

SEC Operations During Federal Government Shutdown

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On December 21, 2018, the federal government failed to enact appropriations to fund certain federal operations, resulting in a partial government shutdown. The Securities and Exchange Commission (“SEC”) has published a detailed plan for the agency’s operation during the shutdown that goes into effect on December 27, 2018.¹ Under the plan, the SEC will initially be open and “fully operational for a limited number of days beyond the start of a government shutdown. During the time [it] remain[s] open, [it] will conduct ordinary business.” However, given the continuation of the government shutdown, starting today, December 27, 2018, the SEC will have only an extremely limited number of staff members available to respond to emergency situations involving market integrity and investor protection, including law enforcement.

The Division of Corporation Finance (“Corp Fin”) has published a set of FAQs addressing certain aspects of its operations during a shutdown.² Corp Fin has also provided a list of contacts identified for questions about individual filings.³ General updates will be posted on the SEC website at www.sec.gov.

Ability to Make Edgar Filings

There will be no impact on the ability of issuers to make EDGAR filings during the shutdown since EDGAR is operated pursuant to contract with an outside third party. Accordingly, EDGAR will continue to accept periodic reports, registration statements, offering statements and other filings.

Filing Reviews by Corp Fin

Reviews of filings by Corp Fin will not commence or continue during the shutdown. The failure to commence a review will be advantageous to filers seeking automatic effectiveness of shelf registration statements 20 calendar

¹ Available [here](#).

² Available [here](#).

³ Available [here](#).

days after filing as described below. The lack of completion of a review in progress may adversely impact the ability of other issuers to take advantage of such automatic effectiveness.

Ability to Declare Registration Statements Effective

The SEC's approach to declaring registration statements effective and facilitating offerings relies on a combination of the following:

- encouraging registrants to seek acceleration of their registration statements while the SEC is still operating;
- adopting a more flexible approach to certain rule-based or procedural requirements that usually apply to acceleration requests; and
- relying on Section 8(a) of the Securities Act of 1933 (the "Securities Act") – a provision that is otherwise little used today – to permit effectiveness without SEC action.

Section 8(a) of the Securities Act provides the SEC with 20 calendar days after filing to review a registration statement before it automatically goes effective. Effectiveness is a critical step before a registered offering can occur because Section 5(a) of the Securities Act prohibits an issuer from delivering a security to a purchaser absent an effective registration statement.

The approach taken will vary depending on the type of offering:

IPO or Other Non-Shelf Offering on Form S-1 or F-1⁴

The bottom line for an IPO is that it will not be possible to achieve effectiveness unless it is requested early from the SEC while the SEC is still operating. This is primarily because an IPO issuer relies on the use of Rule 430A, which permits an issuer to exclude the final price of securities from its effective registration statement and "backfill" that information using a final prospectus filed pursuant to Rule 424(b). Rule 430A is not available in the absence of a delaying amendment; and it is not possible to complete the final price of the securities until pricing. As a result, issuers should consider seeking effectiveness promptly after the start of their roadshow.⁵ At this time, the underwriters should be able to make the representation required under Rule 460 as to the appropriate distribution of the preliminary prospectus to broker-dealers and others. If FINRA clearance has not been received, the SEC has indicated that it will still grant effectiveness provided the underwriters confirm in their request for acceleration that they will not execute the underwriting agreement or confirm sales of the registered securities until they receive that statement from FINRA. Underwriters in this situation should advise FINRA of the plan to request acceleration. Finally, this approach will also require the issuer to have cleared all SEC comments at the time it seeks effectiveness.⁶

⁴ Forms S-1 and F-1 can be used for the sale of secondary securities on a delayed or continuous basis pursuant to Rule 415(a)(1)(i) under the Securities Act. In that case, effectiveness would be achieved in the same way as it is achieved for a shelf offering on Form S-3 or F-3, as described below.

⁵ Rule 430A requires a final prospectus containing pricing information to be filed within 15 business days after the effective date of the registration statement meaning that the pricing and filing of the final prospectus must occur within 15 business days after the "early" effective date. If this will not occur, the issuer can either: (i) file a post-effective amendment under Rule 462(c) to restart the 15-business-day period so that, at the time of pricing, the company can include the pricing information in a final prospectus filed pursuant to 424(b) prospectus supplement (post-effective amendments filed pursuant to Rule 462(c) are effective upon filing, or (ii) file a post-effective amendment under Rule 462(c) at the time of pricing, prior to the time confirmations are sent or given, to include the information omitted under Rule 430A. However, an issuer cannot rely on Rule 462(c) to include the pricing information if the post-effective amendment includes substantive changes from, or additions to, the prospectus in the effective registration statement.

⁶ Issuers may wonder about the implications of having an effective Securities Act registration statement if they fail to price their offering. In that event, the issuer would file a request for withdrawal pursuant to Rule 477 under the Securities Act. A request for withdrawal of a registration statement before effectiveness or after effectiveness if no securities are sold is subject to the SEC's consent upon finding that such request for withdrawal is consistent with the public interest and the protection of investors. Section 15(d) of the Securities and Exchange Act of 1934 (the "Exchange Act") provides that any issuer who registers a class of securities under the Securities Act shall become subject to the periodic reporting

Form S-3 or F-3 Shelf Registration (Non-WKSI)

It would clearly be preferable for a non-WKSI issuer also to seek acceleration of its registration statements on Form S-3 or F-3 while the SEC is still operating. However, if this is not possible, then issuers can file such a registration statement without a delaying amendment and achieve effectiveness automatically 20 calendar days after that filing pursuant to Section 8(a) under the Securities Act. This is because a shelf registration statement on Form S-3 or F-3 does not implicate Rule 430A. Any such issuer should note as follows:

- An issuer that has already filed a registration statement on Form S-3 or F-3 with the customary delaying amendment language may file a further amendment to that registration statement to remove the delaying amendment language. In that case, the registration statement will become effective by lapse of time 20 calendar days after filing. If the shutdown continues, the company can further delay the effective date by filing another pre-effective amendment during the 20-calendar day period. The registration statement would become effective 20 calendar days after the filing date of the latest pre-effective amendment that does not include a delaying amendment. If the shutdown ends and the SEC becomes operational and the registration statement is not yet effective, the SEC would then consider a request to accelerate effectiveness to an earlier date. The SEC may, however, request an amendment to restore the delaying amendment. The SEC cautions that, if a company amends to remove the delaying amendment, the company must also amend to include all information required by the form, including the price of the securities it will sell.
- A company can file an amendment to remove a delaying amendment while the SEC is open and operational, but if the SEC has not yet cleared outstanding comments, the SEC may ask the company to amend to include the delaying amendment.

Automatically Effective Registration Statements

Certain registration statements such as shelf registration statements on Form S-3 and F-3 filed by WKSI, registration statements on Form S-8, and registration statements on Form S-3 or F-3 for dividend or interest reinvestment plans will continue to be automatically effective upon filing, irrespective of any shutdown.

Ability to Qualify Offering Statements on Form 1-A

Despite appearing to be similar in form to a registration statement, an offering statement on Form 1-A filed pursuant to Regulation A uses an exemption from registration under the Securities Act. As a result, the delaying amendment approach described above has no application to such offerings and such offering statements cannot be qualified without SEC action. Therefore, any Forms 1-A filed after the start of the shut down or currently under SEC review will remain unqualified during the pendency of the SEC shut down.

A company may request qualification of its offering statement on Form 1-A even if the underwriters have not yet received the required FINRA clearance, provided that the underwriters confirm in the request for qualification that they will not execute the underwriting agreement or confirm sales of the securities offered pursuant to the Form 1-A until they receive that statement from FINRA. In this case, FINRA should be advised of the plan to request qualification.

General Considerations

The following points from Corp Fin's FAQs are of general relevance to the filings described above:

Timing of Acceleration Requests

The SEC will consider granting requests for acceleration or qualification on the day they are submitted.

requirements under the Exchange Act, however the SEC has stated that an issuer that has abandoned its IPO will generally be eligible to file a Form 15 suspending that reporting obligation. See Staff Legal Bulletin No. 18(CF) available [here](#).

Resolution of Outstanding Comments

Any company contemplating a request for acceleration or qualification during this period should let the SEC know as soon as possible to enable the SEC to work with the company to resolve any outstanding issues.

Updating Registration and Offering Statements

If a company with an effective registration statement determines that it needs to update information in the prospectus before commencing an offering, the company should not proceed with the offering prior to updating the prospectus. In that circumstance, the company and its representatives will have to decide whether the company can update the prospectus without filing a post-effective amendment. If the SEC is not open, the company can file a post-effective amendment on EDGAR but the staff will not be in a position to declare that amendment effective. Similarly, if a company needs to update a previously qualified Form 1-A, if the SEC is not open, the company can file a post-qualification amendment on EDGAR but the staff will not be in a position to qualify that amendment.

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