

# Upcoming Holiday and Potential SEC Shutdown: Practical Pointers for Capital Markets Transactions

December 21, 2018

## Holiday and Potential Government Shutdown

On Thursday, December 20<sup>th</sup>, the Securities and Exchange Commission (SEC) **announced** that it would be closed on December 24<sup>th</sup> and 25<sup>th</sup> in observance of the holidays. In addition, the SEC said it would “remain fully operational for a limited number of days” after the start of the potential government shutdown. During that period, the SEC will conduct ordinary business. The number of “limited days” the SEC would stay open was not specified; however, the SEC indicated that they would provide as much advance notice as possible should their operating status change.

## EDGAR Status

EDGAR will not be available for filing purposes on Monday, December 24<sup>th</sup> or Tuesday, December 25<sup>th</sup> due to the federal holiday. Any filings required to be made no later than December 24, 2018 will be considered timely if filed on or before December 26, 2018, the next operational business day. During a shutdown, EDGAR will accept registration statements, offering statements and other filings; however, the SEC will not be able to declare registration statements effective nor qualify Form 1-A offering statements.

## What to Do Now for Companies Hoping to Issue Securities in Early 2019

WKSI issuers should not need to change their plans, as EDGAR will remain open and the registration statement will be automatically effective. Similarly, non-WKSI issuers with an effective shelf should not need to change their plans, as they can do takedowns off the shelf and file their prospectus supplement on EDGAR.

Per the SEC’s website, non-WKSI companies that do not have an effective shelf registration statement that are contemplating a securities offering in the new year should consider submitting requests for acceleration or qualification as soon as practicable while the SEC remains open and operating. If the SEC’s status changes to closed, such requests will not be able to be accommodated. The SEC has stated that, while it is open, it will consider requests for acceleration or qualification if there are no outstanding SEC comments, despite the absence of the required “no objections” letter from FINRA, if the underwriters confirm in the acceleration request that they will not execute the underwriting agreement or confirm sales until they have received the requisite FINRA statement. Companies are advised to notify FINRA of any such plans to request acceleration of qualification.

For a registration statement that does not involve a delayed offering, SEC rules require that the offering be priced within 15 days after the effective date. If a company does not price the offering within the 15-day day time period following the effective date, the SEC has indicated it may file a post-effective amendment under Rule 462(c) to include pricing information and restart the 15-day time period. Such post-effective amendments are considered effective upon filing. This can afford companies significant flexibility to make an offering next year while the SEC has closed. Importantly, companies should recognize that the final prospectus for an offering cannot make substantive changes from, or additions to, the prospectus in the effective registration statement without a post-effective amendment. Significantly, for an IPO issuer, this can include any significant change to the price compared to the price range included in the registration statement.

Another option that the SEC staff has suggested may be available is to remove the “delaying amendment” from a filed registration statement. Under the Securities Act, a registration statement automatically becomes effective after 20 days unless the SEC staff issues a stop order. In order to facilitate SEC review and to permit earlier effectiveness, the custom is to include a “delaying amendment” on registration statements to delay effectiveness until the SEC declares the filing effective. Companies may choose to make new filings without the delaying amendment, in which case the registration statement would become effective after 20 days. However, the registration statement must have complete information, including the offering price, before it becomes effective.

## SEC Questions and Answers

For further information, the SEC’s announcement regarding the shutdown and related *Questions and Answers* may be found [here](#).

The SEC’s December 14, 2017 *Operations Plan Under a Lapse in Appropriations and Government Shutdown* (SEC Shutdown Plan) is available [here](#).

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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