

Government Shutdown Limits SEC Operations and Affects U.S. Public Companies and Stock Markets

by Paul Thompson

The U.S. government shutdown that began on December 22, 2018, has curtailed virtually all operations of the U.S. Securities and Exchange Commission (SEC) related to securities offerings, public company reporting, investment companies, and securities markets. Electronic filings by corporate issuers, investment advisers, investment companies, self-regulatory organizations, and others will continue to be accepted via the EDGAR, IARD, CRD, and EFFF system, respectively. The review and processing of filings and nearly all other SEC operations have been curtailed, however, including processing and reviewing registration statements and other filings, issuance of no-action letters, processing of requests for exemptive relief, applications for registration of investment advisers, litigation, investigations, compliance reviews, and other enforcement functions. SEC staff will generally not be able to provide interpretive guidance regarding statutes or regulations, including the Securities Act of 1933, the Exchange Act of 1934, the Investment Company Act, and the Investment Advisers Act, among others. Because the timing of necessary appropriations continues to be uncertain, issuers and practitioners should consider the curtailment of SEC operations and make contingency plans to address the effects upon ongoing or planned securities offerings, disclosure filings, registrations or applications, investigations, litigation, rulemaking, and requests for interpretive guidance, among other things.

SEC operational status: Government shutdown impact

During the shutdown, the SEC will retain only an extremely limited number of excepted staff members available to respond to emergencies involving the safety of human life or the protection of property, including law enforcement. Of the approximately 4,400 staff employees, fewer than 300 excepted staff remain in service during the shutdown.¹

EDGAR, Investment Adviser, Broker-Dealer, and SRO Filings Will be Accepted, Not Processed. During the shutdown, SEC systems will continue to accept various electronic filings and submissions, although subsequent processing of filings and submissions will be curtailed.

Related People

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- Investment Funds

- **EDGAR Filings by Corporate Issuers, Registrants, and Investment Companies.**

The shutdown will not affect the ability to submit EDGAR filings and limited staff will be able to process requests for EDGAR access codes and password resets and answer questions about fee-bearing EDGAR filings. The Divisions of Corporation Finance, Investment Management, and Trading and Markets, and the Office of Compliance Inspections and Examinations, however, will not process new or pending registration statements or other filings, including applications for exemptive relief, regardless of the status of any review of those filings. Nor will staff provide interpretive advice, issue no-action letters, or conduct any other normal Division and Office activities.

- During the shutdown, SEC staff will not be processing 33 Act filings and registrations, including review and acceleration of effectiveness of registration statements. Companies engaged in or planning a securities offering will want to carefully consider the guidance and steps outlined by the Division of Corporation Finance (CorpFin) with respect to taking registration statements effective and related matters. The CorpFin guidance is discussed in more detail below.²
- Corporate issuers requiring assistance in calculating a filing fee during the shutdown period should submit their request and contact information to CFEmergency@sec.gov.
- Similarly, investment companies can continue to make filings on EDGAR during the shutdown, but the Division of Investment Management (IM) staff will not be available to respond to any questions about pending matters, other than answering questions relating to fee calculations for EDGAR filings.
- A significant percentage of investment companies' filings, including post-effective amendments to registration statements, become effective automatically either immediately upon filing or following the passage of a certain number of days. These filings will continue to become effective automatically in accordance with the applicable rules.
- The IM staff will follow the procedures established by CorpFin with regard to the acceleration of initial registration statements and other types of filings made by registered investment companies during the federal government shutdown.³
- Questions relating EDGAR filing fees for investment companies and advisers should be directed to IMEmergency@sec.gov.

- **Investment Advisers.** The SEC's IARD system will continue to accept filings, including amendments to Form ADV, Form ADV-W, and Form ADV-E filings, but the Office of Compliance Inspections and Examinations will not approve applications for registration by investment advisers and the Division of Investment Management will not provide interpretive advice regarding the Advisers Act, rules or forms or consider applications for exemptive relief.

- **Broker-Dealers.** The CRD system, used for broker-dealer licensing and registration, will continue to accept filings, but the Division of Trading and Markets and the Office of Compliance Inspections and Examinations will not review pending filings, consider new or pending applications or registrations, provide interpretive advice, or issue no-action letters. In addition, the staff will not be available to conduct any other normal Division and Office activities.

- **Stock Exchanges and other SROs.** The EFFT will continue to accept applications for rule changes and other submissions by self-regulatory organizations (SROs), including the NYSE and Nasdaq stock markets. Any SRO proposed rule change submitted through EFFT during the shutdown will have as its filing date the next business day after the shutdown has ended and SEC opens for regular business. Days that the SEC is operating under its shutdown plan (i.e., while the lapse in appropriations continues) will not constitute "business days" under Section 19 of the

Exchange Act and Rule 19b-4 thereunder.

Other SEC Operations Will Be Curtailed. Other substantive work handled by SEC staff will also be discontinued, including:

- **Enforcement, Litigation, Investigations, and Examinations.** Except for limited emergency enforcement matters, ongoing litigation, examinations, and investigative work by the Division of Enforcement has been suspended. The limited emergency enforcement matters that will be continued include temporary restraining orders and/or investigative steps necessary to protect public and private property, monitoring the SEC's "tips, complaints, and referrals" system and web-based investor complaint system and processing referrals from SROs and others to identify matters that are emergencies and take follow-up steps relating to such emergencies.
- **Rulemaking.** SEC work has been curtailed on all non-emergency rulemaking, interpretive advice, no-action letters, and new or pending applications for exemptive relief.
- **Market Monitoring.** The SEC staff will continue limited Market Watch activities and continue to monitor market technology operations and any broker-dealers reported as being in financial distress. Money market fund surveillance and monitoring will also continue. The staff will also continue monitoring any international market developments that might affect the United States.
- **FOIA Requests.** The SEC staff will not process or respond to requests for information under the Freedom of Information Act (FOIA), absent compelling need.
- **Tips, Complaints, and Referrals.** The SEC staff will not process or respond to tips, complaints, or referrals, although limited staff will attempt to respond to certain critical matters, including allegations of ongoing fraud and misconduct.

In addition, while the SEC will continue to accept comment letters, the SEC anticipates that there will be delays in posting them to the SEC website. The public reference room will be closed.

Ongoing and Planned Securities Offerings Affected. CorpFin has posted on its website additional guidance regarding the impact of the shutdown (See, <https://www.sec.gov/page/corpfm-section-landing>) with respect to ongoing and new offerings of securities. The IM staff will follow the procedures established by CorpFin with regard to the acceleration of initial registration statements and other types of filings made by registered investment companies. Among the guidance provided by CorpFin, the following are particularly relevant to companies conducting or planning offerings:

- If a company with an effective registration statement determines it must update the information in its prospectus before commencing its offering, the company should *not* go forward with the offering without updating its prospectus. The company must decide whether it can update the prospectus without filing a post-effective amendment, because the staff will not be in a position to declare post-effective amendments effective.
- If a company does not price its offering within the 15-day time period provided in Rule 430A, the company may file post-effective amendments under Rule 462(c), which are automatically effective upon filing, to restart the 15-business-day period so that, at the time of pricing, the registrant will be able to include pricing information in a 424(b) prospectus supplement. As an alternative, at the time of pricing, the registrant could

file a post-effective amendment under Rule 462(c) prior to the time confirmations are sent or given to include the information omitted under Rule 430A. Registrants should note, however, that a Rule 462(c) post-effective amendment may not include substantive changes or additions to the prospectus in the registration statement at the time it became effective.

- A registrant may file an amendment to a current registration statement to remove the delaying amendment, in which case the registration statement will be effective in 20 days. The CorpFin staff notes, however, that if the SEC's operating status changes to operational and the registration statement is not yet effective, the staff will consider a request to accelerate to an earlier date or ask the registrant to amend the registration statement to include the delaying amendment. Companies considering this approach should be aware that Rule 430A is not available in the absence of a delaying amendment. As a result, when a company amends a registration statement to remove the delaying amendment, the registration statement and prospectus must also be amended to include all information required by the applicable form, including the price of the securities being offered.
- A registrant may also file a new registration statement without a delaying amendment during the shutdown. Again, however, the CorpFin staff notes that, if the SEC's operating status changes during the 20-day period prior to effectiveness, the staff may ask the registrant to amend the document to include a delaying amendment

Emergency Contacts. The SEC's shutdown plan contains a list of emergency contact telephone numbers and email addresses to reach an extremely limited number of Commission staff members in each office and division who will be available to respond to emergency situations.⁴

¹ The SEC's shutdown plan (Securities and Exchange Commission, *Operations Plan Under a Lapse in Appropriations and Government Shutdown*, <https://www.sec.gov/files/sec-plan-of-operations-during-lapse-in-appropriations-2018.pdf>) went into effect on December 27, 2018.

² The SEC's Division of Corporation Finance (CorpFin) has published a set of "Frequently Asked Questions (FAQs) regarding Issuers' options with respect to new and ongoing securities offerings during the shutdown. This guidance is posted on the Corporation Finance website (See, <https://www.sec.gov/page/corpfin-section-landing>).

³ The SEC's Division of Investment Management (IM) also posted additional guidance regarding the impact of the shutdown (See, <https://www.sec.gov/investment-management>).

⁴ See page 16 of the SEC's shutdown plan available here: <https://www.sec.gov/files/sec-plan-of-operations-during-lapse-in-appropriations-2018.pdf>.