

SEC Updates FAQs Regarding the Ongoing Government Shutdown

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On January 10, 2019, the Division of Corporation Finance of the Securities and Exchange Commission updated its Frequently Asked Questions (FAQs) about how to handle certain filing matters during the U.S. government shutdown, which is now entering its fourth week. (See, sec.gov/page/corpfm-section-landing.) The staff revised questions 4 and 5 and added new questions 6 and 9.

Question 4 was revised to emphasize that Rule 430A is only available to add pricing information to registration statements declared effective prior to the government shutdown (i.e., by December 26, 2018). Issuers whose registration statements were not declared effective before the shutdown are not eligible to use Rule 430A.

Question 5 was revised to specify the “magic words” that must be included in an amendment to a registration statement to remove the delaying amendment language and start the 20-day clock to take the registration statement effective. The amendment must include the statement: *“This registration statement shall hereafter become effective in accordance with the provisions of section 8(a) of the Securities Act of 1933.”* Registrants who amended their registration statements to remove the delaying amendment without including the “magic words” will need to file amendments to add them.

New question 6 adds clarity for registrants who have unresolved staff comments on their filings and wish to amend their registration statements to remove the delaying amendment. The staff stated that registrants could nevertheless remove the delaying amendment, but reiterated that responsibility for complete and accurate disclosure lies with the registrant and others involved in the preparation of the registration statement.

Finally, new question 9 indicates that issuers may request relief under Rule 3-13 of Regulation S-X, which provides that the SEC may permit the omission of one or more of the financial statements required by Regulation S-X or the filing of appropriate substitute financial statements “where consistent with the protection of investors.” During the shutdown, however, such requests must relate to a demonstrable emergency and the

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protection of a significant property interest. Whether Rule 3-13 proves useful as a practical matter during the shutdown remains to be seen.

Below are (1) the revised text of questions 4 and 5 with new language shown in **blue text**, and (2) the text of the new questions 6 and 9.

Question	Answer
4. If my registration statement was declared effective prior to the shutdown (my effective date was December 26, 2018 or earlier) what happens if I don't price my offering within the 15-day time period provided in Rule 430A?	Because your registration statement was declared effective prior to the shutdown, you are eligible to use Rule 430A and you may file post-effective amendments, as necessary, under Rule 462(c) to restart the 15-business-day period so that, at the time of pricing you will be able to include the pricing information in a 424(b) prospectus supplement. Post-effective amendments filed pursuant to Rule 462(c) are effective upon filing. Alternately, at the time of pricing, you 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. NOTE: You cannot rely on Rule 462(c), however, to include the pricing information if the post-effective amendment includes substantive changes from, or additions to, the prospectus in the effective registration statement.
5. Now that the shutdown is in effect, can I file an amendment to my current registration statement to remove the delaying amendment so my registration statement will be effective in 20 days?	Yes. If you choose to remove the delaying amendment, your registration statement will not become effective until 20 days have passed. If the SEC's operational status does not change and you wish to further delay the effective date of your registration statement, you may file another pre-effective amendment during the 20-day period. The registration statement would not become effective until 20 days after the latest pre-effective amendment that does not include a delaying amendment. If the SEC's operating status changes to operational and your registration statement is not yet effective, we would consider a request to accelerate to an earlier date. We may ask you to amend the registration statement to include the delaying amendment.

	NOTE: <u>Simply omitting the delaying amendment from an amendment will not begin the 20-day period.</u> <i>[Emphasis added.]</i> A company that intends to remove the delaying amendment must amend its registration statement to include the following language provided by Rule 473(b) - "This registration statement shall hereafter become effective in accordance with the provisions of section 8(a) of the Securities Act of 1933." It must also amend to include all information required by the form, including the price of the securities it will sell. Rule 430A is not available in the absence of a delaying amendment because Rule 430A is only available with respect to registration statements that are declared effective by the Commission or the staff.
6. Can I amend to remove the delaying amendment while I have outstanding, unresolved staff comments on my filings?	Yes. As in all situations, responsibility for complete and accurate disclosure lies with the company and others involved in the preparation of a company's filings. If you amend your filing to remove the delaying amendment and our operating status changes prior to your effective date, we may ask you to amend your filing to include the delaying amendment so that we may work with you to resolve outstanding comments.
9. Will the Division consider a request for emergency relief under Rule 3-13 of Regulation S-X?	During a lapse in appropriations, the Division's activities are limited. The Anti-deficiency Act generally prohibits agencies from continued operation in the absence of appropriations, but contains exceptions, one of which is for emergencies involving the protection of property. Thus, an agency may act where there is some reasonable likelihood that the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question. In an emergency where Rule 3-13 may provide relief for registrants, the Division may grant an application where consistent with the limitations discussed below <i>[sic]</i>. Submit requests to CFEmergency@sec.gov and describe the emergency and the significant property interest to be protected.

More information about the SEC's plan of operations and the effect on securities offerings, public company reporting, investment companies, and securities markets

during the government shutdown can be found in our prior blog post here: governancecomplianceinsider.com/u-s-government-shutdown-impacts-sec-operations-edgar-and-other-filings-enforcement-and-regulatory-activities/, and also on Dorsey's website here: dorsey.com/newsresources/publications/client-alerts/2019/01/government-shutdown-limits-sec-operations.