

Preparing for a potential SEC shutdown

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With a potential government shutdown only a few days away, we provide a number of SEC shutdown practice pointers for public companies and capital markets transactions.

Legislators in Congress are working to pass a spending bill in an effort to avert a government shutdown after September 30, 2023. The SEC recently updated its [operations plan](#) (updated in July 2023) in the event of a lapse in appropriations that results in an SEC shutdown and posted [guidance](#) (updated September 27, 2023) with more specific questions and answers relating to a potential shutdown. The SEC's operations plan discusses the process for an SEC shutdown, and more importantly, the very limited essential services the SEC would be able to provide. We had written a [client update](#) the last time the SEC shut down in early 2019, and participated in a set of [FAQs](#) in the context of the 2018 shutdown that provide helpful thinking on the impact of an SEC shutdown. We also thought it would be helpful to dust off our playbook from back then to highlight a few practice pointers for public companies and registered capital markets transactions in the event of a shutdown. What follows is based on the SEC's most recent operations plan as well as the guidance the SEC issued.

EDGAR status

Based on the July 2023 operations plan, EDGAR is expected to remain fully functional so long as there is funding available for the third party that operates EDGAR. This means EDGAR will accept registration statements, prospectuses, proxies and other filings (and companies should continue to timely file their periodic filings and current reports as they normally would).

In addition, while the SEC notes in the operations plan that they will have personnel available to process EDGAR access codes and password resets, as well as answer questions about fee-bearing filings, they will not be able to declare registration statements effective, answer any interpretive questions or issue no-action letters, and they will only have an "extremely limited" number of staff members to handle certain SEC emergency activities.

WKSIs and non-WKSIs with effective shelves

Since we expect EDGAR to remain open during the shutdown, well-known seasoned issuers, or WKSIs, will be able to continue to access capital markets, as registration statements filed by WKSIs are automatically effective upon filing. Likewise, non-WKSIs with an effective shelf can access capital markets through takedowns off the shelf and file their prospectus supplement on EDGAR.

Submitting requests to go effective

Non-WKSIs that do not have an effective shelf registration statement and are contemplating a securities offering in the near term should consider putting one up and submitting requests for acceleration 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 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.

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

Removing the “delaying amendment”

A non-WKSI company without an effective shelf could consider filing a registration statement without the customary “delaying amendment” (and adding alternate disclosure required under Rule 473). The registration statement would then automatically become effective 20 calendar days after filing. For companies that have already filed a registration statement that is not yet effective, the SEC has indicated that they may file an amendment to remove the delaying amendment while the SEC has shut down, and similarly, the registration statement would automatically become effective after 20 days. A company amending its registration statement to remove the delaying amendment must also amend the registration statement to include complete information, including the offering price. This is because Rule 430A (which allows the offering price to be omitted) is not available since it only applies to registration statements that are declared effective.

If during that 20-day period the SEC’s status becomes operational, a company may file an acceleration request. The SEC may request a company to file an amendment to include the delaying amendment prior to accelerating effectiveness, and may not declare the registration statement effective until its review is complete and comments are addressed. In addition, should companies remove the delaying amendment to automatically go effective during the shutdown, if the SEC reviews the filing post-offering and believes substantive deficiencies exist, it could bring an enforcement action. While we believe this is unlikely (absent egregious circumstances), companies should address any outstanding SEC comments issued before the shutdown and take all efforts to comply with applicable form requirements in the registration statement that will go effective. A company wishing to further delay the effective date of its registration statement may file another pre-effective amendment during the 20-day period.

The SEC also notes in its guidance relating to removing the delaying amendment that companies “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.”

Note that while we are aware of a few companies that took advantage of removing the delaying amendment during the shutdown in 2019, the vast majority of issuers delayed their offerings until after the end of the shutdown.

What is a delaying amendment?

Under the Securities Act of 1933, a registration statement automatically becomes effective after 20 days pursuant to Section 8(a) unless the SEC staff issues a stop 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. The delaying amendment appears as a legend on the front cover of the registration statement pursuant to Rule 473. A company may choose to make a new filing without the delaying amendment but instead including text prescribed by Rule 473(b), 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.

Proxy statements

For companies that wish to file a preliminary proxy statement during the shutdown, definitive copies may be sent 10 days after filing of the preliminary, as the SEC will not be identifying proxy statements for review during a shutdown.

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

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