

POTENTIAL SEC SHUTDOWN: FREQUENTLY ASKED QUESTIONS ABOUT THE IMPACT ON CAPITAL MARKETS TRANSACTIONS AND PUBLIC COMPANIES

18 Law Firm Consensus Report as of 10:00 am EST, Monday, January 22, 2018

January 22, 2018

On Friday, January 19, 2018, the Securities and Exchange Commission (SEC) announced that “should there be a federal government shutdown after January 19, the SEC will remain open for a limited number of days, fully staffed and focused on the agency's mission.” The undersigned law firms understand that all of the SEC's operations, including filing reviews, no-action and interpretive requests and acceleration requests, will continue as normal during this period.

The SEC has not stated how long this period will last, and market participants have asked what would happen if there were a total SEC shutdown (SEC Shutdown) once it expires. The following questions and answers reflect our current understanding of the impact of such a situation. We have included information so far made public by the SEC, in particular the SEC's December 4, 2017 *Operations Plan Under a Lapse in Appropriations and Government Shutdown*, available at <https://www.sec.gov/files/sec-operations-plan-gov%20shutdown-to-omb-12042017.pdf> (SEC Shutdown Plan).

GENERAL

1. Q: Where should I look for the latest official SEC information on an SEC Shutdown?

A: Any changes to the SEC operational status will be announced on the SEC's website, www.sec.gov.

EDGAR ISSUES

2. 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.”

3. Q: Will SEC Staff members be available to resolve EDGAR filing issues?

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

FILINGS

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

A: No.

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

A: Yes.

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

A: No.

7. Q: Will initial Exchange Act registration statements under Section 12(g) go effective 60 days after filing?

A: Yes.

8. Q: Will initial Exchange Act registration statements under Section 12(b) be declared effective by the SEC?

A: No.

9. 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.

10. Q: 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

INTERPRETIVE GUIDANCE

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

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

17. 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.

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 at: <http://www.sec.gov/litigation/stoporders.shtml>.

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: <http://www.sec.gov/rules/final/2011/34-64251.pdf>).

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.

None of the firms subscribing to this report intends thereby to give legal advice to any person. The undersigned firms recommend that counsel be consulted with respect to matters addressed in this report.

January 22, 2018

Cleary Gottlieb Steen & Hamilton LLP
Cravath, Swaine & Moore LLP
Davis Polk & Wardwell LLP
Gibson, Dunn & Crutcher LLP
Jenner & Block LLP
Latham & Watkins LLP
Mayer Brown LLP
Morrison & Foerster LLP
O’Melveny & Myers LLP
Ropes & Gray LLP
Shearman & Sterling LLP
Sidley Austin LLP
Simpson Thacher & Bartlett LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Sullivan & Cromwell LLP
Weil, Gotshal & Manges LLP
Wilson Sonsini Goodrich & Rosati, PC
Wilmer Cutler Pickering Hale and Dorr LLP