

## Trade Agencies Will Feel Gov't Shutdown Sting

By Alex Lawson

*Law360, New York (January 19, 2018, 5:34 PM EST)* -- The shuttering of the U.S. government will have dramatic effects across the vast federal bureaucracy, and the nation's trade apparatus is no exception, with agencies preparing for a considerable hit to ongoing negotiations and the enforcement of U.S. trade laws.

There's probably never an ideal time for the government to run out of money, but the latest episode of budgetary theatrics has put the Trump administration in a special kind of bind as it prepares for the latest round of the contentious North American Free Trade Agreement renegotiation effort.

NAFTA officials are slated to begin the talks in earnest on Tuesday, and the Office of the U.S. Trade Representative will now be traveling to Montreal with markedly smaller teams as the agency trims itself of "nonexcepted" personnel, per government shutdown protocol.

USTR is housed within the Executive Office of the President, which has more leeway to deem employees essential than some other agencies, but the shutdown will nevertheless pose major hurdles, according to former trade negotiator Wendy Cutler, who was at USTR during the last government shutdown in 2013.

"For a major undertaking like this with a deadline coming up, or at least an aim to conclude in the next couple of months, this is not great for a negotiation," Cutler told Law360. "It's not just being [at the meeting]; it's the work in the lead-up ... and it's the work after when you come back and have a lot of homework to prepare for the next round and conduct the necessary congressional and stakeholder consultations."

The 2013 shutdown forced the USTR to cancel a trade negotiating session with the European Union, but the agency has maintained that the NAFTA session in Montreal will proceed as planned regardless of the government's funding status.

Other former officials, like Crowell & Moring LLP's Robert Holleyman, back up Cutler's assessment. The USTR can get by with a smaller staff of its own people at individual negotiating rounds, he said, but where staffers will begin to feel the squeeze is when they have to consult with technical-level experts in other agencies that will no longer be working during the shutdown.

At a diplomatic level, Holleyman said that a budget lapse sends a message to negotiators on the other

side of the table, even if the USTR exercises no amount of control over the nation's funding squabbles.

"Here, the U.S is trying to assert strength, and the mere fact that our trading partners know that our government is shut down will convey the opposite of strength. It will convey that the U.S. has trouble keeping its doors open," Holleyman said. "It is a cloud that will be hanging over the round that is unfortunate for the U.S. negotiators to go into negotiation with that out there."

Perhaps the most drastic consequence of a shutdown is the de facto halting of the U.S. trade remedy law enforcement effort. The U.S. Department of Commerce's International Trade Administration and the U.S. International Trade Commission effectively shut down their handling of anti-dumping and countervailing duty investigations.

Former Commerce official David Spooner, now a Barnes & Thornburg LLP partner, recalled his past shutdown experience at the agency.

"I remember a shutdown occurred when I was assistant secretary. I remember going to work and sitting at my desk and the building being mostly empty with very little staff," he told Law360.

Spooner also noted that the agency is dealing with a heftier-than-usual workload following a 50 percent spike in new trade remedy petitions in 2017, a dynamic that only compounds the intrinsic headaches of a government shutdown.

"The government will overcome it, of course, but it's a hassle," he said. "The burden on the agency is magnified when there's a heavy caseload like there is now."

Trade remedy lawyers working on active investigations and review have to navigate a Byzantine maze of filing deadlines, all of which is thrown into chaos once the government closes its doors. In the past, every deadline that came during the time of a shutdown has been tolled, with agencies issuing a memo once the government opens back up notifying attorneys about the status of their deadlines.

That is a simple enough fix, but it still doesn't resolve the day-to-day headaches caused by the uncertainty of the government's inactivity, according to Wiley Rein LLP partner Timothy Brightbill.

"It's definitely challenging not knowing how long the government could be out or what the real deadlines will be, especially for client hearings, and not knowing when the agencies will be open and when clients should come to town," Brightbill said. "There are lots of frustrating and complicating details to this process."

--Editing by Christine Chun and Jill Coffey.