

Gov't Shutdown Will Constrict US Trade Work

By Scott Flaherty

Law360, New York (October 01, 2013, 12:19 AM ET) -- As an impasse in Congress over a temporary budget resolution led to a government shutdown Tuesday, some of the federal agencies with a hand in U.S. trade policy say they will effectively close up shop, while others are expected to keep working with limited staff.

The shutdown took effect at midnight on Tuesday, after the two chambers of Congress failed to pass a temporary spending measure that would have funded the federal government for a period of time after the end of the 2013 fiscal year, which ran through the end of the day Monday.

With the possible shutdown looming, a slew of federal agencies, including those that oversee U.S. trade policy and enforcement, released contingency plans late last week explaining how their operations would be affected if Congress failed to pass a spending measure. The U.S. International Trade Commission said it would effectively put its operations on hold, while U.S. Customs and Border Protection planned to retain the majority of its staff.

Both the ITC and the U.S. Department of Commerce's International Trade Administration face hefty staff reductions in the wake of the shutdown, according to contingency plans and other documents the agencies have released. The ITC would retain six of its 390 employees on the first day of the shutdown, due to needs arising from active litigation, and place three to seven on "intermittent recall to preserve and protect property."

In a notice Monday, the ITC said it planned to "shut down its investigative activities" if a spending bill didn't pass Congress and its funding dried up. Save for a few exceptions that would be made only if the commission could resume normal operations Tuesday or Wednesday, "all hearings and conferences will be postponed," the ITC said.

Thomas Jarvis, a Winston & Strawn LLP partner who worked as a staff attorney at the ITC during the last government shutdown, which was in effect in late 1995 and early 1996, said it had a strong impact on the agency's operations.

"During the government shutdown of 1995-96, at the ITC they turned off the heat, and we worked in the cold to meet briefing deadlines," said Jarvis.

Discussing the potential shutdown this time around, Jarvis, who mostly handles intellectual property cases in front of the ITC, said it was likely to spawn a good deal of uncertainty for businesses involved in proceedings before the commission.

“The devil is in the details, which is the great unknown,” he said.

In its contingency plan, dated Friday, Commerce indicated that the ITA would retain just 47 of its 1,427 employees, or about 3.3 percent. On Monday, a Commerce official said that, in the past, government shutdowns have pushed back all deadlines related to the agency's anti-dumping and countervailing duty investigations.

The official did not indicate whether the deadlines would be put on hold during the current shutdown, saying only that the ITA planned to “provide appropriate guidance” at some point on Tuesday if Congress wasn't able to pass a spending measure.

But Daniel Cannistra, a Crowell & Moring LLP partner whose practice includes trade remedy work, expects the Commerce Department would, in fact, freeze deadlines. That would mean delays for upcoming hearings, briefings and even final determinations in duty investigations or administrative reviews of existing orders, he said.

He says that because of the steps it takes to restart the agencies' operations, those delays are likely to outlast the actual shutdown. So if the shutdown lasts a week, Cannistra says, deadlines and hearing schedules could be pushed back 10 to 14 days.

The shutdown will also affect the U.S. Department of Justice, which handles court proceedings in appeals of trade remedy cases at the U.S. Court of International Trade, so those cases could also be delayed, he says.

Another agency with trade responsibility, the Office of the U.S. Trade Representative, said in its contingency plan that 61 of its 232 full-time employees, or about a quarter of its staff, would stay on.

A representative for the office said Monday that while the Obama “administration believes that a lapse in appropriations should not occur,” it has prepared for one.

Crowell counsel Josh Kallmer, who spent time earlier in his career at the USTR's office, said the shutdown is likely to put on hold a lot of the agency's “bread and butter” work, including things like dispute settlement proceedings at the World Trade Organization or working-level dialogues with trading partners.

“It would have a halting effect on U.S. trade policy,” said Kallmer.

U.S. negotiations with the European Union for the proposed Transatlantic Trade and Investment Partnership could take an immediate hit, he says.

A second round of formal talks for the TTIP is scheduled to start Oct. 7 in Brussels, and while the USTR's office may still have the funding and staff to take part in limited, high-level discussions, the government shutdown could mean the majority of trade negotiators won't be able to participate, according to Kallmer. In light of those limitations, he said, “it's hard to imagine” how the full round of negotiations could move forward.

While many of the agencies involved in U.S. trade are expected to reduce staff and limit functions, Customs and Border Protection is expected to keep operating at near-usual levels. In a contingency plan dated Friday, CBP said it estimates that 52,673 of its approximately 59,561 employees, or about 88 percent, would be kept on during the hiatus in federal funding.

“These employees are exempt since they are presidential appointees, law enforcement officers, funded by other than annual appropriations, or necessary for the protection of life and property,” CBP said.

Crowell's Cannistra said the higher staffing for Customs comes down in large part to the impact the agency has on the day-to-day operations of the U.S. trading system. When it comes to the normal flow of goods in and out of the U.S., businesses are not likely to see much of a change in dealing with Customs officials, he says.

“We actually expect a pretty minimal impact,” Cannistra said.

--Editing by Kat Laskowski and Melissa Tinklepaugh.

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