

Capital Markets Alert

Potential SEC Shutdown: Considerations for Public Companies and Impact on Capital Markets Transactions

September 29, 2023

If Congress is unable to approve a new spending bill by October 1, 2023, the federal government could be headed for a shutdown. In the face of a looming shutdown, public companies should be mindful of the impact on the operations of the Securities and Exchange Commission (the “SEC”) and how a shutdown of the SEC might impact capital raising transactions.

In the event of a shutdown, it is expected that the SEC would lose more than 90% of its workforce to unpaid furloughs, leaving limited staff to perform essential functions. Accordingly, the SEC’s operations will be significantly curtailed, with staff on hand to address questions about fee-bearing EDGAR filings and other “emergency” securities matters. While EDGAR will continue to accept periodic reports, registration statements and other filings, staff members would not be available to review filings or to declare registration statements effective.

The federal government was most recently shut down in December 2018. In advance of the 2018 shutdown, the SEC published its [Operations Plan Under a Lapse in Appropriations and Government Shutdown](#), which was updated in July of 2023 (the “SEC Shutdown Plan”), and the Division of Corporation Finance issued [further guidance](#) on the limitations on their activities in the event of a shutdown on September 27, 2023 (the “Shutdown Announcement”). Using the SEC Shutdown Plan and the Shutdown Announcement as a guide, below is a summary of how we would expect a shutdown to impact the SEC’s operations and other related considerations.

EDGAR Issues

1. Q: Will EDGAR accept filings?

A: Yes, the SEC Shutdown Plan states that because EDGAR is operated pursuant to a contract, it “will remain fully functional as long as funding for the contractor remains available through permitted means.”

2. Q: Will SEC Staff members be available to resolve EDGAR filing issues and process requests for EDGAR access codes?

A: Yes, but on a limited basis. According to the SEC Shutdown Plan, the SEC Staff will be available to “process requests for EDGAR access codes and password resets and answer questions about fee-bearing EDGAR filings and other emergency questions regarding EDGAR submissions.”

Filings

3. Q: Will SEC examiners be available to process filings?

A: No.

4. Q: Will automatically effective Securities Act registration statements and automatically effective post-effective amendments go effective when filed?

A: Yes.

5. Q: Will other Securities Act registration statements and post-effective amendments be declared effective or accelerated?

A: No. The Shutdown Announcement notes that issuers “may wish to consider submitting a request for acceleration or qualification, as applicable, while the Division is open and operating.”

6. Q: May an issuer request acceleration of a pending registration statement if it has not yet received a “no objections” statement from FINRA with regard to its underwriting compensation arrangements?

A: Yes. If an issuer has not yet obtained the required “no objections” statement from FINRA, the SEC Staff will consider granting acceleration requests if the underwriters confirm in their request for acceleration that they will not execute the underwriting agreement or confirm sales of the securities from the registration statement until they receive that statement from FINRA. If an issuer finds itself in this situation, it should let FINRA know of its plan to request acceleration as soon as possible.

7. Q: Will the SEC Staff make an exception and declare effectiveness after an SEC shutdown if comments on a Securities Act or Exchange Act registration statement were cleared before an SEC shutdown?

A: No.

8. Q: If a Securities Act registration statement omitting pricing and related information as permitted by Rule 430A is declared effective prior to an SEC shutdown, may the issuer file a prospectus under Rule 424(b)(1) to supply the omitted information if pricing occurs after an SEC shutdown but within the time period provided by Rule 430A(a)(3) (i.e., 15 business days after the effective date)?

A: Yes. Likewise, in the event an issuer does not price its offering within the 15 business-day time period provided in Rule 430A, the issuer may file a post-effective amendment under Rule 462(c) to restart the 15 business-day period so that, at the time of pricing, the issuer will be able to include the pricing information in a Rule 424(b) prospectus supplement. However, an issuer may not rely on Rule 462(c) if the post-effective amendment includes substantive changes from, or additions to, the prospectus in the effective registration statement.

9. Q: The Division of Corporation Finance’s policy [allowing confidential submission of certain Securities Act and Exchange Act registration statements](#) requires issuers to file publicly at least 15 days before the road show in the case of an IPO (or before effectiveness, if there is no road show) and at least 48 hours before effectiveness in the case of a follow-on offering. Will the 15-day or 48-hour period run during an SEC shutdown?

A: Yes. However, the SEC Staff will not be available to declare the registration statement effective.

10. Q: Will it be possible to pay filing fees during an SEC shutdown?

A: Yes, including on a “pay-as-you-go” basis for automatic shelf registration statements.

11. Q: Should all Exchange Act current and periodic filings be made by their due date?

A: Yes, including filings such as proxy statements and Forms 10-K, 10-Q, 8-K, 3 and 4.

12. Q: Should a company still file preliminary proxy materials, if required by Exchange Act Rule 14a-6(a)?

A: Yes, a company should still file preliminary proxy materials in accordance with Rule 14a-6(a), which provides that the preliminary proxy materials must be filed at least ten calendar days prior to the date the definitive proxy materials are first sent or given to security holders. If the company is not advised by the SEC Staff that the preliminary proxy materials will be reviewed prior to the expiration of the 10-day period contemplated by the rule, then the company could proceed with disseminating and filing the definitive proxy materials. That said, the Shutdown Announcement notes that the SEC Staff may review an issuer’s preliminary proxy statement after its operating status changes.

13. Q: Should a company still respond to an SEC comment letter on a Securities Act or Exchange Act filing, including by the requested due date in the case of a comment on an Exchange Act periodic or current filing?

A: Yes, a company should still respond to SEC comments. In the case of comments on Exchange Act periodic or current filings specifying a response date, the company can either respond by the due date or submit a letter (as EDGAR correspondence) advising the Staff of the new response date.

14. Q: Following an SEC shutdown, may an issuer file (i) a registration statement without a delaying amendment or (ii) an amendment to a previously filed registration statement to remove the delaying amendment?

A: Yes. Under the Securities Act, a registration statement properly filed without a delaying amendment would automatically become effective 20 calendar days after filing. The Shutdown Announcement notes, however, that issuers “should consider carefully the risks of this course of action and should evaluate their particular facts and circumstances before doing so. Factors to consider may include, but are not limited to, whether the company is Form S-3 eligible, whether it is a repeat issuer, whether the registration statement is subject to review, and whether significant unresolved staff comments remain

outstanding.” Any issuers considering this approach are encouraged to contact the authors of this alert to discuss further.

Interpretive Guidance & Rulemaking

15. Q: Will it be possible to obtain answers from the SEC Staff to routine interpretive questions?

A: No. The SEC Shutdown Plan states that “non-emergency interpretive advice” will be discontinued.

16. Q: Will it be possible to obtain no-action relief from the Division of Corporation Finance?

A: No, including with regard to shareholder proposals. During an SEC shutdown, a company should make the submission required by Rule 14a-8(j) via email if it intends to exclude a shareholder proposal. The SEC Staff will not, however, respond until after the SEC shutdown ends. If the SEC shutdown is continuing at the time the company disseminates and files its definitive proxy statement, it would have to decide whether to exclude the proposal without the benefit of a no-action letter.

17. Q: Will the SEC engage in any rulemaking activities during an SEC shutdown?

A: No. While the SEC will continue to accept comment letters on rule proposals and concept releases during a shutdown, the SEC will not engage in any non-emergency rulemaking and will not provide any non-emergency interpretive advice.

Miscellaneous

18. Q: Will the SEC’s online database of stop orders remain available, and will it be updated in the event a stop order is issued?

A: Yes. The online database can be found [here](#).

19. Q: Will an SEC shutdown change what constitutes a “business day” for purposes of the Securities Act, Exchange Act or the SEC’s rules under those statutes?

A: No, except for purposes of certain rule-making notices filed by self-regulatory organizations (covered [here](#)).

This means, for example, that the “business day” count for purposes of Rule 430A, Rule 13e-3, Rule 13e-4, Regulation 14D, Regulation 14E (including the 20 business day requirement of Rule 14e-1) and Regulation M will not be affected by a shutdown.

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