by DHS Legislative Affairs.

Training Center (FLETC) may have continued to receive pay despite the lapse in appropriations for FY2014.<sup>7</sup>

Fees and multi-year funding must continue to be used for the purposes for which they were collected or provided—they cannot be used to fund broader component or departmental activity (such as salaries) than originally envisioned.

### **Work That Is Necessary for the Safety of Human Life or Protection of Property**

In the event of a lapse in annual appropriations, some activities continue if they directly relate to preserving the safety of human life or the protection of property. According to the DHS plan, for an activity to continue under this exception, “there must be some reasonable likelihood that the safety of human life or protection of property would be compromised in some significant degree by the delay in the performance of the function in question. Specifically the risk should be real... and must be sufficiently imminent that delay is not permissible.” The DHS procedures go on to note that support functions related to an exempt activity should continue “only to the extent that they are essential to maintain the effectiveness of those activities.”<sup>8</sup>

Employees who work under this exemption are constrained in their activities—limited to performing activities that are exempted (those that relate to the protection of life and property).

At DHS, this work includes the following functions, broken down by component.

#### **Under Customs and Border Protection (CBP)**

- Border Security Programs
- Ports of Entry Operations

#### **Under Immigration and Customs Enforcement (ICE)**

- Immigration Enforcement and Removal Operations
- Immigration and Customs Enforcement Homeland Security Investigations

#### **Under Transportation Security Administration (TSA)**

- Transportation Security (including passenger screening)
- Federal Air Marshal Service

#### **Under U.S. Coast Guard (USCG)**

- Military/Defense Operations
- Maritime Security
- Maritime Safety

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<sup>7</sup> Most USCG personnel now have their pay covered in the event of FY2014 funding lapses by P.L. 113-39, and will therefore receive pay on schedule in the event of further such lapses.

<sup>8</sup> FY2014 Procedures, p. 4.

### **Under Secret Service (USSS)**

- Protection of Persons and Facilities

### **Under National Protection and Programs Directorate**

- Cyber Security

### **Under Analysis & Operations (A&O)**

- State and Local Fusion Centers
- National Operations Center Watch Operations
- DHS Intelligence Operations

### **Under the Office of Health Affairs**

- BioWatch<sup>9</sup>

While a large percentage of DHS employees were still working under this exemption, only those who were exempt from furlough on the basis of funds to pay their salaries being available<sup>10</sup> continued to receive pay for the duration of the funding gap.

OMB provides the following guidance regarding pay for exempted employees who are reliant on one-year annual appropriations for their salaries:

Without further specific direction or enactment by Congress, all excepted employees are entitled to receive payment for obligations incurred by their agencies for their performance of excepted work during the period of the appropriations lapse. After appropriations are enacted, payroll centers will pay all excepted employees for time worked.<sup>11</sup>

### **Other Exceptions and Exemptions**

*Work that is needed for an orderly shutdown:* This is a narrow exception that allows for work to shut down non-exempt operations in an orderly fashion when a funding lapse occurs. OMB has determined that this should cover no more than four hours of work completely dedicated to deactivating a function, such as securing documents, completing payroll, etc.<sup>12</sup>

*Presidential appointees:* Presidential appointees who are not covered by a formal leave system—who are entitled to their pay because of their duties rather than the hours worked—cannot be put

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<sup>9</sup> “DHS Lapse Contingency Plan Summary,” September 27, 2013. Provided by DHS Legislative Affairs.

<sup>10</sup> Either through means other than annual appropriations or through the Pay Our Military Act (P.L. 112-39).

<sup>11</sup> Memorandum M-13-22 from Sylvia M. Burwell, Director, Office of Management and Budget, to heads of executive departments and agencies, September 17, 2013, pp. 15-16, available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-22.pdf>.

<sup>12</sup> FY2014 Procedures, p. 4.

in “nonduty status” and therefore cannot be subject to furlough.<sup>13</sup> DHS reports that it has 28 such personnel.<sup>14</sup>

### **Exempt v. Essential**

The terms “exempted employee” and “essential employee” are not interchangeable when discussing federal employees. This is a common misunderstanding, even among members of the media that focus on the federal government on a regular basis.<sup>15</sup> Exemption or exception is determined based on definitions of the Anti-Deficiency Act and the structure of funding that supports various operations. “Essential employees” and “essential functions” are labeled as such because of their roles in providing continuity of government operations (COOP).

By DHS’s standards, “essential personnel” include “mission critical” and “mission essential” personnel, as well as personnel identified for possible activation depending on the nature of the emergency, emergency personnel, and exempted employees not otherwise covered by the foregoing categories. Therefore, at DHS, one can be considered essential, but not exempt, but not vice versa. Section IV of the DHS procedures document explores these distinctions in more detail.<sup>16</sup>

### **Furlough, Exemptions, and DHS Personnel**

DHS’s contingency plan for the October 1, 2013, funding lapse was detailed enough to outline the impact of a shutdown by component using the number of staff in the component as a metric.

Staffing impacts of a shutdown are relatively easy to quantify, but should carry a caveat. The number of initially furloughed employees does not tell the entire story of the impact of a government shutdown. In this situation, the government likely draws back significantly from its contracting activities overall, as it cannot spend monies normally provided through the appropriations process. In addition, hiring, procurement, and other projects in process are often stalled, and research efforts could be disrupted. Many excepted personnel are not paid during the lapse in appropriations, and their economic activities are curtailed as well as a result. Therefore, the following numbers only provide a limited perspective on the impact of the funding lapse.

**Figure 1** shows a graphic representation of the impact of the lapse in appropriations on the department’s workforce as outlined in the DHS emergency furlough procedures document. The table immediately following provides the detailed data upon which the graphic is based.

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<sup>13</sup> OPM, “Guidance for Administrative Furloughs,” June 10, 2013, p. 5, available at <http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-administrative-furloughs.pdf>.

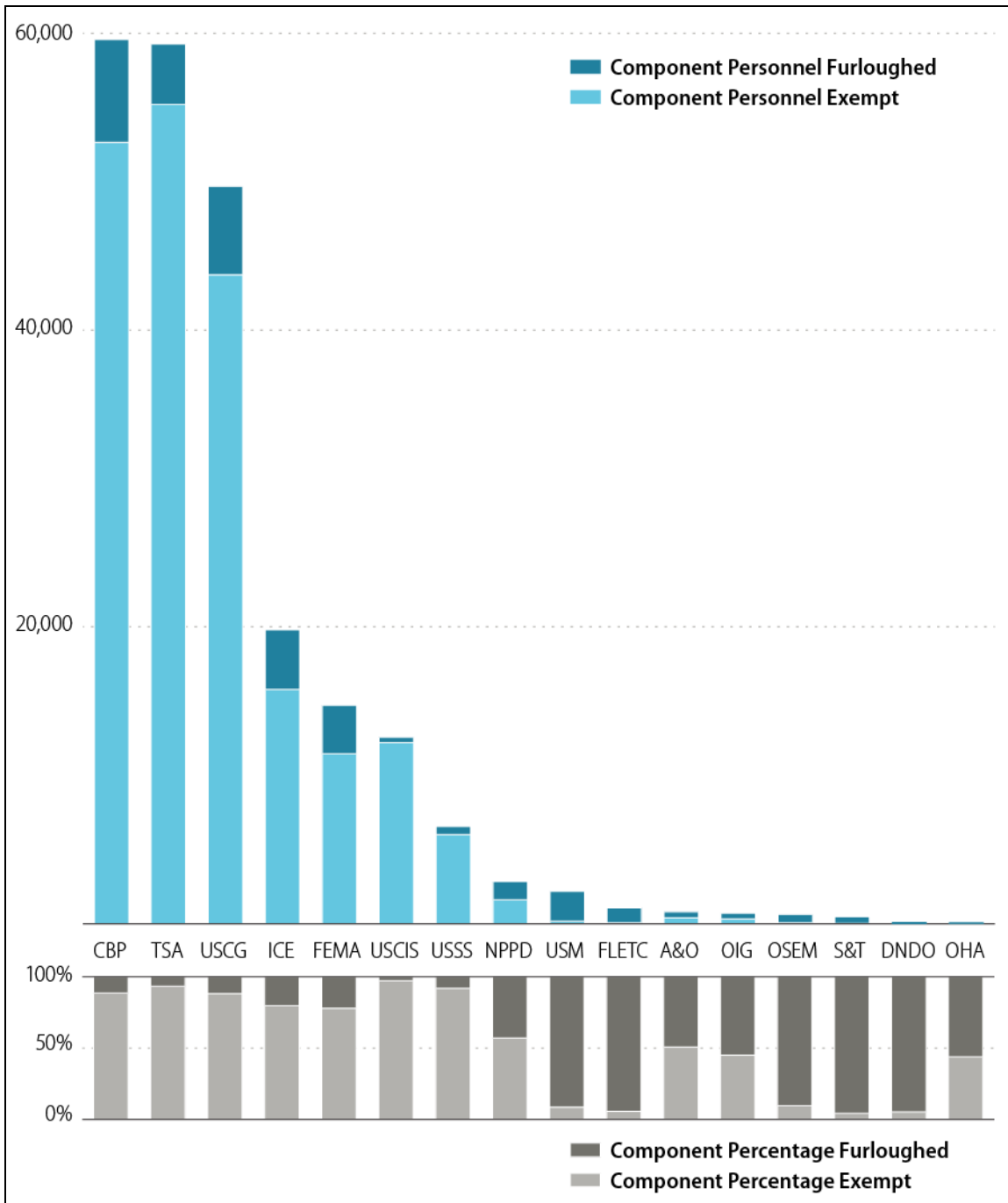
<sup>14</sup> E-mail from to CRS from DHS Legislative Affairs, September 30, 2013.

<sup>15</sup> See Rob Margetta, “Shutdown’s Impact on FEMA Overstated,” *CQ News*, October 7, 2013, available at <http://www.cq.com/doc/news-4358160>.

<sup>16</sup> FY2014 Procedures, p. 5. The pertinent part of Section IV is on pp. 19-20.



**Figure I. Projected Initial Impact of FY2014 Appropriations Lapse on DHS Staffing**



Source: FY2014 Procedures, pp. 26-42.

**Abbreviations:** CBP—Customs and Border Protection; TSA—Transportation Security Administration; USCG—U.S. Coast Guard; ICE—Immigration and Customs Enforcement; FEMA—Federal Emergency Management Agency; USCIS—U.S. Citizenship and Immigration Services; USSS—U.S. Secret Service; NPPD—National Protection and Programs Directorate; USM—Under Secretary for Management; FLETC—Federal Law Enforcement Training Center; A&O—Analysis and Operations; OIG—Office of the Inspector General; OSEM—Office of the Secretary and Executive Management; S&T—Science and Technology Directorate; DNDO—Domestic Nuclear Detection Office; OHA—Office of Health Affairs.

**Table I. DHS Projected Initial Exemption and Furlough Data**

Component	Employees (as of 7/31/2013)	Projected Exempt	Projected Furlough	Projected % of Component Furlough	Projected % of total DHS Furlough
<b>Customs and Border Protection (CBP)</b>	59,561	52,673	6,888	11.56	22.01
<b>Transportation Security Administration (TSA)<sup>a</sup></b>	59,282	55,211	4,071	6.87	13.01
<b>Coast Guard (USCG)<sup>b</sup></b>	49,698	43,736	5,962	12.00	19.05
<b>Immigration and Customs Enforcement (ICE)</b>	19,810	15,794	4,016	20.27	12.83
<b>Federal Emergency Management Agency (FEMA)<sup>c</sup></b>	14,729	11,468	3,261	22.14	10.42
<b>U.S. Citizenship and Immigration Services (USCIS)</b>	12,558	12,205	353	2.81	1.13
<b>Secret Service (USSS)</b>	6,537	6,003	534	8.17	1.71
<b>National Protection and Programs Directorate (NPPD)</b>	2,835	1,617	1,218	42.96	3.89
<b>Under Secretary for Management (USM)</b>	2,187	189	1,998	91.36	6.38
<b>Federal Law Enforcement Training Center (FLETC)</b>	1,074	61	1,013	94.32	3.24
<b>Analysis &amp; Operations (A&amp;O)</b>	812	411	401	49.38	1.28
<b>Office of the Inspector General (OIG)</b>	728	328	400	54.95	1.28
<b>Office of the Secretary and Executive Management (OSEM)</b>	633	61	572	90.36	1.83
<b>Science and Technology Directorate (S&amp;T)</b>	469	20	449	95.74	1.43
<b>Domestic Nuclear Detection Office (DNDO)</b>	115	6	109	94.78	0.35
<b>Office of Health Affairs (OHA)</b>	89	39	50	56.18	0.16
<b>TOTAL</b>	<b>231,117</b>	<b>199,822</b>	<b>31,295</b>		<b>100%</b>

**Source:** FY2014 Procedures, pp. 26-42.

**Notes:** Number of employees is the DHS-reported number of on-board staff as of July 31, 2013.

- a. Does not include Federal Air Marshals (FAMS), whose total numbers are sensitive security information. Federal Air Marshals are generally considered law enforcement personnel and would be exempted from furlough on that basis.
- b. Actual Coast Guard furlough numbers were significantly reduced by the enactment of P.L. 113-39. Only 475 remain furloughed, according to the Coast Guard.
- c. Actual FEMA furlough numbers have fluctuated due to recall and re-furlough of staff to address issues pertaining to protection of human life and property. For example, roughly 200 FEMA employees were recalled when Tropical Storm Karen threatened the Gulf Coast during the funding lapse, and most of those were to be re-furloughed.

As of July 31, 2013, the five largest components by number of staff comprised 87% of total DHS personnel. These components carried the largest share of the projected furlough for DHS as a whole—Customs and Border Protection, Coast Guard, Transportation Security Administration, Immigration and Customs Enforcement, and the Federal Emergency Management Agency bore 77% of the projected furlough total. The remaining 13% of departmental manpower therefore bore 23% of the furlough burden—management, research and development, training, and some operations functions were projected to furlough more than 90% of their personnel. The impact of a shutdown on these functions over the long term, as well as the impact of the projected more than 50% reduction in the staffing for the DHS Office of Inspector General, is unknown, and analysis of those impacts is beyond the scope of this report.

While DHS did not associate numbers of furloughed employees with specific programs, the department identified several activities that would be subject to furloughs and curtailment of activities:

- all non-disaster grant programs;
- NPPD's Critical Infrastructure Protective Security Advisor Program;
- Federal Law Enforcement Training Center activities;
- law enforcement civil rights and civil liberties training;
- FEMA Flood Risk Mapping program;
- chemical site security regulatory program; and
- research and development activities.<sup>17</sup>

### **Emergency Recall of Staff**

The DHS plan envisioned situations where a DHS office might need to recall a non-exempt employee to duty to perform an exempt function, such as an unplanned project or activity that qualified as an exempt function, a need to supplement staffing for an existing exempt function, or replacing an exempt employee who was unable to work. Staff who were recalled for a specific project were only to work on that project.<sup>18</sup>

As an example, on October 2, 2013, FEMA Administrator Craig Fugate posted on FEMA's website a memorandum to FEMA employees that noted, "Beginning shortly, we will be recalling some employees who were furloughed earlier this week to be able to prepare for a possible emergency response operation to protect life and property."<sup>19</sup> FEMA's Daily Operations Briefing noted the activation of resources in FEMA Regions IV and VI, as well as at the federal level.<sup>20</sup> In a speech at FEMA headquarters on October 7, President Obama noted that 200 furloughed employees had been recalled, and over half of those would be re-furloughed.<sup>21</sup>

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<sup>17</sup> "DHS Lapse Contingency Plan Summary," September 27, 2013. Provided by DHS Legislative Affairs.

<sup>18</sup> FY2014 Procedures, pp. 19-21.

<sup>19</sup> Memorandum for FEMA Employees from Administrator Craig Fugate, "Shutdown Update and Potential Staff Recall - October 3, 2013," posted October 2, 2013, at <http://www.fema.gov/media-library/assets/documents/84380>.

<sup>20</sup> Federal Emergency Management Agency, "Daily Operations Briefing" e-mail, October 4, 2013, p. 6-8.

<sup>21</sup> CQ Newsmaker Transcripts, "President Barack Obama Delivers Remarks at FEMA Headquarters," October 7, 2013, available at <http://www.cq.com/doc/newsmakertranscripts-4358009>.

## Restoration of Coast Guard Employee Pay Under P.L. 113-39

H.R. 3210, the Pay Our Military Act, was introduced on September 28, 2013, and signed into law on September 30, 2013, as P.L. 113-39. This legislation provides FY2014 continuing appropriations during a funding gap for pay and allowances for members of the armed forces on active duty and civilian personnel and contractors providing support for them.<sup>22</sup> The Coast Guard is considered part of the armed forces, and the act provides pay for Coast Guard uniformed personnel on active service and the civilian Coast Guard personnel and contractors in support of them.

The Department of Defense (DOD) and DHS did not initially avoid furlough for any of its employees under the provisions of the act, as the Department of Justice had cautioned that the law did not allow them to end furlough for all civilian employees, or allow all contractors to be paid, because of language in the act specifying funding civilian employees and contractors who provide “support” for military personnel in active service. On October 5, 2013, DHS and DOD announced the parameters under which they would be bringing employees back to work and paying contractors beginning the week of October 7.

Under Secretary of Defense (Comptroller) Robert Hale described the executive branch’s interpretation thusly: “Under our current reading of the law, the standard for civilians who provide support to members of the Armed Forces requires that qualifying civilians focus on the morale, well-being, capabilities and readiness of military members that occurs during a lapse of appropriations.”<sup>23</sup>

The Administration indicated that salaries would be paid for civilians already working under exemptions, and civilians who provide support to military members on an ongoing basis would be recalled, as well as those civilians “[whose] work, if interrupted by the lapse for a substantial period would cause future problems for military members.”<sup>24</sup>

Acting Secretary of DHS Rand Beers sent a memorandum to the Commandant of the Coast Guard, outlining the implementation of P.L. 113-39 for the Coast Guard. Several Coast Guard activities were specifically listed in the memorandum that were not to be restored under the act:

- the National Vessel Documentation Center;
- the National Maritime Center;
- Congressional Affairs; and
- work done in support of non-USCG agencies and activities with the exception of work done in support of DOD.<sup>25</sup>

<sup>22</sup> Budget authority provided under H.R. 3210 would terminate upon the enactment of interim continuing appropriations or annual appropriations for these purposes. For more information on continuing appropriations, see CRS Report R42647, *Continuing Resolutions: Overview of Components and Recent Practices*, by Jessica Tollestrup.

<sup>23</sup> Transcript of conference call. “Defense Department Official Holds Conference Call on Furloughed Civilian Employees,” CQ Newsmaker Transcripts, October 5, 2013. Posted at <http://cq.com/doc/newsmakertranscripts-4357707>.

<sup>24</sup> Ibid.

<sup>25</sup> Memorandum from Rand Beers, Acting Secretary, DHS, to Admiral Robert J. Papp, Jr., Commandant, USCG, re: “Guidance for Implementation of Pay Our Military Act,” October 5, 2013, p. 3, available at <http://www.dhs.gov/sites/default/files/publications/pay-our-military-act-dhs-10052013.pdf>.

According to the Coast Guard, after implementing P.L. 113-39, 475 Coast Guard civilian personnel remained furloughed.<sup>26</sup> With the passage of P.L. 113-46, the lapse in annual appropriations that began October 1, 2013, was resolved. Should those temporary appropriations expire without additional appropriations being enacted for DHS, another shutdown furlough would take effect, but the provisions of P.L. 113-39 would again provide funding for the Coast Guard to continue paying all of its personnel except for these same 475 civilians.

Both Under Secretary Hale's conference call and Acting Secretary Beers's guidance memorandum note an important continuing impact of the funding hiatus, even with P.L. 113-39 in place and its implementation clarified. The act only provides for pay and allowances—no other expenses. Hale noted:

[W]e have authority to recall most of our civilians and provide them pay and allowances. We don't have authority to enter into obligations for supplies, parts, fuel, et cetera unless it is for an excepted activity, again, one tied to a military operation or safety of life and property. So as our people come back to work, they'll need to be careful that they do not order supplies and material for non-excepted activities.<sup>27</sup>

Beers echoes Hale's note of caution:

The Act provides appropriations for personnel; it does not provide appropriations for equipment, supplies, materiel, and all the other things that the Department needs to keep operating efficiently, except as provided by the provision relating to contractors. While the Act permits the U.S. Coast Guard to bring many of its civilian employees back to work, and to pay them, if Congress continues to fail to enact an appropriation, many of these workers will cease to be able to do their jobs. Critical parts, or supplies, will run out, and there will be limited authority for the Coast Guard to purchase more. If there comes a time that workers are unable to do their work, the Department will be forced once again to send them home.<sup>28</sup>

## **What Was the Impact of the Lapse in Appropriations?**

Estimates of the cost to the economy and the cost to the government of the October 1, 2013, lapse in annual appropriation vary.

As noted above, the disruption of DHS activities likely has had some economic impact, even if the total number of employees furloughed was relatively small compared with the overall size of the department. Procurement activities were disrupted to some extent, and DHS is the sixth largest federal agency in terms of procurement spending.<sup>29</sup> Separating the specific economic costs of the shutdown of DHS operations from the shutdown of other governmental elements and the costs incurred by other factors in the economic environment—including the potential for the U.S. to reach its debt limit—is a highly complex task and beyond the scope of this report.

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<sup>26</sup> E-mail from USCG House Liaison Office, October 7, 2013.

<sup>27</sup> Transcript of conference call, "Defense Department Official Holds Conference Call on Furloughed Civilian Employees," *CQ Newsmaker Transcripts*, October 5, 2013. Posted at <http://cq.com/doc/newsmakertranscripts-4357707>.

<sup>28</sup> Memorandum from Rand Beers, p. 3.

<sup>29</sup> CRS analysis of USASpending.gov data, September 30, 2013.

DHS required its components to report all costs incurred due to the lapse in appropriations. These are expected to include, but not be limited to:

- interest incurred for late payments;
- discounts lost due to late payments;
- unplanned travel expenses to terminate and restart temporary duty; and
- direct costs of shutdown of operations (such as IT systems).<sup>30</sup>

Multiple press reports have focused on the negative impact of the shutdown on federal employee morale, both exempted and furloughed, and possible impacts on workforce retention.<sup>31</sup> Given that a large ratio of exempt DHS employees worked during the shutdown without a date certain for the receipt of pay, parallel impacts are possible at the department, which already suffers among the worst morale in the federal government, according to third-party research.<sup>32</sup>

One impact concurrent with the expiration of the FY2013 funding was the expiration of three authorities that have regularly been extended by legislation in the DHS appropriations bill: the authority of the Secret Service to use funds derived from its investigative activities to support its operation without separate appropriation; the authority for DHS to enter into research and development contracts that do not conform to the Federal Acquisition Regulations; and the authority to regulate high-risk chemical facilities. The third of these was arguably the most significant lapse of authority for those working with DHS. With the expiration of this authority on October 4, 2013, the Chemical Facilities Anti-Terrorism Standards (CFATS) were no longer in effect.<sup>33</sup> On October 17, 2013, P.L. 113-46 reinstated the authority of the DHS to regulate these facilities through January 15, 2014. While no major incidents occurred over the course of the funding lapse, DHS might not have been able to undertake or enforce regulatory action related to these facilities during this time period.<sup>34</sup>

## What Did These Developments Mean for the Public?

DHS indicated that impacts the public would see in the short term would include

- E-Verify would not be accessible for businesses to determine work eligibility of new employees;<sup>35</sup>

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<sup>30</sup> FY2014 Procedures, p. 23.

<sup>31</sup> See Nicole Black Johnson and Sean Reilley, “Fed-up Feds: Many Decry ‘Morale-sucking Environment,’” *Federal Times*, October 7, 2013, available at <http://www.federaltimes.com/article/20131007/AGENCY01/310070009/Fed-up-feds-Many-decry-morale-sucking-environment-;> and Joe Davidson, “Shutdown Hits the Wallets and the Spirits of Federal Employees,” *The Washington Post*, October 1, 2013, available at [http://articles.washingtonpost.com/2013-10-01/politics/42574562\\_1\\_federal-employees-two-federal-workers-budget-cuts](http://articles.washingtonpost.com/2013-10-01/politics/42574562_1_federal-employees-two-federal-workers-budget-cuts).

<sup>32</sup> See “The Best Places to Work in the Federal Government” for details, at <http://bestplacestowork.org/BPTW/rankings/overall/>. DHS ranks 19<sup>th</sup> out of 19 large agencies in terms of employee satisfaction.

<sup>33</sup> Guarino, Douglas P., “Administration Cites Lapse in Chemical Security Effort as Reason to End Shutdown,” *Global Security Newswire*, October 7, 2013. Available at <http://www.nti.org/gsn/article/administration-cites-chemical-security-lapse-reason-end-shutdown/>.

<sup>34</sup> For more information about the CFATS program, see CRS Report R42918, *Chemical Facility Security: Issues and Options for the 113<sup>th</sup> Congress*, by Dana A. Shea.

<sup>35</sup> U.S. Citizenship and Immigration Services announced that E-Verify resumed operations at 10:28 am on October 17, 2013, and provided information on how employers and employees should proceed with resolving issues connected with (continued...)

- FEMA would stop providing flood-risk data for local planners and insurance determinations; and
- civil rights and civil liberties complaint lines and investigations would shut down.<sup>36</sup>

The plan also noted that Coast Guard would stop issuing licenses and seaman documentation, stop doing routine maintenance on aids to navigation, and curtail its fisheries enforcement patrols. Given the continuing appropriation provided by P.L. 113-39, however, these Coast Guard-specific impacts may have been somewhat mitigated.

## **Legislative Vehicles to Mitigate Impacts of the October 1, 2013, Funding Gap**

Several pieces of legislation were introduced that would have impacted the funding status of the Department, allowing it to either pay employees or restore operations to varying degrees during the October 1, 2013, lapse in appropriations. This section of the report focuses on the status and general impact of eight such pieces of legislation on DHS and DHS components alone.

### **Annual Appropriations**

- H.R. 2217—the Homeland Security Appropriations Act, 2014

### **Automatic Continuing Resolution**

- H.R. 3210 (P.L. 113-39)—the Pay Our Military Act

### **Continuing Resolutions**

- H.J.Res. 59—the Continuing Appropriations Resolution, 2014
- H.J.Res. 79—the Border Security and Enforcement Continuing Appropriations Resolution, 2014
- H.J.Res. 85—the Federal Emergency Management Agency Continuing Appropriations Resolution, 2014
- H.J.Res. 89—the Excepted Employees' Pay Continuing Appropriations Resolution, 2014
- P.L. 113-46—the Continuing Appropriations Act, 2014

### **Authorizing Legislation**

- H.R. 3223—the Federal Employee Retroactive Pay Fairness Act

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(...continued)

the shutdown. Notice available at <http://content.govdelivery.com/bulletins/gd/USDHSCIS-900f6d>.

<sup>36</sup> "DHS Lapse Contingency Plan Summary," September 27, 2013. Provided by DHS Legislative Affairs.

## Annual Appropriations

### H.R. 2217—the Homeland Security Appropriations Act, 2014

This is the annual appropriations bill for the Department of Homeland Security. The Administration requested \$39.0 billion in adjusted net discretionary budget authority for DHS for FY2014. H.R. 2217 as passed by the House would provide \$39.0 billion in adjusted net discretionary budget authority. The Senate Appropriations Committee amendment to the bill would provide \$39.1 billion in adjusted net discretionary budget authority. Both bills would also provide the \$5.6 billion in disaster relief requested by the Administration.<sup>37</sup>

The House passed H.R. 2217 on June 6, 2013. The Senate Appropriations Committee reported its proposal for H.R. 2217 on July 18, 2013, but it has not received floor consideration in the Senate. Enactment of this measure would have ended the emergency furlough for the department by providing full-year funding by account for DHS, as well as providing the potential additional detailed direction and context for the department's actions through a conference report joint explanatory statement, such as a conference report.

## Automatic Continuing Resolutions

### P.L. 113-39—the Pay Our Military Act (H.R. 3210)

This automatic continuing resolution was introduced on September 28, 2013, and enacted two days later as P.L. 113-39. It provides “such sums as are necessary” to provide pay and allowances for FY2014 to members of the armed forces on active duty, and to the civilians and contractors employed by DOD and DHS in support of them. It appears that it is intended to provide such funds during any period in FY2014 when full-year or part-year appropriations are not in effect, hence the term “automatic.”<sup>38</sup>

As noted above, although this legislation could have been interpreted to provide relief to Coast Guard military and civilian personnel and partially end the funding hiatus for part of the government, DOD and DHS did not end furloughs for any of its employees under the provisions of the act until the week of October 7, 2013. The Department of Justice had cautioned that the law did not allow the departments to end furlough for all civilian employees, or allow all contractors to be paid. As noted above, after implementing P.L. 113-39, 475 Coast Guard personnel remained furloughed until the enactment of P.L. 113-46, which became the operative appropriations measure for the Department of Defense and DHS.<sup>39</sup> For a more detailed discussion, see “Restoration of Coast Guard Employee Pay Under P.L. 113-39,” above.

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<sup>37</sup> For a fuller discussion of the FY2014 DHS appropriations bill, see CRS Report R43193, *Department of Homeland Security Appropriations: FY2014 Overview and Summary*, by William L. Painter or CRS Report R43147, *Department of Homeland Security: FY2014 Appropriations*, coordinated by William L. Painter.

<sup>38</sup> For more discussion of automatic continuing resolutions, see CRS Report R41948, *Automatic Continuing Resolutions: Background and Overview of Recent Proposals*, by Jessica Tollestrup.

<sup>39</sup> E-mail to CRS from USCG House Liaison Office, October 7, 2013.



## Continuing Resolutions

The next five pieces of legislation are continuing resolutions with differing scopes. The fifth measure is the continuing resolution enacted as a part of P.L. 113-46, which ended the lapse in annual appropriations. With its enactment, further action on the other measures in this section in their current form is unlikely.

### **H.J.Res. 59—the Continuing Appropriations Resolution, 2014**

This short-term continuing resolution was introduced September 10, 2013. As introduced, this measure would have provided temporary appropriations for DHS, funding the department at same rate it was for FY2013 (post-sequester) through December 15, 2013, or until it was replaced by another appropriations law.

There are four sections in H.J.Res. 59 that contain legislative language that applies to DHS. Generally speaking, the sections carry authority and direction given to DHS and its components in both annual appropriations legislation and CRs covering the department in recent years.

- Section 122 extends the authority for chemical facility anti-terrorism standards.
- Section 123 extends the ability of the Secret Service to expend resources gained in the process of their investigations.
- Section 124 maintains the ability of DHS Science and Technology to use Other Transaction Authority to get R&D services and prototypes without being constrained by Federal Acquisition Regulations.
- Section 125 allows Customs and Border Protection to apportion its funding to maintain 21,370 border patrol agents and sustain border operations, including the new tethered aerostat program, and allows Immigration and Customs Enforcement to apportion funds to keep 34,000 detention beds.

According to the Congressional Budget Office (CBO), the annualized cost of the DHS-related provisions in the continuing resolution as introduced in the House would be \$37.7 billion, not including \$236 million for overseas contingency operations funding for the Coast Guard, or \$6.1 billion for disaster relief funding.<sup>40</sup>

None of the proposed amendments to this measure altered provisions directly impacting DHS, except for a Senate change shortening the maximum duration of the bill to November 15, 2013. On October 1, 2013, the House requested a conference with the Senate. The Senate voted to table that request later that same day, and thereby returned H.J.Res. 59 to the House.

Enactment of this measure would have ended the emergency furlough for the entire government, at least until its date of expiration. As the measure currently stands, as is usually the case with CRs, account-level direction for funding is not provided, and no explanatory statement of congressional intent (such as a committee report) exists.

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<sup>40</sup> Congressional Budget Office, “Continuing Appropriations Resolution, 2014 (H.J.Res. 59) as Introduced in the House,” September 11, 2013.

**Figure 2**, at the end of this section, shows a graphical representation of the relative size of DHS annualized appropriations that would be restored under a continuing resolution for the entire department at a rate equivalent to post-sequester resources provided under P.L. 113-6—the same rate and coverage provided in H.J.Res. 59 and P.L. 113-46. It compares that annualized appropriation to the resources that would be provided through H.J.Res. 79, H.J.Res. 85, and the actions taken in P.L. 113-39.

### **H.J.Res. 79—the Border Security and Enforcement Continuing Appropriations Resolution, 2014**

This continuing resolution was introduced on October 3, 2013. It is a temporary appropriations measure that would provide funding for several DHS components, including U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), U.S. Coast Guard (USCG), U.S. Citizenship and Immigration Services, and part of the National Protection and Programs Directorate (NPPD)—the Office of Biometric Identity Management. These entities would be funded at the same rate as was provided in P.L. 113-6, taking into account sequestration, through December 15, 2013, or until it was replaced by another applicable appropriations law. H.J.Res. 79 passed the House on October 10, 2013, by a vote of 249-175.<sup>41</sup>

According to CBO, the annualized cost of the measure would be \$18.8 billion, not including \$236 million for overseas contingency operations funding for the Coast Guard. CBO's scoring assumes that \$5 billion in costs for the Coast Guard would have been paid already under H.R. 3210.<sup>42</sup>

Enactment of this measure would have ended the emergency furlough for the five DHS entities listed in the bill, at least until its date of expiration. As the measure currently stands, as is usually the case with continuing resolutions, account-level direction for funding is not provided, and no explanatory statement of congressional intent (such as a committee report) exists. It would also not provide the four legislative extensions of authority for DHS as envisioned under H.J.Res. 59.

The components included in this measure include three of the five largest discretionary budgets at DHS—CBP, ICE, and USCG. These components also represent three of the four largest groups of employees furloughed at DHS, totaling 16,866 employees—54% of DHS's total initial projected furlough.

**Figure 2**, at the end of this section, shows a graphical representation of the relative size of the DHS appropriations that would be restored under the bill, relative to the resources that would be provided through H.J.Res. 85 and the actions taken in P.L. 113-39 and P.L. 113-46.

As **Figure 1** and **Figure 2** show, removing the funding hiatus impact on CBP, ICE, Coast Guard, and USCIS would have represented a significant restoration of funding to the department. As noted below, a separate piece of legislation had been passed in the House to fund FEMA over a similar time period.

Had these two pieces of legislation been enacted, many other complementary components of DHS would have remained affected by the funding hiatus: the management and intelligence

<sup>41</sup> Roll No. 540.

<sup>42</sup> Congressional Budget Office, "Border Security and Enforcement Continuing Appropriations Resolution, 2014, (H.J.Res. 79) as Introduced in the House," October 4, 2013, table note 3.

functions of the department, the Office of the Inspector General, the Transportation Security Administration (TSA), the Secret Service, the Office of Health Affairs, the Science and Technology Directorate of the department, the Domestic Nuclear Detection Office, and most of the National Protection and Programs Directorate would have remained unfunded. With the exception of the TSA and the Secret Service, all of these functions were projected to furlough more than 40% of their employees, with most of them projected to furlough over 90%.

### **H.J.Res. 85—the Federal Emergency Management Agency Continuing Appropriations Resolution, 2014**

This CR was introduced October 3, 2013. It would provide temporary funding for the Federal Emergency Management Agency (FEMA) at the same rate as was provided in P.L. 113-6, taking into account sequestration, through December 15, 2013, or until other appropriations legislation replaces the direction in the bill. H.J.Res. 85 passed the House on October 4, 2013, by a vote of 247-164.<sup>43</sup>

According to CBO, the annualized cost of the bill would be \$4.1 billion in discretionary budget authority for the department, plus \$6.1 billion in disaster relief funding—a total of \$10.2 billion.<sup>44</sup>

Enactment of this legislation would have ended the emergency furlough for FEMA, at least until its date of expiration. As the measure currently stands, as is usually the case with continuing resolutions, account-level direction for funding is not provided, and no explanatory statement of congressional intent (such as a committee report) exists. It would also not provide the four legislative extensions of authority for DHS as envisioned under H.J.Res. 59.

This bill provides temporary funding to FEMA, leaving the coordinating, managing and oversight functions of the overall department unfunded. It is unclear whether passage of this legislation would provide for a transfer of funds to the DHS OIG to pay for oversight of disaster relief operations, as has occurred in recent years, and whether such a transfer would allow the OIG to conduct those activities.

**Figure 2**, below, shows a graphical representation of the relative size of the DHS appropriations that would be restored under the bill, relative to the resources that would be provided through H.J.Res. 85 and the actions taken in P.L. 113-39 and P.L. 113-46.

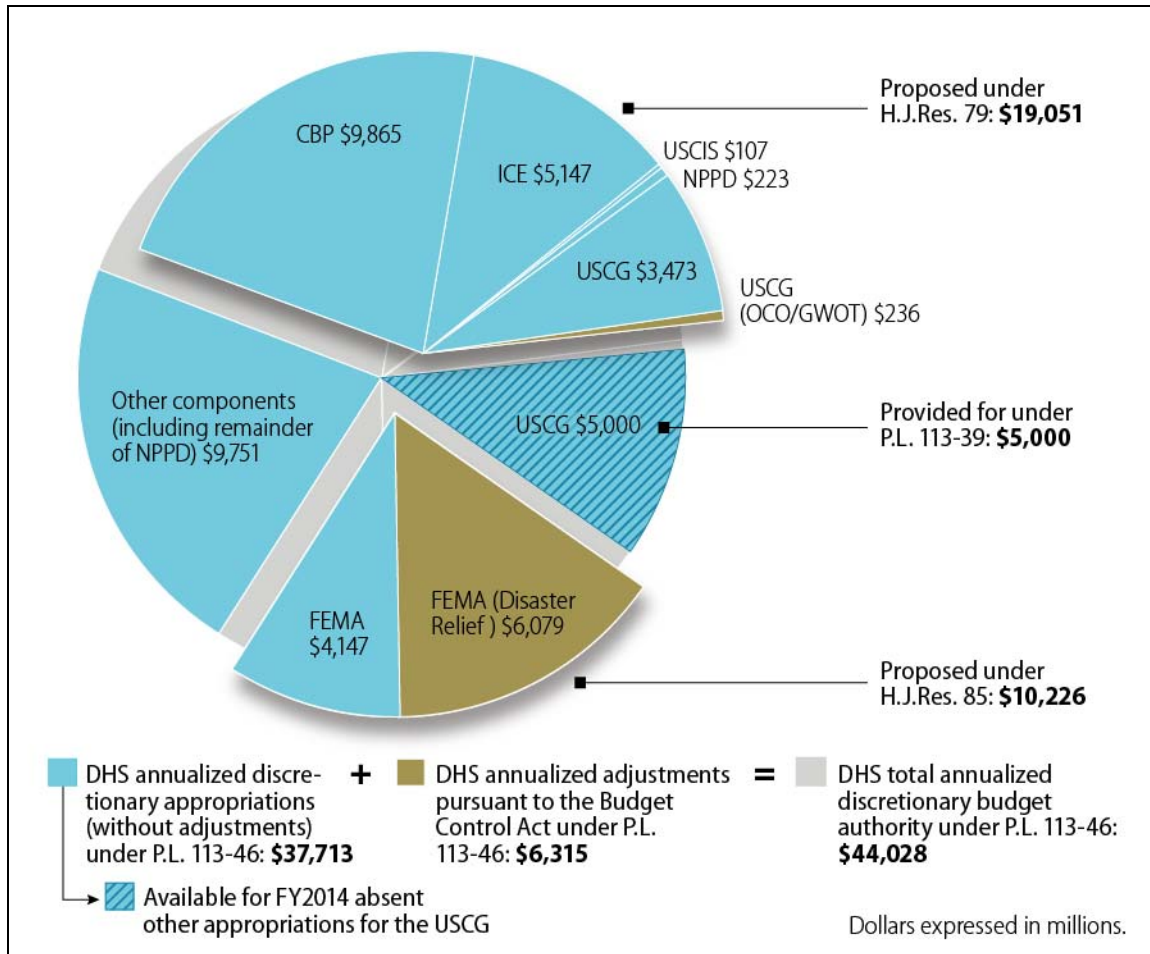
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<sup>43</sup> Roll No. 522.

<sup>44</sup> Congressional Budget Office, “Federal Emergency Management Agency Continuing Appropriations Resolution, 2014, (H.J.Res. 85) as Introduced in the House,” October 4, 2013.

**Figure 2. Projected Impact of Selected Continuing Resolution Proposals on the FY2014 DHS Funding Lapse**

(millions of dollars of annualized discretionary budget authority)



**Source:** CRS Analysis of CBO scores for H.J.Res. 59, H.J.Res. 79, and H.J.Res. 85, as introduced, and H.R. 2775 as amended (enacted as P.L. 113-46).

**Figure 2** compares the CBO-estimated impact of the two enacted and two proposed temporary appropriations measures affecting DHS. The underlying circle of the pie chart reflects the annualized discretionary budget authority that is provided for DHS through P.L. 113-46—essentially, the equivalent of the post-sequester appropriated budget for DHS for FY2013. This is the same as the annualized discretionary budget authority that would have been provided to DHS through H.J.Res. 59. The sections in blue are regular discretionary appropriations, while the tan sections are covered by adjustments for disaster relief and costs of overseas military operations<sup>45</sup> that are provided for under the Budget Control Act. The crosshatched section of the pie represents the annualized budget authority provided under P.L. 113-39—appropriations that will not lapse for FY2014. The two pieces “lifted” from the circle reflect what continuing appropriations would

<sup>45</sup> The term used in Section 101 of the Budget Control Act (P.L. 112-25; reference 125 Stat. 243) is “Overseas Contingency Operations/Global War On Terrorism,” abbreviated in this report as OCO/GWOT.

have been provided under H.J.Res. 79 and H.J.Res. 85. *All* of these continuing resolutions, proposed and enacted, had the same rate—the FY2013 post-sequester level of funding provided under P.L. 113-6. Their coverage differed, however, with only H.J.Res. 59 and P.L. 113-46 covering the entire department (in fact, the entire government), and H.J.Res. 79, H.J.Res. 85, and P.L. 113-39 covering appropriations for portions of DHS. As the figure shows, roughly 22% of the DHS budget would not have been covered by the three measures that addressed DHS in part, but not the entire federal government.

### **H.J.Res. 89—the Excepted Employees’ Pay Continuing Appropriations Resolution, 2014**

This continuing resolution was introduced and passed the House on October 8, 2013. It would provide temporary funding to pay the salaries of all federal employees working during the lapse in appropriations who are not paid by other means, through December 15, 2013, or until other appropriations legislation replaces the direction in the bill. H.J.Res. 89 passed the House on October 8, 2013, by a vote of 420-0.<sup>46</sup>

At the time the bill passed the House, there was no CBO estimate of the annualized cost of the bill.

Enactment of this legislation would not end the emergency furlough for any government component, although it would reduce the economic impact of the shutdown by maintaining the flow of compensation to “excepted” or “exempted” federal workers, including many at DHS. The resolution is drafted to pay “salaries and related expenses” only,<sup>47</sup> so the limitations noted in the analysis of P.L. 113-39 would apply in the case of enactment of this measure as well.

As the measure currently stands, as is usually the case with continuing resolutions, account-level direction for funding is not provided, and no explanatory statement of congressional intent (such as a committee report) exists.

### **P.L. 113-46—the Continuing Appropriations Act, 2014**

H.R. 2775 was amended by the Senate on October 16, 2013, to include the Continuing Appropriations Act, 2014 as Division A. The amended measure provides temporary appropriations for the federal government, including DHS, funding the department at same rate it was for FY2013 (post-sequester) through January 15, 2013, or until it is replaced by another appropriations law. H.R. 2775, as amended, passed the Senate by a vote of 81-18 on October 16, 2013,<sup>48</sup> and several hours later, passed the House of Representatives by a vote of 285-144.<sup>49</sup> The bill was signed into law shortly after midnight on October 17, 2013, and the federal government resumed operations that same day.

There are five sections in P.L. 113-46 that contain legislative language that specifically apply to DHS. Four of these sections have the same essential impact as those that were highlighted above

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<sup>46</sup> Roll No. 535.

<sup>47</sup> H.J.Res. 89(eh), p. 2.

<sup>48</sup> Record Vote No. 219.

<sup>49</sup> Roll No. 550.

as part of H.J.Res. 59.<sup>50</sup> The fifth, Section 157, mirrors a general provision from P.L. 113-6, requiring DHS to share reports it provides to the appropriations committees to the House Committee on Homeland Security and the Senate Committee on Homeland Security and Governmental Affairs.<sup>51</sup> Generally speaking, the sections carry authority and direction given to DHS and its components in both annual appropriations legislation and CRs covering the department in recent years.

Division A also includes legislative language similar to that of H.R. 3223 (discussed below), which authorizes back pay for all furloughed and exempted federal employees for the period of the October 1, 2013, funding lapse.<sup>52</sup>

As with H.J.Res. 59, according to CBO, the annualized cost of the DHS-related provisions in the act as introduced in the Senate would be \$37.7 billion, not including \$236 million for overseas contingency operations funding for the Coast Guard, and \$6.1 billion for disaster relief funding.<sup>53</sup> These numbers are a projection of what could be spent if the resolution were extended to the end of the fiscal year—the act is currently set to expire on January 15, or when it is replaced by relevant appropriations legislation.

Enactment of this measure ended the emergency furlough resulting from the lapse in appropriations on October 1, 2013. As is usually the case with continuing resolutions, account-level direction for funding is not provided, and no explanatory statement of congressional intent (such as a committee report) exists.

## **Authorizing Legislation**

### **H.R. 3223—the Federal Employee Retroactive Pay Fairness Act**

This is authorizing legislation that states that all employees furloughed as a result of the funding lapse at the beginning of FY2014 shall be paid for that time after the lapse in appropriations ends. The House passed H.R. 3223 by a vote of 407-0 on October 5, 2013. Its stated intent was accomplished through Section 115 of P.L. 113-46.

This would apply to all furloughed employees of DHS, but it would not end the funding lapse or change the operations of DHS directly. Establishment of this obligation could have significant implications for departments' budgeting and performance metrics. Resources budgeted in the expectation of performance of regular departmental duties would instead be expended to compensate staff for conforming to shutdown procedures.

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<sup>50</sup> P.L. 113-46, Sec. 130-133.

<sup>51</sup> P.L. 113-6, Sec. 574 and P.L. 113-46, Sec. 157.

<sup>52</sup> P.L. 113-46, Sec. 115.

<sup>53</sup> Congressional Budget Office, "Continuing Appropriations Act, 2014, as Introduced in the Senate on October 16, 2013, as an Amendment to H.R. 2775," October 16, 2013.

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