

Update on the SEC Shutdown

January 2, 2018

The SEC and Government Shutdown

Due to the government shutdown, the SEC has **announced** that it has only a “limited number” of staff members available. These staff members will be available to respond to emergency situations involving market integrity and investor protection, and to answer questions regarding filing fees, but will not be able to answer other questions. As a result, SEC staff members will not consider requests for acceleration or qualification of registration or offering statements until further notice.

As discussed in our recent **memo**, companies may still offer securities under certain circumstances.

EDGAR Status

The EDGAR filing system will continue to operate during the shutdown and will continue to accept periodic filings, registration statements and offering statements.

Options for Companies Hoping to Issue Securities or Send Proxy Statements in Early 2019

Since EDGAR will remain open during the shutdown, WKSJ issuers will be able to continue to access capital markets, as registration statements filed by WKSJ issuers are automatically effective upon filing. Likewise, non-WKSJ issuers with an effective shelf can access capital markets through takedowns off the shelf and file their prospectus supplement on EDGAR. For other issuers, options are more limited. After consultation with the working group for a proposed offering, a non-WKSJ company without an effective shelf could consider filing a registration statement without the customary “delaying amendment,” which appears as a legend on the front cover of the registration statement pursuant to Rule 473 under the Securities Act of 1933. This registration statement would 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; the registration statement would then 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. If during that 20-day period the SEC’s status becomes operational, a company may file a request to accelerate the effectiveness. The SEC may, however, request an amendment to include the delaying amendment prior to accelerating effectiveness, and may also refuse to declare the registration statement effective until the SEC’s review is complete and any comments are addressed. In addition, should companies remove the delaying amendment in order to automatically go effective during the shutdown, to the extent the SEC reviews the filing post-offering and believes substantive deficiencies exist, there is the possibility of the SEC bringing an enforcement action. While we believe the likelihood of such an action to be remote (absent egregious circumstances), companies should be careful to address any outstanding SEC comments that preexisted the shutdown and take all efforts to comply with applicable form requirements in the registration statement that will go effective.

For companies wishing to further delay the effective date of their registration statement, they may file another pre-effective amendment during the 20-day period.

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 the shutdown.

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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